



# Leaving Others Behind?

Impact of Negotiated Democracy on Inclusive Politics in Kenya

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## ACRONYMS AND ABBREVIATIONS

AFRICOG	African Centre for Open Governance
ASAL	Arid and Semi-Arid Lands
CSOs	Civil Society Organisations
CREAW	Centre for Rights Education and Awareness
ECFA	Election Campaign Financing Act
FGD	Focus Group Discussion
IEBC	Independent Electoral and Boundaries Commission
IRI	International Republican Institute
IPPMS	Integrated Political Parties Management System
JLAC	Justice and Legal Affairs Committee
KI	Katiba Institute
KII	Key Informant Interview
KNCHR	Kenya National Commission on Human Rights
MMR	Mixed Method Research
NCIC	National Cohesion and Integration Commission
NDI	National Democratic Institute
NGEC	National Gender and Equality Commission
NVPG	National Values and Principles of Governance
OECD	Economic Cooperation and Development
ORPP	Office of the Registrar of Political Parties
PPA	Political Parties Act
PPDT	Political Parties Dispute Resolution Tribunal
PWDs	Persons with Disabilities
SMS	Short Messaging Service
TI	Transparency International
USSD	Unstructured Supplementary Service Data

# EXECUTIVE SUMMARY

The study sought to establish the impact of the triad of negotiated democracy, the amendment of the political parties Act, 2022 and the lack of elections campaign financing framework on the participation of women and youth in the 9<sup>th</sup> August 2022 General Elections.

## SUMMARY OF FINDINGS

The study found that there was prevalent use of negotiated democracy in identifying 'suitable candidates' for the 2022 General Elections. Political parties, coalitions and the one coalition party used methods such as consensus building, interviews, and opinion polls to a greater extent in the 2022 elections, partly because of the provisions of the Political Parties Amendment Act 2022 that allowed for indirect methods of nominations. Communities in pastoralist and Arid and Semi-Arid Areas (ASAL) also used this method to identify individuals to represent their clans and communities.

Negotiated democracy was publicised as an ideal way of identifying candidates that was less expensive and less chaotic and would prevent fallouts within parties. Its widespread use, however, led to curtailing the rights of many women and youth who sought to participate in the electoral process. Negotiated democracy seemed to contravene constitutional principles of free and fair elections based on universal suffrage and the free expression of the people's will. It was not representative or inclusive and placed unnecessary restrictions on the rights of voters and aspirants.

Parliament, through the Political Parties Amendment Act 2022, expanded the space for negotiated democracy, introduced the unconstitutional provision of indirect nominations, and potentially legalised an electoral offence of belonging to more than one political party at a time. It also brought about a duplication of roles between the ORPP and the IEBC regarding timelines and management of party certification of nominations rules, membership lists and party lists, thus creating a conflict in the Elections and Political Parties Acts. The amendment act, however, did expand opportunities for more political parties to benefit from the Political Parties' Fund and may have contributed to less chaotic party nominations and the sanitisation of the same by requiring parties to use a certified register of members during nominations.

Regarding election campaign financing, the study worryingly found that among the political class, there is no appetite for regulating election campaign financing. The other side of that coin was that the electorate wanted to be 'treated' for them to support an aspirant or candidate, making the financing of one's campaign inordinately expensive, especially for youth and women who were unable to finance their campaigns fully. 10% of women sampled and 29% of youth were only able to raise between 50% and 75% of their campaign financing targets, while the rest raised less than 50%.

Furthermore, very few women and youth (15%) reported getting support from their political parties.

Concerning zoning, this was not overtly practised by political parties, as it was clear it was an electoral offence. However, in areas considered particular party or coalition strongholds, there was a lot of intimidation and threats of aspirants belonging to an opposing party or coalition. In other situations, it seemed that parties self-censored where they felt it was not a party stronghold and therefore gave little support to candidates or aspirants who vied in regions that were not party strongholds, adversely affecting women and youth. As a result, many women and youth opted to contest as independent candidates or gave up their political aspirations.

Based on these findings, the study makes the following recommendations.

## RECOMMENDATIONS

### **Recommendations to the Independent Electoral and Boundaries Commission (IEBC)**

- 1) Provide reasonable limits to election campaign spending that are scientifically arrived at and have had the public's input.

- 2) The IEBC, in concert with other law enforcement bodies such as the Office of the Director of Public Prosecutions (ODPP), proactively take action to enforce the Electoral Code of Conduct. This includes identifying, arresting, and prosecuting voter bribery offences to deter the practice.
- 3) IEBC to push for its complete independence to enhance its capacity technically, financially, and in its human resource to address election campaign financing and other electoral demands.
- 4) Initiate public participation on the Elections Campaign Financing Regulations and Campaign Expenditure Limits so as to operationalise the Elections Campaign Financing Act, 2011.
- 5) Makes proposal to Parliament on the amendments of the Elections Act 2011 to align sections 27, 28 and 35 of the Elections Act with the provisions of the Political Parties Amendment Act 2022 as provided in section 31 of the political parties Amendment Act, 2022.
- 6) IEBC ensures that nominations by political parties meet the requirement of the two-thirds principle and rejects nomination lists of parties that are not compliant.

**b). Recommendations to the Office of the Registrar of Political Parties (ORPP)**

1. The ORPP should enforce the implementation of section 26 (1)(a), which requires at least 30% of monies received by parties to be used to promote the representation of women and youth in Parliament. This is in line with section 26 (1)(a) of the Political Parties Act, 2011.
2. ORPP collaborates with CSOs and other stakeholders to undertake political education on the Political Parties Amendment Act, 2022, targeting youth, women, PWDs and CSOs.

**c). Recommendations to Parliament**


- 1) Parliament to initiate the amending Elections Act, 2011, to align it with the Political Parties Amendments of 2022.
- 2) The Justice and Legal Affairs Committee (JLAC) of the senate to fast-track debate and approval of the representation of the Special Interest Group Bill that the National Assembly passed on 11<sup>th</sup> March 2020
- 3) Enact a law on the not more than two-thirds gender principle on elective and appointive positions as provided for in the constitution

**d). Recommendations to Political Parties**

- 1) Ensure compliance with the two-thirds gender rule during the party nomination process and compilation of the party list.
- 2) Ensure women and youth occupy key decision-making positions in the party and coalition structures.

**e). Recommendations to Civil Society Organisations**

1. Seek a judicial interpretation of the concept of negotiated democracy and its application in the Kenyan political context, given the apparent risk it poses to the inclusion of women and youth in political processes.
2. Undertake a study on the use of negotiated democracy and its compatibility with Kenya's majoritarian - First-Past-The-Post electoral system.
3. Mzalendo Trust, in collaboration with organisations that work with marginalised groups, engage with the senate Justice and Legal Affairs (JLAC) to advocate for the fast-tracking and passing of the Special Interest Groups Bill, 2020.
4. Support women and youth to organise themselves better and demand for their political rights.
5. Support in capacity strengthening of women and youth to strengthen their negotiation, leadership and campaign management skills.
6. Undertake a multi-stakeholder, multi-pronged advocacy campaign that seeks reforms to the entire election legal framework. This would include engagement with Parliament to amend laws, seeking judicial opinions on grey areas of the constitutions, overlapping mandates and any other electoral issues identified.
7. Civil society organisations undertake an exploratory study on the application of the proportional representation electoral system to all other electoral positions, not just for elections contemplated in 177 of the constitution.
8. To create spaces at the community level for dialogue targeting the council of elders, chiefs, men, women, PWDs, and religious organisations on how to address retrogressive cultural practices

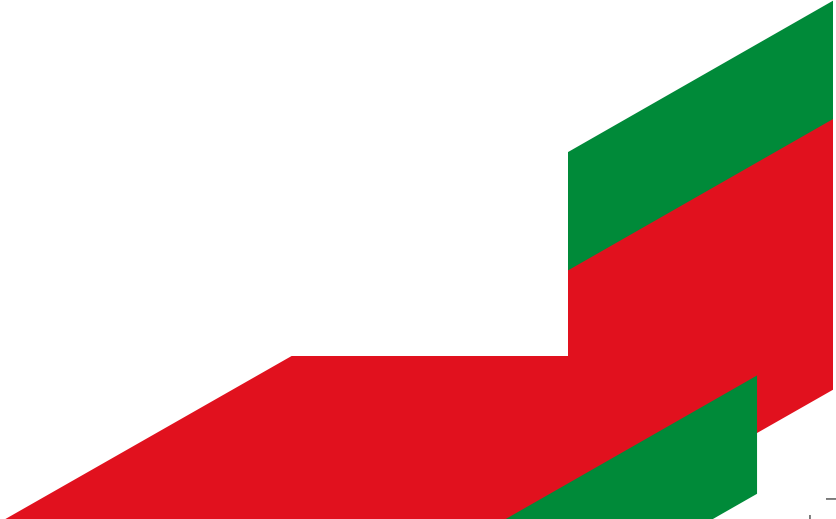


and mindsets that inhibit the political participation of women and youth.

**f). Recommendations to National Gender and Equality Commission (NGEC)**

1. Sensitise the public on the Special Interest Groups, Bill once it is approved by the Parliament to promote informed citizens' accountability mechanisms.

**g). Recommendations for Youth and Women aspirants**

1. Women and youth should join political parties in numbers, aggressively seek party leadership positions and present themselves for elective positions in numbers.
  2. Demand that 30% of the Political Parties Fund allocated to one's party is used to promote representation of women, youth and PWDs.
  3. Join women and youth movements / formations to leverage the opportunities for greater political inclusion.
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# CHAPTER ONE: INTRODUCTION

## **1.1 Overview of the Chapter**

This chapter briefly describes the study's background and the problem it seeks to address. It outlines the purpose, objectives, and significance of the research and the study's scope.

## **1.2. Background to the study**

Since the advent of multi-party politics in Kenya, elections have been a high-stakes game, characterised by high competition and ethnic tensions, often leading to the breaking out of violent conflicts. They also tend to be highly exclusionary. Marginalised groups (women, youth and PWDs) are constantly disenfranchised by retrogressive cultural practices, a prohibitive legal environment, sexual and gender-based violence and imbalanced economic and financial power.

The Constitution of Kenya 2010 provides that sovereign power belongs to the people of Kenya and that this power can be exercised directly or indirectly through their democratically elected representatives. This means that the Constitution envisages the application of democratic principles and processes that leads to the establishment of an inclusive government. To further emphasise inclusivity in electoral processes and institutions of governance, the Constitution, in various Articles, provides guidelines for forming an inclusive government. Article 10(2)(a), the Constitution aspires for the establishment of a government that is anchored on National Values and Principles of Governance (NVPG). These include the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised.

The promulgation of the Constitution of Kenya 2010 expanded the space for previously marginalised groups to participate in political and electoral processes. However, the non-implementation of crucial laws, particularly the gender and inclusion provisions of the Constitution and the introduction of specific unfavourable laws that may be perceived as unconstitutional, continue to exclude women, youth, PWDs and other marginalised communities from political spaces.

The Constitution recognises the importance of an independent body in managing elections. Article 88 establishes the Independent Electoral and Boundaries Commission (IEBC). It mandates the IEBC to regulate the process by which parties nominate candidates for elections, the registration of candidates for election and the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. The law compels political parties, like other public institutions and citizens, to strictly adhere to and comply with national values and principles of governance articulated in Article 10 of the Constitution. This requirement is amplified in Article 91, which mandates political parties to abide by the democratic principles of good governance, promoting and practising democracy through regular, fair and free elections within the party, respecting the right of all persons to participate in the political process, including minorities and marginalised groups and respecting and promoting human rights and fundamental freedoms, and gender equality and equity.

In December 2021, Parliament passed the Political Parties Amendment Act 2022, which, among other things, recognised political party coalitions as coalition parties and provided for direct and indirect nomination processes for candidates for elective positions. These amendments, in part, contributed to the increase in 'negotiated democracy' as actors in political parties jostled to remain relevant in the coalition parties that they had become part of. In his Article on the contribution of negotiated democracy and transformational leadership in devolved units in Kenya, Daudi, 2021 defines negotiated democracy as a practice of agreeing on how to distribute political positions in advance of an election brokered by a council of elders based on an ethic formula. He argues that Kenya has a hybrid of consociational democracy and a regime of veto players.

In Kenya, the concept of 'negotiated democracy' is considered to have its roots in the North-Eastern region. However, the advent of the devolved system of government has highlighted its prevalent use, especially in areas where clan-based politics are dominant, e.g., among the Abagusii. Negotiated

democracy was occasioned by the need to minimise clan conflicts by agreeing on how political positions would be distributed among different (and often warring) clans and tribes. In the 2022 General Elections, negotiated democracy seemed to favour those with resources and connections over those that did not, specifically women, youth and persons with disabilities (PWDs).

The situation for marginalised groups was further compounded when legislators failed to approve the Election Campaign Financing Act 2013 Regulations, arguing that they had been formulated without public participation and were time-barred. When this decision was challenged in court, the High Court held that, among others, that the Elections Campaign Financing Act 2013 section 29(1) was unconstitutional for requiring Parliamentary approval and that there was no requirement to subject sections 12, 18 and 19 of the regulations to Parliament's approval. However, it required the Independent Electoral and Boundaries Commission (IEBC) to undertake public participation before publishing the regulations.

Without these regulations, politicians had a wide field of funding their campaigns indiscriminately, often with money from illicit sources. This further compounded women and youth's ability to compete in a context where they came already disadvantaged, being previously marginalised. This was demonstrated in the number of women and youth that the IEBC cleared to participate in the 2022 general elections, which stood at 4,508 (28%) youth and 1,962 (12%) females out of the 16,100 candidates.

Therefore, this study to assess the impact of negotiated democracy and the lack of an election campaign financing regulatory framework on the political participation of youth and women in the 2022 General Elections is timely. It exposes the nexus between legal (absence of an election campaign financing framework) and societal practices (negotiated democracy) that marginalise women and youth while identifying ways these challenges can be effectively addressed. The study explores and identifies ways in which the playing field can be levelled to promote fair representation and participation of women and youth in political processes in Kenya.

### **1.3 Statement of the problem**

Women and youth continue to be underrepresented in elective politics despite a progressive Constitution and Kenya being a signatory to various international and regional conventions and treaties, which provide for the inclusion of minority and marginalised communities in politics, leadership and governance. Contrary to the vision of the Constitution of Kenya 2010, the gender threshold of not more than two-thirds representation in elective and appointive positions remains far from attainment even after three cycles of elections under the Constitution. Despite a marginal increase in the number of women elected in the 2022 General Elections, the figures still fall far short of this constitutional threshold. Seven women were elected governors (four more than in 2017), 3 Senators (no change) and thirty MPs (up from twenty-three in 2017). For the MCAs, there were 115 women candidates elected, representing a negligible increase from ninety-six in 2017. Seven counties did not elect women to their legislatures, a decrease from 12 in 2017.

Compared to the regional average of 32.2% and 30.2% female representation in the lower and upper chambers, Kenya's performance is abysmal at 23.4% and 31.82% respectively. Regarding the youth, it is worth noting that the average age of legislators in the Senate and National Assembly is 51.22 and 50.73, respectively. The historical and constant underrepresentation of women and youth in the political space calls for structured and continuous studies to inform policy formulation and advocacy initiatives to promote women and youth participation in the electoral processes.

### **1.4. Purpose of the Study**

The purpose of this study was to assess and identify how the triad of negotiated democracy, changes in the Political Parties Amendment Act 2022 and the absence of regulations to operationalise the Election Campaign Financing Act 2013 limited the participation of women and youth in the 2022 general elections. Further, the study aimed at assessing whether there were opportunities that could have been leveraged in the Constitution and by other actors to realise positive results for these groups in the elections. The study findings and recommendations are expected to benefit Mzalendo Trust's advocacy efforts that can influence the electoral environment and make it fairer for women



and youth seeking elective positions.

### **1.5 Objectives of the study**

The study aimed to achieve the following two (2) broad objectives

- (i) To assess the impact and identify challenges and opportunities of negotiated democracy, the Political Parties Amendment Act 2022, and the lack of an election campaign financing regulatory framework on political participation of women and youth in the 2022 general elections; and.
- (ii) To document findings and recommendations that would inform Mzalendo Trust's sustained advocacy efforts on elections campaign financing regulatory framework and inclusive electoral legal reforms as a priority area for the 13<sup>th</sup> Parliament.

### **1.6 Significance of the study**




This study is critical if Kenya is to realise the aspirations of the Constitution of Kenya 2010 for inclusive governance as contemplated in Article 10(2). It should be noted that Kenya cannot attain electoral integrity if the exclusion of women, youth and PWDs continues to dominate the political process every electioneering period. The study is well-timed after a general election. It allows for a critical assessment of how factors such as negotiated democracy, amendments to the Political Parties Act and the lack of an election campaign financing regulatory framework influenced the conduct and outcome of the elections. The findings are also crucial to informing policy and advocacy agenda that are critical in entrenching greater integrity and inclusion of marginalised groups in Kenya's electoral processes.

Specifically, the study is of great significance to electoral actors, especially the IEBC, in ensuring that the campaign financing regulatory and campaign spending limits frameworks are implemented. It is also significant to political parties who are the key players in the electoral process to ensure that their nomination processes are inclusive and that they comply with the principles of holding free and fair elections provided in Article 81 of the Constitution. The study is also crucial to the CSOs since the findings and recommendations inform structured advocacy for electoral reforms for future elections. The study directly benefits women and youth, including those with disabilities, to continuously demand inclusion in political and social spheres.

### **1.7 Scope and Delimitation of the study**

The study focused on the following four key thematic areas.

1. Assessing and analysing primary and secondary data to understand the following key issues.
  - a. The extent of use of the negotiated democracy in the 2022 elections, salient dimensions of the concept and the hidden costs associated with the method.
  - b. The methods applied to identify stronger candidates and their efficacy, i.e., polls, interviews etc.
  - c. The number of women and youth who were cleared/not cleared through negotiated democracy.
  - d. How women and youth were disadvantaged/advantaged by negotiated democracy and the use of unregulated funds in Kenya's 2022 general elections.
  - e. The ramifications of the introduction of coalition parties on the participation of youth and women.
  - f. The effects of zoning on the participation of women and youth.
  - g. Highlight the unexploited constitutional powers, if any, by constitutional institutions to regulate campaign financing.
  - h. Any other challenges or positives occasioned by the amendments to the Political Parties 2021 Act on the participation of youth and women.

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2. Reviewing the Political Parties Amendment Act, 2021 and other legislations to highlight their shortcomings in ensuring the participation of women and youth in elective politics.
  3. Identifying policy and legislative recommendations in relation to the Political Parties Act, 2021 and campaign financing regulations for post-2022 electoral reforms.
  4. Developing a policy brief for advocacy initiatives on the study.
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# CHAPTER TWO: REVIEW OF THE RELATED LITERATURE

## **2.0. Overview of the chapter**

This section presents an analysis of the related literature on the impact of negotiated democracy and the lack of an election campaign financing regulatory framework on the political participation of women and youth in the 2022 general elections based on the study objectives and scope to critique and establish gaps to be filled by the current study. Findings and recommendations from the previous studies are also presented for corroboration with this study.

## **2.1. Negotiated Democracy: Challenges and Opportunities**

### **2.1.1. Concept of Negotiated Democracy**

Negotiated democracy, while it might seem to have gained greater pre-eminence in the 2022 general elections in Kenya, has a long history of being practised both in Kenya and worldwide. According to the Dictionary of African Politics (Cheeseman 2019), negotiated democracy is 'the practice of agreeing how to distribute political positions in advance of an election.' Negotiated democracy comprises consociational democracy, corporatism democracy and a regime of veto players.

Consociational democracy is practised where no particular social or economic group can form a majority on their own but is large enough to endanger the political systems, especially if their interests are continually ignored (Guleid 2016). Guleid continues to argue that political representatives of these segments would not have access to much power politically without mutual cooperation. Thus, this form of democracy institutionalises cooperation between political parties and groups, securing system integration in segmented societies. Power sharing is seen as a conflict-regulating mechanism used to resolve violent conflict by diffusing contestation over access to power between political groups (Sjögren 2019).

Corporatism democracy is defined as where entities like trade unions, employer organisations, and governments develop a goal to enhance social and economic development. Corporatist systems of interest representation are made-up of public administration linked with interest organisations. (Armingeon, 2002).

A regime of veto players is a form of democracy, which according to Armingeon, emerged from the belief that checks and balances must moderate the power of a central government and legislative assembly. According to Guleid, Kenya's negotiated democracy comprises a combination of consociational and a regime of veto powers, though this feature is confined to the national government.

Negotiated democracy has long been practised in countries like Switzerland and Germany (Lane & Preker 2018). In Kenya, it is believed to have roots in the North-Eastern region and gained traction with the advent of devolved governments. It was occasioned by the need to minimise clan conflicts by agreeing on how political positions would be distributed among different (and often warring) clans and tribes.

### **2.1.2. Background of Negotiated Democracy in Kenyan Politics**

It could be argued that negotiated democracy in Kenya, in the form of coalition politics, goes back to the early part of the 20<sup>th</sup> Century, with the colonial government using it to serve short-term interests, according to Munene (2001). Munene further points out that the colonial government regularly co-opted 'certain' African leaders into the government machinery to defuse grievances, and those co-opted would be made 'home guard leaders.'

Before the one-party rule system, political parties constantly formed coalitions to defeat or keep opposing parties from power in the immediate post-independence period. With the repeal of Article 2A of the Constitution of Kenya, the then-president used the practice of coalition formation to subjugate opposition parties and retain control (Munene 2001). The 2008 accord following the

Post-Election Violence and the resultant power-sharing agreement resulted from negotiated democracy, where the two conflicting parties agreed on power-sharing modalities to cease hostilities.

The advent of the system of devolved government under the new Constitution of Kenya saw an increase in the use of negotiated democracy in counties. Ahead of the 2013 elections, the National Cohesion and Integration Commission (NCIC) endorsed local initiatives to defuse local competition over power and prevent communal violence through 'negotiated democracy' (Elfversson & Sjögren 2019).

In North-Eastern Kenya, negotiated democracy was applied in three counties, Mandera, Wajir and Garissa. Here, political positions were determined on a rotational clan basis. In Nakuru County, negotiated democracy was used, with seeming success among the Kikuyu and Kalenjin of the region, to determine which group would take what position in the 2013 general elections. Similar attempts at negotiated democracy in Uasin Gishu County were not as successful (Elfversson & Sjögren 2019).

### **2.1.3. Negotiated Democracy in Kenya's 2022 General Elections**

In the 2022 general elections, negotiated democracy took a much more prominent role in party politics. For example, in the lead-up to the polls, Nakuru, Narok, Elgeyo Marakwet, Uasin Gishu, Kisii, Nyamira, Siaya, Bungoma, Busia, Vihiga, Kakamega, and Migori counties were cited as counties that were likely to opt for negotiated democracy given their history practising the same (Otieno, 2021).

In December 2021, Parliament passed the Political Parties Amendment Act 2022, which, among other things, provided a broader definition of a political party, which includes a coalition political party. Through the amendments, parties could form both coalitions and coalition parties. The law also made it possible for political parties to conduct nominations directly (through party members directly electing those they wanted to represent them at the ballot) or indirectly (using opinion polls, consensus, interviews and the use of delegates from registered members etc.). All these were aimed at giving political parties a better chance at winning elections at the national and local levels by leveraging political parties within the coalitions to bring in the votes of their constituencies. As a result, and to accommodate the competing demands of the different parties within coalitions, concessions had to be made to ensure that these coalitions had a fighting chance at winning the elections. For example, President Ruto and Raila Odinga were reported to have brokered deals to restrain fall-outs occasioned by the nominations. Supporters of these two individuals were said to have been prevailed upon to shelve their political ambitions, with promises of critical postings at the national and county governments (Ndayala 2022). Numerous incidences were reported of women being impressed upon by party leaders to cede their political ambitions in favour of male aspirants. Men were seen as more 'viable' candidates and could bring in more money for the parties or coalition parties during the campaigns.

### **2.1.4. Perceived Benefits of Negotiated Democracy**

The appeal of negotiated democracy is its perceived ability to allow small communities or political parties that would not otherwise gain power the opportunity to participate in national politics with a fighting chance of winning elections.

In the 2022 General Elections, the Orange Democratic Movement (ODM) and the United Democratic Alliance (UDA) determined that they would not have been able to mobilise sufficient votes to win the elections. They, therefore, needed to come together with other political parties to provide the muscle needed to get over the finish line in terms of the 2022 elections. Similarly, ethnic groups, such as the Rendille Gabra and Burji, have often established coalitions against the larger Borana ethnic group of Marsabit County, aware that each would be unable to prevail on their own against the latter.

According to literature, negotiated democracy has been touted as a panacea for conflict mitigation in contexts where societies are not homogenous. It is viewed as having the ability to deter or minimise violent conflict among opposing groups, including ethnic groups, by agreeing on how political positions will be distributed amongst them. In North-Eastern Kenya, it has been primarily used given the diversity of clans among the Somali Community. Also, in its consociational form, negotiated democracy is perceived to institutionalise cooperation between political parties and groups and having the ability to integrate significant minorities, thus deterring political instability (Armingeon 2002).

In the 2022 general elections, women aspirants seemed to have benefited from this form of democracy through the direct party nominations they received. Examples of these are Gladys Wanga, Wavinya Ndeti, and Aisha Jumwa, who were vying for Homabay, Machakos and Kilifi gubernatorial seats, respectively. Others included Priscilla Nyokabi, who got a direct nomination from Jubilee to run for the Nyeri's senatorial seat and Millie Odhiambo, Lilian Gogo and Eve Obara, who were all vying for MP positions with The Orange Democratic Movement (ODM) Party. Negotiated democracy has been seen as a tool for promoting greater collaboration. However, carefully assessing its darker underbelly, it may only be postponing conflicts rather than helping to resolve them, and the collaboration only lasts as long as the usefulness of the coalescing parties lasts.

### **2.1.5. The Hidden Costs of Negotiated Democracy**

According to Obadha, at the core of coalition negotiations and agreements is the notorious cliché, "What will we eat?" Ideological considerations do not drive coalitions in Kenya, but office-seeking reasons are at the heart of their formation (Etyang 2021). As such, the propensity to entrench unethical and even corrupt practices to ensure the ascent to power becomes higher. In North-Eastern Kenya, the council of elders who are responsible for selecting individuals from the different clans to represent them in political office have come to be referred to as '*tenderpreneurs*.' Because of their role, their demands on those seeking elective offices are high. For example, according to Abdullahi, if the council selects an individual for the deputy governor or Member of Parliament position, one has to pay the council Ksh 10 million. In contrast, those vying for the Member of the County Assembly must pay Ksh 3 million. Additionally, they determine which companies will be awarded contracts after the elections (Abdullahi, 2017).

Furthermore, negotiated democracy undermines the principles of democracy of holding free and fair elections through a secret ballot as provided in Article 81 of the Constitution, erodes trust and can contribute to voter apathy. In a liberal democracy, elections are based on principles of free and fair elections and universal suffrage based on the aspirations of fair representation and equality of the vote. However, as evidenced during the party nominations, the opacity of the nomination process meant that the electorate at the party level did not have a say on who they wanted to represent them (Ben-Hur 2022). In certain instances, political parties and coalitions stated that they had used opinion polls to determine who they would field for certain positions but ended up giving nomination certificates to entirely different individuals. When Cheeseman et al. (2022) researched this, they noted that citizens who felt their party's nomination process had not been legitimate were less likely to say they would vote in the general election. In her critique of negotiated democracy, Dr Salah Abdi Sheikh argues that negotiated democracy does not allow people to express themselves as individuals but only as a group (In Dalle 2022). Of equal importance, in these contexts of negotiated democracy, the electorate is denied the opportunity to elect individuals based on their integrity, competence and ideology or development agenda.

Negotiated democracy is also, to a certain extent, based on promises of future benefits. An aspirant may be asked to cede their present aspirations for future gain. However, there is no guarantee that these promises will materialise. The party making these promises may not get the power they had hoped for, or because of other interests that need to be accommodated, the promises are not fulfilled. In their manifesto, Kenya Kwanza committed to realising the two-thirds gender principle, including 50% of appointments to the cabinet being women. However, this promise has not materialised. Seven (7) out of twenty-one (21) Cabinet Secretaries appointed by the president are women, while there are ten (10) female principal secretaries out of a total of fifty-one (51).

#### **2.1.5.1. Impact of Negotiated Democracy on Women and Youth**

Negotiated democracy intensifies the marginalisation of women and youth in political leadership and decision-making. They are denied the right to participate in a democratic process as candidates or aspirants in the various elective seats, as these decisions are made elsewhere by others perceived to have more power. Political party leaders are overwhelmingly male, as are the council of elders that determine who will get into the office on behalf of their clans. Therefore, women and youth in political parties can only abide by these bodies' decisions, often to their detriment and further exclusion.

In coalition parties, as member parties zone which geographic regions to field candidates, women and youth with political ambitions may find themselves edged out if a party decides it will not field a

candidate in a particular electoral unit. This is done to accommodate the demands of a counterpart political party in the coalition. This was cited as a common occurrence in the 2022 general elections, where women found themselves locked out from the ballot because of a decision made by the party leadership, with no consultation with the women in the political parties (Muiruri, 2022).

In the 2022 general elections, negotiated democracy seemed to favour those with resources and connections over those that did not, in this case, women, youth and persons with disabilities. Because of their previously marginalised status, women and youth are less economically empowered and have limited capacity regarding campaigning and resource mobilisation. They are, therefore, ill-equipped to contend with candidates who have endless amounts of unregulated funds and can finance their campaigns better and more easily.

The performance of women and youth in the 2022 general elections bears out this observation. Only 1,962 females and 4,508 youth were cleared to vie for elective positions against 16100 Candidates. The numbers elected were even fewer.<sup>1</sup> (National Gender and Equality Commission 2022).

## **2.2. Challenges and Opportunities of the Political Party Amendment Act**

The Political Parties Amendment Act 2022 is the third amendment to the Political Parties Act No. 11 of 2011. The amendment of the 2022 effected changes in the original Act of 2011 that introduced new provisions that may have impacted positively or negatively on the participation of youth and women in the August 2022 general elections. The following section analyses key provisions of the Act and documents the opportunities and challenges that may have been occasioned by the amended Act and how they affected the participation of women and youth in the last general elections.

### **1.1.1 Opportunities of the Political Parties Amendment Act, 2022**

The Political Parties Amendment Act 2022 provides more opportunities than challenges to the participation of women and youth in the electoral processes. The following are some of the opportunities.

**Being a political party member:** The Act amended section 3 of the original legislation to provide that a Kenyan citizen who has attained the age of eighteen can become a political party member. This is contingent on the payment of the party membership fees and by complying with any other party requirements. Additionally, a person who is a political party member has a right to participate in party decision-making and vying for any elective position within a party. Current statistics show that only 8.1% of the registered parties are women-led and that only 36% of party members are women. Therefore, the amended section presents an excellent opportunity for women and youth to be members of political parties. However, parties should ensure that their membership fee is affordable and that party policies, elections, and nomination processes comply with Article 10 of the Constitution. This enables women and youth to be appointed to key decision-making organs of a political party and can present themselves for various elective positions.

**Roles and Functions of a political party:** The 2022 Political Party Amendment Act added a new Section 4A to the original Act that stipulates the roles and responsibilities of a political party. These roles include recruiting and enlisting members, nominating candidates for elections, promoting representation in Parliament and County Assemblies of marginalised groups and marginalised communities, enhancing national unity, mobilising citizens into participating in political decisions and shaping and influencing public policy. Therefore, women and youth can take advantage of this provision and demand their right to be meaningfully engaged in the decision-making processes of a political party.

**Establishment of Party Website:** The Act amended section 7 of the original Act to provide that parties should have an official website as a condition for full registration. The website is to disseminate parties' information, including party constitution, nomination rules, party ideology, policies, party nomination information, venues, party membership list and other relevant information. This

<sup>1</sup> Women elected in direct elections: Senate – 6.4 per cent; County Assemblies – 7.9 per cent; NA – 13.3 per cent; governor – 14.9 per cent.

requirement is an opportunity for women and youth as it promotes access to information, which is key to deciding which party to join and making a meaningful contribution to the parties in which they are members. Political parties should leverage the high internet prevalence rate in Kenya, reach out to women and youth, and sensitise them with their ideologies, policies, rules and procedures.

**Distribution of Political Parties' Fund:** The Act amended section 25 on the distribution of political parties' Fund. It explicitly states that 15% of the Fund will be shared proportionately with political parties based on the number of political party candidates from special interest groups elected in the preceding general elections. The Act also provides that no party qualifies for the Fund if more than two-thirds of its registered office bearers are of the same gender and if the party does not have representation of special interest groups in its governing body. This is a significant opportunity for women and youth, for it compels and motivates the party to promote the political participation of women and youth in internal processes and political participation.

**Use of Technology:** The Act included a new section, 34B, for establishing the political parties' Information Management System (IMS). The system should be simple, accurate, verifiable, secure and accountable. Before the 2022 general elections, the ORPP upgraded its digital infrastructure through the automation of solutions such as the Integrated Political Parties Management System (IPPMS), collaboration with E-Citizen, Unstructured Supplementary Service Data (USSD) and Short Messaging Service (SMS) code. Through these platforms and, especially, the USSD code, citizens can verify their political party registration status and leave or join a political party by use of a mobile phone. Women and youth can leverage these digital platforms to increase their membership in political parties.

### 2.2.2. Challenges of the Political Parties Amendment Act, 2022

**Political Party Coalitions and Coalition Political party:** The political parties Act 2011, under sections 10 and 11, provides for coalitions and mergers, respectively. Section 2 of the Political Parties Act defines a "coalition" as an alliance of two or more parties formed to pursue a common goal and is governed by a written agreement deposited with the Registrar. Parties form coalitions to win elections, increase bargaining power, shore up strength in legislatures and form the government.<sup>2</sup> Section 10 of the Political Parties Act, 2011 provides for pre and post-election coalitions.

One of the fundamental changes brought by the Political Parties Amendment Act 2022 was the expansion of the definition of a political party to mean an association of citizens with an identifiable ideology or programme that is constituted to influence public policy or nominate candidates to contest elections. This includes a coalition party. According to the Act, a coalition political party is a coalition that the Registrar registers as a party after depositing the coalition agreement. In the run-up to the 2022 General Election, two pre-election coalitions were formed (Azimio la Umoja One Kenya Coalition Party and Kenya Kwanza Alliance). The difference was that Azimio la Umoja One Kenya Coalition was a registered coalition party meaning it ought to have fielded candidates as a party. However, this was not the case. Member parties fielded candidates under their original constituent party. On the other hand, Kenya Kwanza Alliance was a coalition of parties that allowed constituent parties to field candidates within the coalition.

Coalitions must adhere to the requirement in schedule 3 of the PPA, 2011. This includes specifying parties in the coalition, overall and general organisational structure, nomination rules, electoral areas where the coalition party intends to field candidates, sharing of funds and dispute resolution mechanisms. A coalition party, being a party, is qualified to field candidates for all six elective positions. Registered members of parties in a coalition party subject to nomination rules in the coalition agreement are the only ones eligible to participate in nominating candidates of a coalition party.

The Azimio la Umoja One Kenya Coalition party was registered on 21st April 2022. According to the ORPP, the coalition has 26 parties. On the other hand, Kenya Kwanza Alliance has 15 parties.

The formation of coalitions meant that political actors had to be accommodated within the umbrella of the parties forming these coalitions. Some of the challenges associated with coalitions include suspicion and mistrust that may ruin the otherwise good intention of the coalition parties. Parties losing their identity, name and existence to the detriment of loyal and committed members and supporters and only involve top leaders of the political parties and often violate the rights of members who are hardly involved in the negotiations or consulted before decisions are made.<sup>3</sup> Coalitions may manifest a weak form of government due to conflict of interest and competing interests among members, which may be reflected in fielding candidates for various positions apart from the presidency.

<sup>2</sup> ORPP's Kenya's Political Education Source Book, A Training Tool Box for Party Members, Election Aspirants and Political Leaders, 1<sup>st</sup> Edition, 2022, p. 62

<sup>3</sup> ORPP, Kenya's Political Education Source Book, A training Tool Box for Party members, Election Aspirants and Political Leaders.



The ORPP Kenya's Political Education Source Book notes that part of the strategies for sustaining stable coalitions is that each coalition member should demonstrate commitment to the letter and spirit of the coalition agreement, which must be enforceable. Parties within a coalition must all agree to implement the agreement with clear sanctions for non-implementation or breach of the agreement. The sourcebook also notes that the coalition should be founded based on national values and principles of governance under Article 10, as read together with Chapter 6 and the third schedule of the PPA, 2011.

Letoo (2022), in his article, noted that Azimio la Umoja One Kenya Coalition party agreement provide that any party may withdraw from the coalition agreement upon giving 90 days' notice to the coalition council of its intention to withdraw from the coalition party. The agreement further says that no party may withdraw from the coalition six months before the August 2022 General Election or within three months after the date of the said General Election. However, Maendeleo Chap Chap and Pamoja African Alliance Party joined Kenya Kwanza Alliance days before the 9th August 2022 general elections in contravention of the coalition agreement procedures. This brings to question the trust and commitment of constituent parties within a coalition to the ideology and agreement of a coalition party.

**Indirect Party Nominations.** The Political Parties Amendment Act 2022 legalised undemocratic modes of party nominations. These violate the values and principles of governance as contemplated in Article 10 of the Constitution and the principles of free and fair elections as envisaged in Articles 38, 81 and 91. The indirect method of nomination also violates section 3 of the Political Parties Act, 2011, which provides that parties shall promote inclusiveness, democracy and participation of the people in the nomination of candidates for elections.

The Act provides that parties are at liberty to use either direct nomination (where all party members participate in choosing a candidate) or indirect method (where measures such as the use of delegates drawn from members choose candidates). For indirect nomination, the process requires a political party to select delegates who will then nominates candidates on behalf of the party. The delegates do not need to be chosen by the party members through a vote but can be selected using any procedure that aligns with the party constitution and nomination rules.<sup>4</sup> Other indirect methods that parties use to nominate candidates include consensus, internal polls, or other forms. With this provision, most political parties opted for indirect methods of nominating candidates. This resulted in supposed 'strong candidates' emerging as nominees without necessarily being chosen by party members through an election. In most cases, indirect nominations were based on financial resources, loyalty to the party and other factors considered by the party.

According to the *'Preliminary Statement of Initial Findings and Recommendations of the IRI/NDI International Election Observer Mission to Kenya's 9th August 2022, the General Elections'* indirect party nomination process was often opaque and marred by nepotistic selections over competitive processes. These often excluded young aspirants, particularly young women. This opaqueness contributed to the increased number of candidates who sought to be cleared by the IEBC as independent candidates. Statistics show that ORPP received more than 7,000 independent aspirants who sought to be cleared, though only 4,526 were ultimately cleared, representing 28% of all candidates. The statement also notes mixed reactions towards the political parties' indirect nomination processes. Some hailed the process for contributing to a more peaceful nomination process, while others raised questions about its transparency and inclusion.

The statement noted that more women ran for seats in 2022 than in 2017, both in absolute numbers and as a share of the total number of candidates. According to the IEBC, out of the 16,100 candidates cleared for the 2022 polls, women represent 12.18% or 1,962 candidates. Three of the four presidential candidates nominated a woman as a running mate. The ORPP enforced the two-third-gender rule for party membership lists for the first time. Also, the number of female deputy gubernatorial candidates doubled from 30 in 2017 to 62 in 2022.

Notwithstanding these improvements, women aspirants faced hurdles to their election bids. These included cultural and economic barriers, inability to mobilise resources to sustain their campaigns throughout the election period, and exclusion from business networks. They also faced online and

<sup>4</sup> Ibid



physical harassment on the campaign trail. They were subjected to verbal abuse and psychological violence from male and female opponents and their supporters.

### **2.3. Challenges and Opportunities of the Elections Campaign Financing Act, 2013**

#### **2.3.1. Overview of the Elections Campaign Financing Act 2013**

The Act provides for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns. Part two of the Act provides for the function of the IEBC in regulating and administering campaign financing. Part of the functions include supervising candidates, political parties, and referendum committees concerning campaign expenses, setting spending limits and enforcing compliance with such limits, verifying sources of contributions to a candidate, a political party or a referendum committee, monitoring and regulating campaign expenses and providing a framework for the reporting of campaign expenses.

Part three of the Act provides for the regulation of expenditure. Section 5 states that the IEBC shall make rules to regulate election campaign financing at least twelve months before the election in case of a general election and for a by-election and referendum at such a time that the Commission may determine. The Act also establishes (a party expenditure committee (section 7), Independent Candidates Expenditure Committee (section 8), and a Referendum expenditure committee (section 9).) It also provides for the submission of expenditure reports (21 days after the party nominations and the final expenditure three months after the elections).

Part four of the Act provides for contributions and donations, including sources of campaign financing (section 11), limits contributions to at least 12 months before a general election (section 12), prohibits receiving contributions from anonymous or illegal sources (section 13), prohibition of contribution from the state or state institution (section 14), capping spending limits at least twelve months before an election, by notice in the *Gazette* (section 18), prescribing the nature of authorised expenditure (section 19), setting limits for media coverage for state-owned media (section 20)

Part five provides for dispute resolution and offences. It states that anyone who commits an offence shall be liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding five years or both.

Part six provides for the registration and dissolution of expenditure committees (section 25), keeping records of campaign sources of income and expenditures (section 26), and audit of accounts by the Auditor General (section 27). It also provides for delegated powers that empower the Commission to make regulations for the better performance of its functions under the Act. Such regulations are to be presented before the National Assembly for approval before they are published in the *Gazette* (section 29).

#### **2.3.2. Implementation Status of the Elections Campaign Financing Act, 2013.**

Article 88(4)(i) of the Constitution mandates the IEBC to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. The Election Campaign Financing Act (No. 42 of 2013) to operationalise Article 88(4)(i) of the Constitution has never been implemented due to a lack of regulations. In 2017, the National Assembly did not approve the Election Campaign Financing Regulations submitted to it by the IEBC. Instead, it amended section 1A of the Elections Campaign Financing Act to provide that the Act shall come into force immediately after the 2017 General Elections. In August 2021, the National Assembly Committee on Delegated Legislation voted to nullify the Elections Campaign Financing Regulations proposed by IEBC, citing insufficient public participation and that it was time-barred. Section 5 of the Elections Campaign Financing Act, 2013 requires IEBC to make rules, which must be submitted to Parliament for approval at least 12 months before the General elections. Therefore, the elections campaign financing regulations 2020 should have passed before 9th August 2021.

The committee also rejected the campaign financing limits proposed by IEBC via Gazette Notice No. 8024 dated 9th August 2021, citing that they had not been approved by Parliament as required by the Elections Campaign Financing Act, 2013. The IEBC had proposed limits and contributions that political parties and candidates could spend during the 2022 general elections. For the presidential

elections, the limit was Ksh. 4,435,565,094. For the county, Parliamentary and ward elections, the limits would be based on the population density and area in square kilometres.<sup>5</sup> IEBC also set limits for political party expenditures on venues, publicity materials, advertising and media, campaign personnel, elections agents, transportation, communication, nomination fee charges, security, accommodation and administration cost. The Commission capped this at 17Billion per party. Those found guilty of breaking the annulled spending rules would have been liable to a fine not exceeding Ksh. 2 Million or a jail term not exceeding five years or both.

The lack of regulations to operationalise the Elections Campaign Financing Act, 2013 and the rejection of the spending limits for each election undermine political and electoral equality of opportunity, accountability and transparency in the electoral campaigns. The rejection of campaign financing limits has rendered the electoral process illegitimate in as far as it makes the electoral slots a preserve of the monied elites (usually men) and perpetuates marginalisation and exclusion of others, contrary to the spirit of the Constitution. PWDs, women and youth, being on the lowest end economically, have less capacity to leverage financing and cannot match their male competitors. This observation is corroborated by the EU Election Observation Mission in their report on Kenya's 2022 August General elections. The mission noted that Kenyan elections are considered an elite and male-dominated affair due to the high costs associated with candidate nomination, which highly impacts the ability of women, youth, and minority group representatives to be fairly represented. Failure to legislate on campaign financing further exposes the legislature and executive to manipulation by various interests who can, without limit, finance their electoral participation. It, therefore, impairs the pursuit of Articles 6 and 10 on provisions on leadership integrity and National values and Principles of Governance.

On failing to approve the 2020 Draft Campaign Financing Regulations and the set contribution and spending limits, two petitions were instituted in the High Court to suspend the resolution of the National Assembly to annul set limits for spending and contributions for the 9th August 2022 General Elections.

The petitioners argued that section 29(1) of the ECF Act was unconstitutional to the extent that it required the mandatory approval of the National Assembly. This requirement resulted in the absence of rules regulating election campaign financing contrary to Sections 5 and 18 of the Act, which obligates the Commission to make rules to regulate election campaign financing and the limits. The petitioners were also of the view that Section 29(1) of the ECF Act was inconsistent with Article 88(4) (i) of the Constitution, which bestows the Commission with the responsibility to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. They posited that mandatory approval of the regulations before gazettelement had the unconstitutional purpose of encroaching on IEBC's independent mandate contrary to Article 88(5) and 249(2) of the Constitution and was further unconstitutional since it introduced an impermissible conflict of interest requiring members of the National Assembly to approve rules governing their own election campaign financing contrary to Article 73(2)(b) and 75(1)(b) of the Constitution and Section 16(1) of the Leadership and Integrity Act, 2013. The petitioners argued that the National Assembly should consider the Elections Campaign Financing Regulations under statutory instruments in line with the Statutory Instruments Act, 2013 and not constitutional instruments as distinguished by Article 94(5) of the Constitution. They argued that regulating campaign financing encouraged greater participation in the electoral process towards the legitimacy of its outcome.

The High Court, in its ruling, held that the Regulations under Article 88 (4)(i) of the Constitution were statutory and not constitutional instruments. Section 29(1) of the Election Campaign Financing Act, 2013 was unconstitutional as it contravened Articles 10(2)(c) and 88(4)(i) of the Constitution on requiring Parliament's approval of regulations before gazettelement. Lastly, the spending limits in sections 12,18, and 19 of the Elections Campaign Financing Act, 2013 did not call for Parliamentary approval but must be subjected to appropriate public engagement. This, therefore, means that amendments to section 29(1) of the Elections Campaign Financing Act, 2013, should be initiated to align it with the court ruling.

<sup>5</sup> Kenya Gazette Notice Number CXXIII – 162, dated 9<sup>th</sup> August 2021. Spending limits for political parties and candidates for purposes of general elections of the 9<sup>th</sup> August 2022

### **2.3.3. Challenges of Lack of Implementation of Elections Campaign Financing Act, 2013**

In his article, 'Campaign Financing and Corruption in Kenya', Gichana, 2022, noted the importance of election campaign financing as it caters to costs associated with campaigns such as transport, logistics, campaign meetings, publication and materials, publicity and media cost. However, he noted that unregulated election campaign financing might lead to corruption and money laundering in favour of a few to boost their financial muscles that would influence and compromise political processes and outcomes. This position mirrors that of Okechukwu & Nkechi (2014). They posit that relationships between party financing and corruption are so significant that ignoring party funding is simply "to open the door for corruption". Okechukwu & Nkechi (2014) in their Article noted that most parties are vehicles in the hands of a few "political entrepreneurs" who invest vast amounts of money and expect concurrent rewards on such investments.<sup>6</sup>

Gichana (2018) also noted that the lack of an elections campaign financing regulatory framework can create an unequal playing field among political competitors resulting in skewed elections outcomes mostly favouring men. This is evidenced by how youth and women performed in the 2013, 2017 and 2022 general elections. For example, the overall success rate for women candidates in the 2017 general elections remained similar to 2013 at 13%, despite having the legal instruments in place. Also, only 1,333 (11%) of the 12,188 contenders - not including Women Members of the National Assembly (WMNA) – in the party nominations were women.<sup>7</sup> In 2017, out of the 1,862 elected persons for the six elective seats, women comprised 172 (9.2%) of the total. In the 2022 general elections, even though there was an improvement, the statistics are still skewed towards men and fall below the constitutional threshold. Of the 16,100 candidates cleared for the 2022 polls, women represented 12.18 per cent or 1,962 candidates. Seven women were elected governors (4 more than in the last election), 3 Senators (no change) and 30 MPs (up from 23). In the Senate, there are 16 nominated reserved seats for women. It is noted that the 13<sup>th</sup> Parliament is the third consecutive Parliament that does not meet the 2/3 gender rule enshrined in the Constitution. For the MCAs, there were 115 women candidates elected, representing a gradual increase (96 previously). Seven counties did not elect any women (12 in 2017)<sup>8</sup>.


Concerning youth, only 23 youths were elected to the National Assembly in 2017, and out of these, only two were female. Out of 12,454 candidates who were cleared to vie for the six elective positions in the 2017 general elections, only 3,693 (29.67%) were below 35 years while only 96 (7%) women were elected as MCAs out of 1,450 MCAs. According to Gichana, 2018 to ensure the integrity of elections, it is necessary to regulate campaign financing by establishing measures that promote transparency and accountability in elections financing. The article recommended the review of the current legislative framework and implementation to promote electoral integrity.

IRI & NDI, in their report, noted that failure to implement campaign finance legislation resulted in the cost of elections being prohibitively high for many, particularly women candidates. The European Election Observation Mission pointed out in their report that the election campaign legislation intended to create a regime of regulation and accountability for funds raised and spent on election campaigns. The report noted that the absence of regulation of campaign finance is in clear breach of the legal commitments of Kenya in the Convention against Corruption, which requires, in Article 7(3), that 'each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office'. The report noted that the absence of finance regulations resulted in the widespread payment of cash from multiple candidates to voters during the campaign and undermined the standards for democratic elections, given the corrupting influence of money on the voters. It also has a negative impact on transparency and accountability. It creates incentives for corrupt political behaviour that distorts the playing field, disadvantaging candidates with fewer funds, particularly women, youth, and minority representatives with less opportunity to be fairly represented. The report recommended that the IEBC operationalise the Election Campaign Financing Act to regulate the amount of money received and spent by candidates and political parties during an election or referendum.

<sup>6</sup> In the form of public works and procurement contracts, appointments of cronies to public offices and other forms of rewards


<sup>7</sup> NDI/ FIDA –K Gender report of the 2017 General elections, p.29

<sup>8</sup> EU Election Observation Mission Report of the Kenya 2022 General Elections, p.33



The Organization for Economic Cooperation and Development (OECD) Article 'Funding of Political Parties and Election Campaigns and the Risk of Policy Capture' in 2016 noted that money in politics is a double-edged sword. It is a necessary component of the democratic process, enabling the expression of political support and competition in elections. However, the increasing concentration of economic resources in the hands of fewer people presents a significant threat to political and economic systems. The article also noted that if the financing of political parties and election campaigns are not adequately regulated, money might also be a means for powerful special interests to exercise undue influence and "capture" the policy process. For example, access to public procurement has been used by elected officials to "return the favour" to corporations that made significant contributions to their campaigns or to exclude those that supported their opponents.

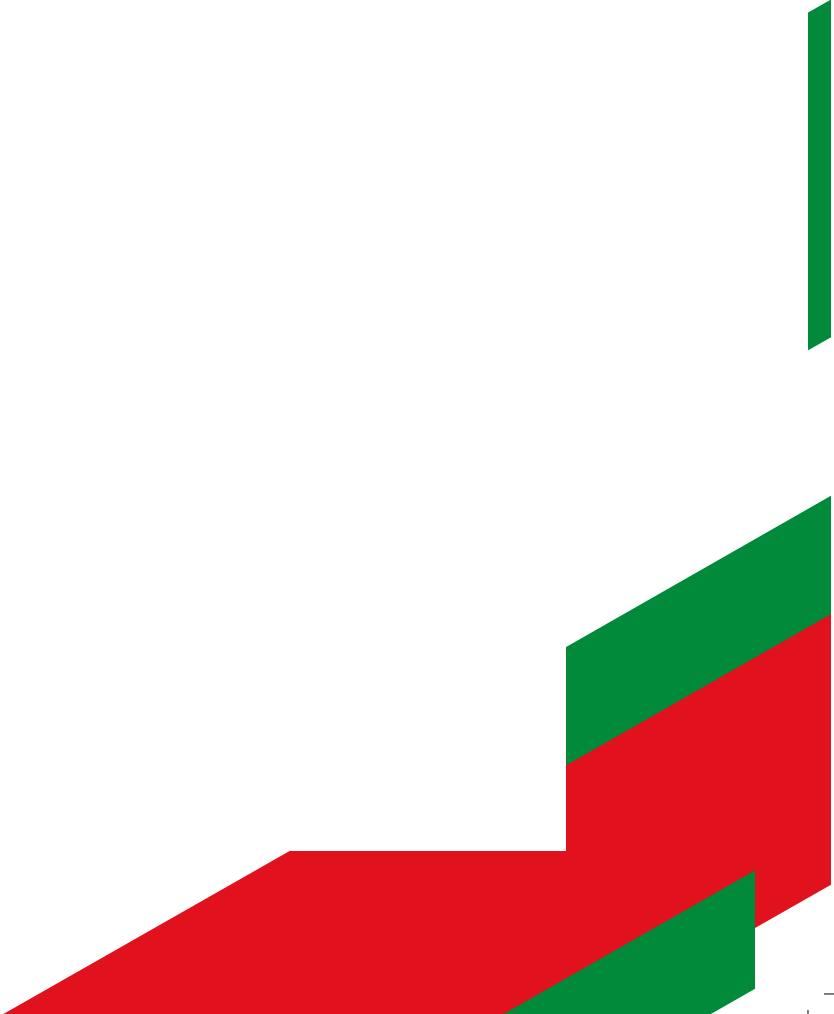
#### **2.4. Recommendations on Negotiated Democracy and Election Campaign Financing**



Literature shows that while necessary steps have been made to promote the inclusion of women and youth, more needs to be done to operationalise relevant provisions to make them meaningful. To this end, several recommendations have been proposed. These include having a legal framework to operationalise the two-thirds gender rule, representation of marginalised groups, and regulations to implement the Elections and Campaign Financing Act. There should also be enforcement of political parties' adherence to the two-thirds gender rule if they are to benefit from the Political Parties Fund. Political parties should meaningfully engage youth, women, PWDs, and marginalised communities as delegates during consensus building, opinion polls and other indirect party nominations procedures.

#### **2.5. Summary of Literature review and knowledge gap**

Several studies have been undertaken on negotiated democracy, particularly in North-Eastern Kenya. However, there is a shortage of similar studies in Kenya's political landscape nationally since none of these studies focused on the nexus of negotiated democracy and the lack of an election campaign financing regulatory framework on the participation of youth and women in the 2022 General Elections in Kenya. This study, therefore, has sought to fill this gap.



# CHAPTER THREE: STUDY DESIGN AND METHODOLOGY

## 3.0. Overview of the Chapter

This chapter documents the locale of the study, study design, target population, sample and sampling techniques that were employed to generate the sample of the study, description of research instruments, validity, piloting of the research instruments, description of data collection and analysis, study ethical considerations, validation of the draft report and report finalisation and presentation.

## 3.1. Locale of the study

The study was carried out within Nairobi City County. However, respondents were drawn from the seven economic blocs namely lake region economic bloc, the North Rift Economic Bloc, the Mt Kenya and Aberdares Economic Bloc, the Jumuiya ya Kaunti za Pwani, the South Eastern Kenya Economic Bloc, the Frontier Counties Development Council, Kajiado - Narok Economic Bloc, and Nairobi City County. The study utilised internet and digital platforms to reach out to respondents outside Nairobi County.

## 3.2. Study Design

The study employed a Mixed Method Research (MMR) design where both primary and secondary quantitative and qualitative data was collected, analysed, triangulated and interpreted to have a deeper understanding of the study. The mixed-method research that was used is a convergent parallel mixed-methods design - an approach to inquiry that combines both qualitative and quantitative methods concurrently, prioritising both data sets almost equally. In this case, the quantitative and qualitative methods complemented each other. The justification for adopting an MMR design in undertaking the study is that both data sets were required to meet the study's objectives.

Triangulation was used to verify or crosscheck data using several pieces of evidence for the purpose of enhancing the credibility, reliability, relevance and usefulness of the study findings and recommendations. Participatory data collection methods to collect qualitative data was adopted which included Key Informant Interviews (KIIs) and participatory workshops respecting diversity on geography, women and youth intersectionality of age and gender. The methodology was participatory and engaged different stakeholders in meaningful and appropriate ways to ensure inclusion.

## 3.3. Target Population

The study targeted a diversity of electoral stakeholders, including and not limited to the following:

- The 2022 pre-election coalition parties that formed the two coalitions (Azimio La Umoja One Kenya Coalition party and Kenya Kwanza Coalition)
- Government institutions that are involved in the management of elections (IEBC, ORPP, Parliament).
- Constitutional Commissions (NGEC, KNCHR)
- CSOs that focus on democracy and elections.
- Women and youth aspirants who participated in the party nominations and lost
- Women and youth candidates who won party nominations and were cleared by the IEBC to vie for the six elective positions.
- Women and youth elected in the six elections positions on 9th August 2022.

The research respondents were identified in consultation with Mzalendo trust team, who also supported in the booking of interviews, mobilisation and logistics of the respondents

### **3.4. Study Implementation Phases**

The study was implemented in three main phases: An inception phase, Data Collection phase and Data analysis, synthesis and report writing phase.

#### **3.4.1. Phase 1: Inception Phase**

The inception phase had the following key Activities

- 1. Literature Review/Desk Research.** This entailed review of the available secondary data on negotiated democracy, the impact of the lack of an election campaign financing regulatory framework on women and youth participation in the electoral processes and the opportunities and challenges brought about by the amendments of the Political Parties Amendment Act (PPA), 2022. The document reviewed included but not be limited to
  - The legal framework guiding the nomination process of political parties (Freedom of association, Article 36; Freedom of Movement, Article 39; Principles of electoral system, Article, 81; Allocation of Party list, Article 90; Basic requirements for political parties, Article 91, Legislation on Political Parties, Article, 92 and Elections Act, 2011
  - The Elections Campaign Financing Act, 2013, the draft 2021 regulations and the Kenya Gazette Notice No. 8024 on the contributions and spending limits, including the total amount that a candidate or political party may receive and spend during the expenditure period.
  - The High court ruling of petition No. E540 and E546 of 2021 filed by Katiba Institute, AFRICOG and TI
  - List of women and youth who the cleared by the IEBC to vie for the various elective positions,
  - List of women and youth who were elected in different elective positions,
  - The 2022 elections observer reports and
  - Previous studies on the subject matter such as the Cost of Politics in Kenya; Implications for Political Participation and Development.

The literature review findings were incorporated into the inception report, development of the study tools and during the synthesis and reporting phase. The literature review findings complemented the data collected from the field, thereby enabling the triangulation of findings.

- 2. Preparation of an Inception Report, Draft Research Tools and presentation to the Mzalendo Trust for review and input.** The inception report and data collection tools were presented to Mzalendo trust who provided feedback that was incorporated to ensure that the inception report was aligned to study objectives and that the study tools were designed to collect data necessary for answering the study questions.

#### **3.4.2: Phase 2: Data Collection Phase**

The primary data collection phase started upon approval of the inception report and data collection tools by the Mzalendo Trust project team. Data was collected in 10 days from 17<sup>th</sup> to 29<sup>th</sup> November 2022. The process was guided by a field plan that was flexible enough to accommodate any last-min-

ute challenges in the field, including COVID - 19 related challenges or other challenges.

The study adopted a participatory and hybrid approach to primary data collection. The data collection process involved administering research tools to multiple stakeholders to collect both qualitative and quantitative primary data, allowing for triangulation to discern meaning and draw conclusions on the study. The data collection tools included a survey questionnaire that was administered to a total sample of 40 women and youth who participated in the selected political parties' nomination process and those who were cleared by the IEBC to vie for various political seats. The selection of the 40 women and youth was done in such a way that the represented seven economic blocs. The study also used a semi-structured key Informant guide to elicit information from the key informants and an FGD discussion guide during the participatory workshop that targeted women and youth who participated in the 2022 general elections.

### 3.4.2.1: Collection of Primary Qualitative Data

#### Sampling of Qualitative data collection respondents

The non-probability sampling techniques were used to generate the sample respondents for qualitative data. The technique allowed for the selection of respondents based on one's judgment and diversity to ensure maximum variability within the primary data that would enhance triangulation, to arrive at the most valid status of the impact of negotiated democracy and lack of an election campaign financing regulatory framework on the participation of youth and women in the 2022 general elections in Kenya. Inclusivity was adhered to, to ensure all the relevant stakeholders were represented in the non – probability sample. Key Informant Interviews (KIIs), Focus Group discussions (FGDs, in the form of participatory workshops), and case studies were also utilised to collect qualitative data.

#### Key Informant Interviews (KIIs)

Key informant interview were also utilised to collect data. They targeted 30% of the 41 political parties that formed the two coalitions pre-2022 general elections, elected youth and women representatives, Government Institutions that are involved in the management of elections, Constitutional Commissions and civil society organisations that focus on democracy and elections. Table 1 shows the number of Key informant interviews were planned to be undertaken.

**Table 1: Targeted Number of key informant interviews for the study.**

Respondent Category	Number of KIIs Planned	Held
Chairpersons of Political parties' Elections Management Boards or Secretary Generals of 30% of the 41 parties that formed the two pre-elections coalitions for the 2022 general elections (Azimio – 26; Kenya Kwanza-15)	A total of 12 8 parties in Azimio La Umoja, one Kenya Coalition party; 4 parties in Kenya Kwanza Coalition	6
Women and youth elected representatives	6	2
Government institutions that are involved in the management of elections (IEBC, ORPP, Parliament)	3	3
Constitutional Commissions	2	2
Democracy and Governance CSOs	5	8
<b>Total KIIs</b>	<b>29</b>	<b>21 (72%)</b>

Face-to-face interviews were held with key informants. However, in some cases virtual meetings were held where holding physical meetings was not possible.

**Participatory Discussion Workshops:** Two participatory discussion workshops were held. This method was adopted due to the time constraints under which the study was being undertaken and



the fact that there was a need to collect data from a substantive number of women and youth who participated in the 2022 general elections, either as aspirants or candidates. Mzalendo Trust was able to mobilise participants and the workshops were held on 25<sup>th</sup> (women's FGD) and 28<sup>th</sup> (Youth) November 2022. The workshops had 10 and 17 participants respectively, drawn from women and youth who participated in the electoral process as aspirants and candidates. The consultants facilitated the discussions using an unstructured discussion guide for the qualitative data.

**Table 2: Targeted Number of Participatory workshops**

	Number of Workshops	Respondents Category	Number of Targeted Participants
Women Workshop	1	(i) Women aspirants who did not make it to the party nomination list	10 participants
		(ii) Those cleared by IEBC to vie	
Youth Workshop	1	(i) Youth aspirants	17 participants
		(ii) Those cleared by IEBC to vie	

#### 3.4.2.2: Collection of Primary Quantitative Data

Quantitative data was collected through a questionnaire and targeted women and youth aspirants who participated in the party nominations and women and youth candidates who the IEBC cleared to vie for six elective positions. Participants were sampled from the seven regional economic blocks and Nairobi City County. The regional economic blocs include Lake Region Economic Bloc (20%), the North Rift Economic Bloc (17.5%), Mount Kenya and Aberdares Regional Economic Bloc (15%), the Jumu'ia Kaunti za Pwani (15%), the South-Eastern Kenya Economic Bloc (12.5%), the Frontier Counties Development Council (5%), Kajiado and Narok Economic Bloc (5%) and Nairobi City County (20%).

Using random sampling methods, 40 respondents (21 Women and 19 male Youth) who participated in the 2022 general elections as aspirants and candidates were selected and google form questionnaire was administered to them.

#### 4. Validity and Piloting of Research Tools

The content and face validity of the research tools was ascertained by sharing the tools with the Mzalendo research team for feedback and approval. Piloting was done by administering the tools to a few research respondents who did not take part in the study, after which the tools were revised for use in the main study.

#### 5. Data Quality Control

Data quality was ensured throughout the data collection period. The KIIs and workshop discussions were audio-recorded (after securing consent from the participants). Interview notes were also taken where recording was not consented to. Data management was undertaken professionally. Before data was analysed, it was cleaned to remove any inconsistencies, incomplete records, and any other errors to ensure that the statistical report is accurate.

#### 6. Research Ethical Consideration

The study was undertaken professionally and within the internationally agreed research ethics of: -

**Informed Consent:** Informed Consent is a voluntary agreement to participate in research. It is a process in which the participant understands the survey and its risks. Informed consent was sought





from participants before participation in the Research exercise.

**Confidentiality: This was maintained throughout the research process.** No survey details were divulged to any third parties without Mzalendo Trust's permission.

**Do No Harm Principle:** The Do No Harm principle of conflict sensitivity was observed. The principle states that the Actions and Behaviours of humanitarian Actors have consequences on the individuals and group dynamics and context in which humanitarian assistance is being provided. Therefore, the study was conducted in a professional and neutral manner without leaving the respondents in a worse situation than they were before the study.

### **3.4.3: Phase 3: Analysis, Syntheses and Reporting**

Qualitative data analysis involved transcription, coding, categorisation, charting, mapping connections between categories, and exploring patterns of meaning or emerging themes. Quantitative data was analysed using google excel forms. After the analysis of the qualitative and quantitative data sets, both were merged to allow for comparisons and interpretation, to establish the extent to which the two sets of results converged, diverged, related, or could be combined to create a better understanding of the study objectives.

## **7. Stakeholders' Validation and presentation of the Final report**

The validation of the draft report took place on Tuesday, December 6, 2022. The participants represented those who participated in the study. It aimed to ensure that the report findings and recommendations are credible and that there is stakeholder buy-in to enhance the utility of the study findings. After the validation, the final report was prepared and presented to Mzalendo Trust.

# CHAPTER FOUR: FINDINGS AND RECOMMENDATIONS

## 4.1. Overview of the Chapter

This chapter presents the analysis of data that sought to examine the impact of the triad of negotiated democracy, amendments to the Political Parties Act, 2022 and lack of Campaign Financing framework on the participation of women and youth in the 2022 general elections. The chapter documents findings, interpretations, and discussions on the four objectives that guided the study. Results from KIIs, FGDs, and open-ended questions are presented under key themes, while data from the questionnaire are presented in tables, bar charts, and pie charts. The findings are discussed alongside the reviewed literature for corroboration of findings with the present study. This chapter is organised under four major headings: data collection response rate, demographic information of the respondents, and findings per each of the study objectives.

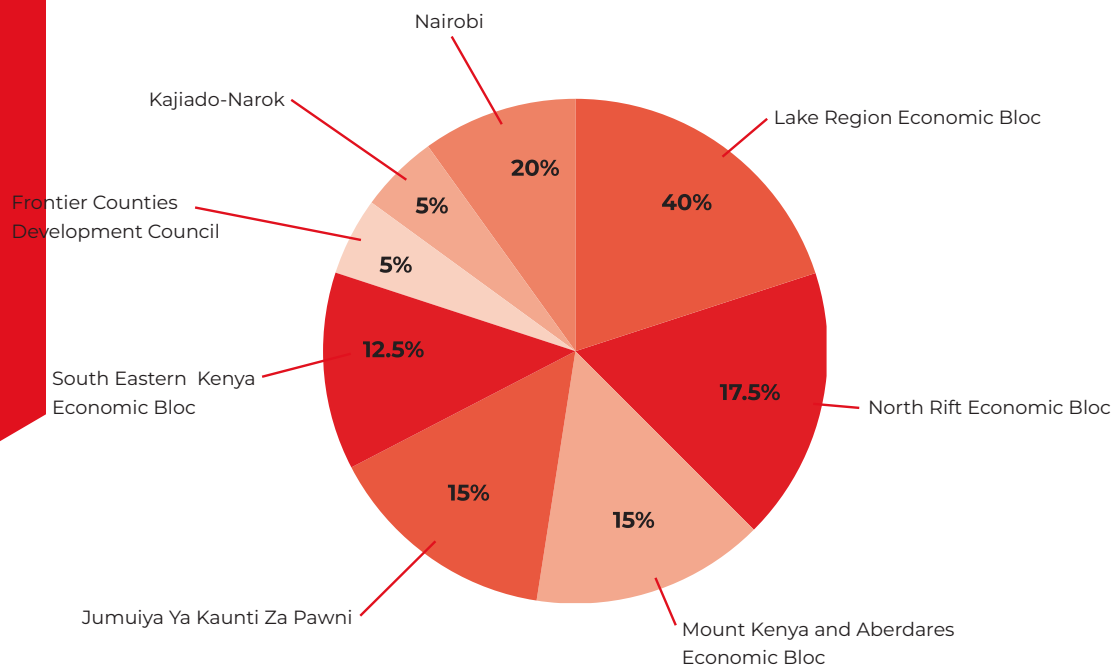
## 4.2. Data Collection Response Rate

The data response rate was 72% of the majority of the targeted respondent, which provided sufficient data for the analysis, interpretation and making key recommendations to the relevant key stakeholders.

## 4.3. Demographic information of Respondents

The study reached 40 respondents drawn from seven regional economic blocs against a target of 30 respondents from six economic blocs. The breakdown is captured in the chart below.

### Regional Representation



### Gender

Of the forty respondents, 52.5% were female and 47.5 male



### Age

55% of respondents were between the ages of 25-35, 42.5% 36 and above and 2.5% between 18-24 years.



### **4.4. Brief Description of the Institutions that participated in the study**

The study reached representatives drawn from various institutions as Key Informant Interviews. These were:

State bodies – These include electoral management bodies, Constitutional Commissions and Parliamentary bodies

Political parties – These include political parties in the two main coalitions, Kenya Kwanza Coalition and Azimio la Umoja One Kenya Coalition

Civil Society Organisations – These included youth, and women organisations, governance and human rights organisations.

### **4.5. Study findings**

**Objective 1: To assess the impact and identify challenges and opportunities of negotiated democracy on the political participation of women and youth in the 2022 general elections.**

#### **4.5.1. The extent of Use of Negotiated Democracy**

As noted in the literature, negotiated democracy took a more prominent role in Kenyan politics in 2022 with widespread regional use of the practice. For example, in the lead-up to the polls, Nakuru, Narok, Elgeyo Marakwet, Uasin Gishu, Kisii, Nyamira, Siaya, Bungoma, Busia, Vihiga, Kakamega, and Migori counties were cited as counties that were likely to opt for negotiated democracy given their history practising the same (Otieno, 2021). Youth and women respondents in this study, from pastoralist communities and arid and semi-arid regions, all pointed to having been subjected to meeting with community elders to justify or cede their electoral aspirations for 'better' aspirants.

Political party members and officials also indicated using negotiated democracy through indirect nomination methods. They noted that direct nomination as a method of identifying candidates is expensive and contributes to sharp divisions and possible fallouts within the party. At the same time, negotiated democracy provided a chance for a win-win situation. Because of this, it seemed preferable for the parties to use indirect nomination methods. Furthermore, the stiff competition between the two leading coalitions, the Kenya Kwanza coalition and Azimio la Umoja One Kenya Coalition, contributed to the rise of this phenomenon, especially in cosmopolitan areas where there were real fears of losing to the opposing teams.

Compared to previous elections, it seems that negotiated democracy was more widely applied in 2022. This could be attributed to the provisions in the Political Parties Amendment Act 2022 that brought methods such as consensus building, opinion polls, and interviews to the fore of political

party nomination processes.

Survey respondents indicated the political parties under which they sought candidature used various nomination methods to identify 'strong' candidates. These included consensus building, interviews, opinion polls, and direct nominations. In several cases, political parties also issued direct tickets. This information was corroborated by responses from Parliamentarians interviewed and respondents in the Focus Group Discussions (FGDs) conducted.

#### **4.5.2. Salient Features of Negotiated Democracy**

Respondents indicated being in 'consensus building' meetings with party officials. According to respondents, these meetings allowed the party leadership and aspirants to agree on which aspirants were best placed to represent the party. Several respondents pointed out that they had been asked to cede their political aspirations in support of more 'favourable' aspirants. However, it was not clear what parameters were used to determine 'favourable'.

Another commonly used method of nomination was the opinion polls. Where a political party had more than one aspirant seeking an elective post, they would commission an opinion poll to determine the popularity of the competing aspirants and use the data generated to convince one to step down for the other depending on their popularity. Political parties also used interviews to determine an aspirant's suitability and 'strength' and the extent to which their aspirations aligned with the party's vision. At these interviews, aspirants were also asked to speak about their campaign financing strategies. In several cases, an individual's financial capability (or lack of it) was used to give or deny party tickets, regardless of one's popularity.

Of course, the most evident form of negotiated democracy was the establishment of coalition and coalition parties, which brought together different parties under one entity to increase the chances of parties winning the elections. Outside of political parties, various communities, particularly in pastoralist areas, used negotiated democracy to identify suitable individuals to represent the community in elective politics.

Political parties viewed negotiated democracy as a preferred method to identify suitable candidates to avoid expensive and potentially contested nomination elections. "Purely from a political point of view, our party was not popular in this county, and probably that is one of the reasons why we opted for the alternative [nomination methods] rather than subjecting the aspirants to party primaries, to prevent a lot of fallouts. This was the sentiment of one party official.

Given the political history of our country and the highly contested nature of Kenyan elections, negotiated democracy has been pushed for as a way to avert conflict, though this is also challenged.

From the perspective of those who sought elective positions, it seems there were very few benefits to women and youth who vied. If one belonged to one of the larger parties in the coalitions and one was connected to the party leadership, there was the likelihood of getting nominated to the legislature or an appointive seat. One respondent indicated that women had benefited from negotiated democracy. A case in point is the current Cabinet Secretary for Environment, who initially sought the UDA party ticket for Narok governor, but through negotiated democracy, ceded her aspirations and was later nominated to the senate before being appointed as a Cabinet Secretary. These incidences seem few and far between. This is corroborated by the survey data where only 10% of women surveyed indicated having benefited from negotiated democracy. Similarly, 14% of youth surveyed stated that they had benefited from negotiated democracy. These belonged to the United Democratic Alliance (UDA) and Jubilee, with one exception drawn from one of the smaller parties in the Kenya Kwanza Coalition.

#### **4.5.3. Hidden cost of Negotiated Democracy on women and youth candidates**

Even though negotiated democracy was seemingly more widely used in the 2022 general elections, sharp criticism has been levelled both on the concept and how it was practised. Negotiated democracy has been termed as curtailing people's rights and inconsistent with the principles of free and fair elections as envisioned in the Constitution of Kenya 2010 and the International Covenant on Civil and Political Rights (ICCPR), which Kenya is a signatory to. One participant in the study termed negotiated democracy as "a sanitised system of impunity with no foundational ethos or democrat-


ic framework." The fact that negotiated democracy is driven by a few individuals, as in the case of community elders, and party leadership, does not have a clear framework of operation, or inclusive parameters, puts itself at cross purposes with constitutional principles. Firstly, it seems to be in contravention of Article 1 of the Constitution, which recognises the right of the people to exercise their power through their democratically elected representatives. Therefore, if those driving negotiated democracy are not democratically elected and represent the interest of a few, it can be argued that negotiated democracy is unconstitutional. It also does not seem to hold any of the values and principles of governance contemplated in Article 10 of the Constitution. When scrutinised against Articles 38, 81 and 91 of the Constitution, negotiated democracy does not seem to align with the principles of free and fair elections based on universal suffrage and the free expression of the will of the electors. In the 2017 ruling of the Supreme Court on the Presidential Election petition, the court noted that,

*Negotiated democracy is a sanitised system of impunity with no foundational ethos or democratic framework*  
-FGD Respondent


*"An election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results.... The concept of free and fair elections is expressed not only on the voting day but throughout the election process.... Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament. "*

Viewed in the light of this observation and the principles of free and fair elections, negotiated democracy leaves out an essential component -the electorate. It leaves the mandate of choosing would-be representatives to power dealers, be they community elders, or the party leaders, thus placing an 'unreasonable restriction' on the electorate. In conventional party primaries, the process – though often chaotic – is known. The parameters are clear -when, where and how party primaries will be conducted, and citizens are free to exercise their universal suffrage right. However, with negotiated democracy, it was unclear who facilitated the consensus building or where these meetings were happening. It was unclear what the parameters of opinion polls or interviews were, who was conducting them and how. The study participants noted that the selection of candidates by the party officials tended to take place behind the scenes and did not include the wider party membership or the aspirants at times. Negotiation was not defined in any of the party instruments, what its parameters were, who was included in the negotiations, and how it had been determined that these were the 'negotiators'. This made the process of party nominations opaque and eroding of trust among members. Even party officials in coalitions noted that the opinion polling within the coalitions lacked objectivity, "Few people knew who was actually doing the opinion polling, so information could be fabricated." Respondents in the Focus Group Discussions echoed this sentiment. Given these shortfalls, it could be argued that negotiated democracy undermines human rights and constitutional principles of free and fair elections, the universal and equal suffrage of the citizen and the free expression of the will of the people.

Because negotiated democracy lacked clear operational parameters, women and youth found themselves the object of manipulation, intimidation, and exclusion in their efforts to secure party tickets. Overwhelmingly, youth and women interviewed in this study noted that the community elders locked them out from seeking party tickets, or they were often asked to cede their political aspirations to older men. When their popularity was high, they were asked to cough up money to secure their candidature with the party. One respondent was told, "You are popular, but we will not give you the ticket," after they asked her for money, which she could not provide. Women respondents in the FGD noted that on many occasions, women were told to step down for a male aspirant on the promise of nomination after the party won. "Many women were forced into consensus without wanting because here is a man who has given the party money, and you have not, so you are forced out, even if you refuse [to cede], you will not get the party ticket."



Youth were equally asked to step down in favour of older aspirants, sometimes with promises of employment, as was the case of Kevin Bahati Kioko, who was vying in Mathare but was asked to step down in favour of the ODM aspirant.



Negotiated democracy, as articulated in the Political Parties Amendment Act 2022, does not contemplate how disputes relating to nominations will be dealt with. It did not integrate any remedial measures to ensure those aggrieved got justice. *“Negotiated democracy was an end in itself. When a political party settles on a candidate, where does the losing aspirant go to file their appeal?”* The assumption seems to have been that because it was negotiated democracy, there would be the amicable reaching of agreements within parties and among parties within coalitions. When this did not happen, some aspirants sought refuge in smaller parties or chose to vie as independent candidates. 2022 saw a rise in the number of independent candidates, many of whom indicated they had been unfairly treated in their political parties, perhaps, an indictment on negotiated democracy, which threatens to compromise the principles of independent candidature.

These grievances were not restricted to aspirants within political parties but even within coalition partners. One effect of the coalitions was the zoning of regions (a phenomenon that will be discussed in detail in this study). Political parties within coalitions were locked out of some geographic areas that had been marked as the territory of a particular party. One party official cited a situation where their candidate had been edged out of a specific electoral unit by a partner party in the coalition on the premise that the area was a stronghold of the said party. As a result, the youth vying in that unit had to withdraw their candidature.

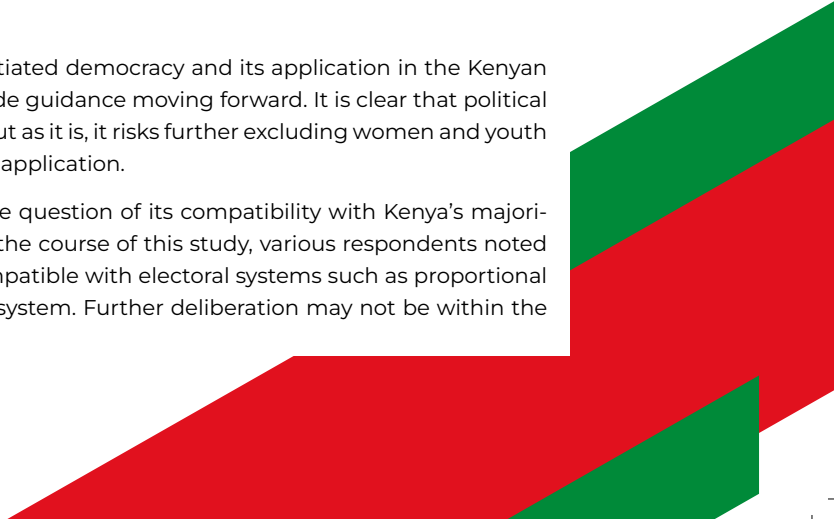
Political parties claimed that negotiated democracy was meant to enhance the inclusion of marginalised groups. It could be argued that women such as Gladys Wanga, Wavinya Ndeti and Aisha Jumwa, who got direct nomination tickets, were beneficiaries of negotiated democracy. However, on closer examination, women who benefitted were already well-known and connected to the political party machinery and had the financial wherewithal to bring to their campaigns. In fact, one could go as far as to say that they probably would have won their respective seats without the direct tickets they got. As one respondent noted, gender became an issue in this election on the back of the dissolution order of Parliament. *“For a long time, there had been no political cost to short-changing women, so the political class got away with repeatedly making empty promises to women. The dissolution order was a high cost to the political class. They were facing the dissolution of Parliament and, by extension, the dissolution of the government. Therefore, gender had to be a part of the political agenda in 2022.”* On the other hand, there is little evidence that women of ‘obscure’ backgrounds or youths, in general, benefited from negotiated democracy; if anything, it further marginalised them to the extent that they were ‘forced’ to give up their political aspirations.

Looking at Kenya’s recent history since the advent of multi-party democracy, negotiated democracy has manifested itself in one way or another and seems to be taking root in a way that is unlikely to be dispensed with in subsequent elections. Negotiated democracy has been touted as a panacea for tackling the inclusion of marginalised groups, but as evidenced in the 2022 general elections, the numbers of women and youth that made it into elective office remained low, so in that respect, negotiated democracy did not deliver on that promise and has not been able to in the more traditional approaches that have been applied.

As it is, it could be argued that negotiated democracy is unconstitutional. The critical question that arises, therefore, is, given the penchant for negotiated democracy and its inherent challenges, is it possible to make negotiated democracy compatible with constitutional principles as envisioned in Articles 1, 10, 38, 81 and 91?

A judicial interpretation of the concept of negotiated democracy and its application in the Kenyan political context is, therefore, necessary to provide guidance moving forward. It is clear that political parties are intent on its continued application, but as it is, it risks further excluding women and youth from political processes in its infrastructure and application.

The use of negotiated democracy also raises the question of its compatibility with Kenya’s majoritarian - First-Past-The-Post electoral system. In the course of this study, various respondents noted that negotiated democracy would be more compatible with electoral systems such as proportional representation or Mixed-member proportional system. Further deliberation may not be within the



purview of this study but may be something that Mzalendo Trust wants to explore in future studies.

**Objective 2: To assess the impact and identify challenges and opportunities of the Political Parties Amendment Act 2022 on the political participation of women and youth in the 2022 general elections.**

## 1.6. Opportunities and Challenges of the Political Parties Amendment Act 2022

### 1.1.1 Opportunities of the Amendment of Political Parties Act, 2022

Many respondents felt that the amendments to the Political Parties Act had provisions that, if enforced and adhered to, would promote women's and youth's participation in electoral processes. The following were key opportunities that the respondents cited.

**Provision of a clear framework for distributing the political parties' Fund.** The amendment of section 25 of the original political parties Act, 2011, to provide that fifteen per cent of the Fund should be shared proportionately to political parties based on the number of marginalised groups elected by a party, was hailed by many respondents as a mechanism to promote inclusion. The Act also provides that no party qualifies for the Fund if more than two-thirds of its registered office bearers are of the same gender and if the party does not have representation of marginalised groups in its governing body. This was cited as a significant opportunity for women and youth, for it compels political parties to adhere to provisions of s 91 (d & e) with regard to abiding with democratic principles of good governance and the realisation of political rights marginalised groups (women, youth and PWDs). The provision also compels parties to nominate women and youth for elective seats in areas where they have high chances of winning.

**Increased the number of political parties benefiting from the political parties Fund.** The amended Act lowered the threshold of qualifications for a political party to benefit from the political parties Fund. It provides that the bare minimum for a party to benefit from the Fund is to have at least an elected representative and ensure compliance with the two-thirds gender principle in the composition of its office bearers and representation of its governing body. This is a paradigm shift from the previous practice where only the largest parties were beneficiaries of the Fund.

As noted in the report by Kanyinga & Mboya (2021), 'The Cost of Politics in Kenya; Implications for Political Participation and Development', it is vital that the government holds the parties who receive monies from the Fund accountable. They must be required to account for their use of the Fund and especially in the adherence to the allocation of 30% in supporting initiatives geared towards promoting women and youth political participation. In addition, the fact that the amendment provided a new provision (1A) under section 26 of PPA, 2011 to provide that that monies allocated to a coalition party shall be distributed in accordance with the coalition agreement suggested that women and youth in coalescing parties would have a chance to benefit.

**Less chaotic party nominations:** When asked to share their views on the conduct of party nominations in the 2022 general elections compared to past elections, most respondents were of the opinion that party nominations in the 2022 general elections were less chaotic. They attributed this to the legalisation allowing for indirect methods of party nomination processes. They argued that parties, particularly those in coalitions, could negotiate and build consensus on which party in the coalition would field candidates in certain electoral units and for which elective position. This, in theory, would reduce potential acrimony and chaos, as evidenced in direct party nominations in previous elections.



**Contributes to 'sanitisation' of party nomination processes:** The majority of respondents who participated in KIIs believed that the amended Act contributes to better conduct of party nominations. They pointed out that the requirement that parties use a certified register of members during nominations was good progress towards promoting internal party democracy, where only party members are entitled to vote. This is a shift from the previous experiences where parties used the register of voters of IEBC to nominate candidates for elections. In addition, the requirements that parties establish structures (Section 38B) such as dispute resolution mechanisms, designating a person to issue nomination certificates and clearly prescribing the role of the body responsible for party nominations were viewed as progressive clauses towards strengthening how parties conduct their nominations. Other provisions that were considered progressive include access to the register of party members (section 38D), Notification of party nominations not less than ten days to the day of nominations (Section 38E), publication of methods to be used by parties to nominate candidates, date, venues and register of members to the political party and the ORPP websites seven days before nominations as well as sections 38F and 38G that provides guidelines on the use of direct and indirect methods of party nominations.

**Establishment of Party Website:** The Act amended section seven of the original Act to provide that parties should have an official website as a condition for full registration. The website is to disseminate parties' information, including party constitution, nomination rules, party ideology, policies, party nomination information, venues, party membership list and other relevant information. Most respondents believed that the requirement that parties should have websites promoted transparency and accountability in elections, as information was made readily available. This provision also provides an opportunity for women and youth as it promotes access to information, which is key to deciding which party to join and making a meaningful contribution to the parties in which they are members. Political Parties can leverage the high internet prevalence rate in Kenya to reach out to women and youth and sensitise them with their ideologies, policies, rules and procedures.

**Explicit statement of the roles and functions of a political party:** The 2022 Political Party Amendment Act added a new Section 4A to the original Act that stipulates the roles and responsibilities of a political party. These include recruiting and enlisting members, nominating candidates for elections, promoting representation in Parliament and County Assemblies of Persons with Disabilities, youth, women, ethnic and other minority groups and marginalised communities and mobilising citizens into participating in political decisions and shaping and influencing public policy. Therefore, women and youth should organise and take advantage of this provision to demand their right to be meaningfully engaged in the decision-making processes of a political party.

**Use of technology in the management of political parties:** The Act included a new section, 34B providing for the establishment of the political parties' Information Management System (IMS) to facilitate the processing of political parties' data and records. The system should be simple, accurate, verifiable, secure, and accountable. Before the 2022 general elections, the ORPP office upgraded its digital infrastructure through the automation of solutions such as Integrated Political Parties Management System (IPPMS), collaboration with E-Citizen, use of Unstructured Supplementary Service Data (USSD) and Short Messaging Service (SMS) code. Through these platforms, especially the USSD code, citizens could verify their political party registration status and leave or join a political party using a mobile phone. Women and youth can leverage these digital platforms to increase their membership in political parties, which currently stands at 36%.

#### **4.6.2. Challenges of the amendment of the Political parties Act, 2022**

**Introduction of unconstitutional provisions:** Most of the respondents who participated in the KIIs believed that the introduction of indirect party nomination methods go against the principles of democracy provided in Articles 10, 38, 81 and 91 of the Constitution. The indirect method of nomination also violates section 3 of the Political Parties Act, 2011, which provides that parties shall promote inclusiveness, democracy and participation of the people in the nomination of candidates for elections. For indirect nomination, the process requires a political party to select delegates who will



then nominates candidates on behalf of the party. The delegates do not need to be chosen by the party members through a vote but can be selected using any procedure that aligns with the party constitution and nomination rules.

Respondents felt that the introduction of indirect methods of party nominations legalised negotiated democracy, which is not contemplated in the 2010 Constitution. To them, negotiated democracy is discriminatory and results in supposed 'strong candidates' emerging as nominees without necessarily being chosen by party members through a democratic process. In most cases, indirect nominations were based on financial resources, loyalty to the party and other factors considered by the party. There is a need to have court advisory on its application in Kenyan political context.

**Conflicting laws and duplication of roles of ORPP and IEBC:** The Political Parties Amendment Act of 2022 contemplated that the relevant sections of the Elections Act, 2011, would be amended to align it with the new provisions of the PPA, 2022. In section 31, the Act provides that section 27 of the Elections Act, 2011 was to be amended to provide that the ORPP certify the nomination rules before they are submitted to the IEBC. This amendment was not effected before the conduct of the 9th August elections. Therefore parties were not bound by any law to present certified nomination rules to the IEBC since the Elections Act 2011 was not amended to provide reference to the role of the Registrar.

In addition, the Political Party (Amendment) Act, 2022 contemplated the amendment of Section 28 of the Elections Act, 2011 to provide that a party participating in an election shall, at least 14 days before submitting the party membership list to the Commission, submit the membership list to the ORPP for certification. The Act also contemplated the amendment of section 35 of the Elections Act to provide that a party intending to submit a party list to the Commission shall, at least within 14 days before submitting the list to the Commission, submit it to the Registrar for certification. All these amendments to the Elections Act 2011, were not effected. This resulted in the duplication of roles where parties were to submit party nomination rules and membership lists to the ORPP and the IEBC based on different provisions in the Political Parties Amended Act 2022 and Elections Act 2011.

As one participant noted, *"the amendments brought more confusion as they created the overlap of duties between ORPP and IEBC with regard to the requirement of party nomination rules and party membership list. Parties used this loophole to manipulate their party processes, and more often, what was deposited to the Registrar is not what was presented to the IEBC."*

**Clash of timelines:** The Elections Act, 2011, in section 31 provides that a political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary and the Commission shall publish, in the *Gazette* the names of the persons contesting in a party primary and the date of the party primary within seven days of receipt of the names of party candidates. The political parties amendment Act requires the Registrar to publish the same information to the ORPP Website. In addition, before the certification of the party membership list, there is a lot of back and forth for parties to amend. During this back and forth, IEBC timelines are running before the parties complete the processes with the ORPP.

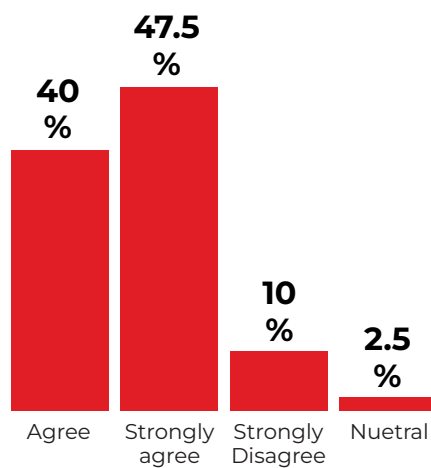
**Legalising of an electoral offence:** One of the new provisions was the registration of a coalition as a party. For a coalition to be registered as a party, what is required is to deposit the coalition agreement with the Registrar. In contrast, the coalescing parties still retain independent status as registered parties. Respondents viewed this provision as one that goes against section 14(4) of the same Act that provides that a person shall not be a member of more than one political party at the same time.

**Low public awareness of the provisions of the political parties Amendment Act, 2022:** Almost all participants in the FGD participatory workshops and a good number of Key informants portrayed low or lack of awareness of the provisions of the Political parties Amendments Act, 2022. They cited that the amendments were effected too close to the August 9<sup>th</sup> General Elections and, therefore there was inadequate time for the ORPP to sensitise all the stakeholders, especially women and

youth aspirants, on its provisions and how they would leverage the amendments to demand for their rights in the political space.

#### 4.6.3. Ramifications of coalition parties on the youth and women in the 2022 General Elections

Respondents believed that coalitions both promote and hinder the political participation of women and youth because coalitions have agreements and are supposed to operate within the confines of the law to ensure inclusivity. The ORPP should ensure that coalitions adhere to their own coalition agreements. Some were of the view that what needed to be addressed was not whether coalitions promote the participation of women and youth in the political process but what was the place of women and youth in the political party structures. Because if they are at the decision-making table, they will be part of the party's decision-making body and can influence party policies. Therefore, there should be deliberate efforts to ensure that women and youth occupy key leadership positions within a party as opposed to them relegated to being mobilisers.



##### a). Views of Women on coalitions

When asked if women stood a better chance of being nominated if they were in a coalition, 52.5% of respondents disagreed with that statement. 30% were of the view that coalitions allowed them to be nominated, while 12.5% were ambivalent, and five indicated they didn't know. These findings are reflected in the chart below.

Some of the reasons given to support disagreement on the question above included:

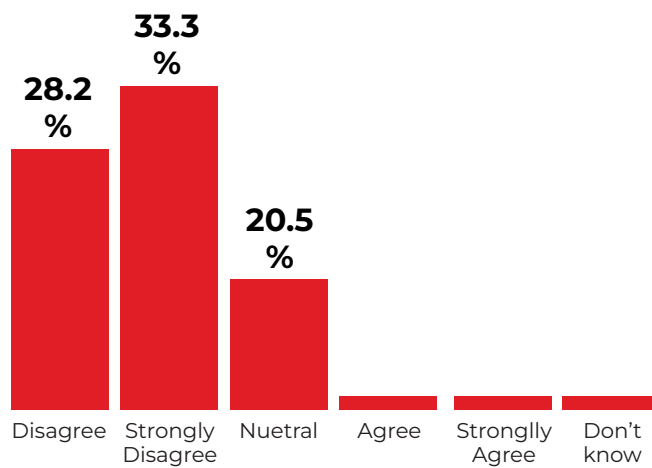
- Most candidates did not know what was agreed between the parties, so many were caught in limbo. Some parties had to give up fronting their candidates.
- Under the coalition, many of those with stable financial power were prioritised to counter similar approaches in the other alliance since whatever mattered was not those with good leadership but those who could win and finance their campaigns.
- Parties in a coalition were zoning their strongholds to secure the various seats, which meant that even strong female candidates were promised nominations to drop their ambition of vying. However, some dropped their ambitions, and others continued to compete, but the chances of winning were slim. Those who dropped never got what they were promised.

Conversely, those who agreed that women stood a better chance at being nominated in coalitions argued that:

- Women candidates paid half the cost of the nominations fee paid by the men, so it saw more women aspire for the seats
- The party officials gave support in terms of resources to its female aspirants.
- The qualification to vie for an elective post were the same for both male and female apart

from the nomination fee, which was slightly lower than that of male counterparts

**b). Views of Youth on coalitions**



When asked whether they thought youth had a chance in coalitions to be nominated to vie for elections, 56.5% of the respondents did not think so, while only 10.2% thought otherwise. 20.5% were neutral, and the remaining 7.7% were non-committal.

Some of the reasons given to support disagreement on the question above included:

- I even went further to apply to be nominated by the party as a youth representative in the National Assembly as per the IEBC guidelines, the best I got was to be featured on the newspaper, but I never got a chance, or no communication was made thereafter. So, I disagree, youth had better chances in the coalition to be nominated.
- It may not be about being a youth in a coalition that gives you better chances of being nominated, it's about being in a big party with the most sycophants, a good party will give you up to 60% of the votes in the general election.

**Objective 3: To assess the impact and identify challenges and opportunities of the lack of an election campaign financing regulatory framework on the political participation of women and youth in the 2022 general elections.**

**4.7. Challenges and Opportunities of the lack of Election Campaign Financing Regulation**

**4.7.1 Perceptions on Regulating of Elections Campaign Financing**

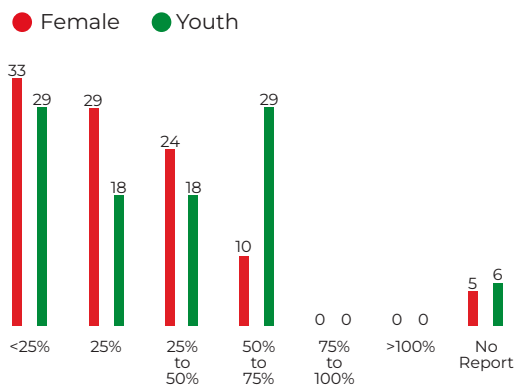
Regulating Election Campaign Financing in Kenya has been an impossible task in Kenya since the passing of the Election Campaign Financing Act 2013 (ECF Act). There is a distinct lack of appetite among legislators and political parties to regulate this component of elections. Efforts by the Independent Electoral and Boundaries Commission (IEBC) have been thwarted at every turn. One respondent termed the ECF Act as *“terrible law and a futile ambition,”* asking why campaign financing should be regulated. Another respondent said, *“Money is freedom, and you can't curtail freedom.”* These sentiments point to a deep-seated lack of political will to regulate campaign financing despite the sustained agitation for the same and the efforts by the IEBC at every election to have regulations in place. But they also point to an important clue as to the place of money in Kenyan elections, specifically Kenyan electoral campaigns. The ECF Act 2013 and its ensuing regulations seek to control the conduct of political aspirants, candidates and political parties in as far as raising and spending campaign resources towards the eventual outcome of free and fair elections.

#### 4.7.2. Effect of Unregulated Campaign Financing on Women and Youth Candidature

The regulatory vacuum has meant that incumbents and those with power and connections seeking elective office can raise inordinate amounts of money from questionable sources and spend this money with no accountability. Furthermore, incumbents can use state resources to campaign under the guise of commissioning development projects. As Kenya's history has shown, a lot of the high-level scandals have been, in part, for the purpose of raising financing for electoral campaigns. Those with power and connections can exploit an unregulated environment to raise money from dubious sources and spend as they like. This has served to create an uneven playing field for women and youths seeking elective office, curtailing their political ambitions for lack of money. *"It was difficult to compete with candidates who had deep pockets. They were able to compromise security, electoral officials, and the electorate – you, as a woman or youth, had lost before you started."*

Most of the women and youth surveyed in this study (87.5%) overwhelmingly indicated that they found it difficult to raise campaign finances for their elections.

To what extent were you able to realise your campaign financing targets?



#### None of the respondents were able to fully finance their campaigns

*"There is the mentality that if you are vying for a seat, you are wealthy, so why would you ask for support from your supporters?"*

Survey respondents as well noted challenges with financing their campaigns, especially in the constrained economic situation in the country. *"Kenyan citizen is already experiencing hard economic times. For me to organise friends to contribute for my campaigns, I found it a bit hard and unrealistic to ask for their support because even affording to settle on their bills has always been a struggle [sic]."*

Respondents also indicated receiving little support from the political parties they were vying with. Of those surveyed, only 15% indicated receiving any kind of support from the political parties they vied under.

In Kenya's patriarchal culture, women and youth do not control wealth. As such, financing campaigns is very difficult. The survey data bear this out. Of the women sampled, the majority (67%) spent Ksh 5,000,000 or less in their nominations campaign, while only 10% spent Ksh 45 million and above. A similar story is borne out by the data from the youth sampled. 88% spent Ksh 5,000,000 or less in their nomination campaigns. (See chart below).

A very small proportion of these women and youth indicated meeting their campaign financing targets. In fact, the majority fell below 50%. 86% of the women and 65% of the youth were only able to meet 50% or less of their campaign financing target.

Women who vied for the Member of Parliament seat spent between Ksh 5 and 10 Million, while the youth vying for the same seat spent Ksh 5M or less for their elections campaign. Both the women and youth who vied for the MCA position spent Ksh 5M or less for their elections campaign. Suppose one was to compare these amounts with what the IEBC had put as the spending caps in the now suspended ECF regulation, then, in that case, an MP candidate is expected to spend in the range of Ksh 20M, while an MCA is expected to spend on average between Ksh3 – 10M, depending on the region one is vying in. It is worth noting that these are the upper limits against which a candidate cannot exceed, but perversely, they are taken as the indicative amounts one should spend. This mentality is, in part, informed by how high these spending limits are.<sup>9</sup> However, the removal or the lack of limits is not a solution and will open up election campaign financing to extortionate spending, which will more likely lock out marginalised groups, including youth and women, from political participation. Also, in a context where winning an election seems contingent on how much one spends,<sup>10</sup> it seems unlikely women and youth would stand a chance where there are no spending limits in the election campaign financing. Therefore, the IEBC needs to provide reasonable limits that are scientifically arrived at and have had the public's input.

One of the charges levelled on the election campaign environment in Kenya is the expectation of the voter to receive money from aspirants and candidates. This expectation drives the cost of politics up.<sup>11</sup> A political party official noted that the focus of election campaign financing regulation gives undue attention to the elected few, while the problem is with the voter. The voters' demands for handouts drive the behaviour of the politician, and therefore when discussing election campaign finance regulation, the focus should be on the voter more so than the politician. *"The big problem of our democracy and the risk to this democracy is the quality of citizenship we have. If the ground [sic] required different, it would dilute and erode the power of money with one election."*<sup>12</sup>

The fact that there have been so few arrests and convictions means there is no disincentive for the voter or the politician to engage in the practice. The IEBC, in concert with other law enforcement bodies such as the Office of the Director of Public Prosecutions (ODPP), need to proactively address the issue. This also calls for enhancing the capacity of the IEBC technically, financially and in its human resource to address this and other electoral demands.

Coupled with legal action, there is an urgent need to address the Kenyan culture of expecting bribes. It has been argued that poverty is a primary driver of this culture, but this is arguable. One aspirant observed that every time they visited a church, there was an expectation that, because they were vying for a seat, they would 'make a donation to a Harambee.' *"Once you go to church, kidogo, kidogo, harambee inatokea from nowhere...Unatoa pesa kuoneshana seriousness yako ya kutaka kiti."*<sup>13</sup> (Once you go to church, suddenly, there is a fundraiser... you are giving a contribution to show how serious you are in seeking an elective position).

So while there is definitely a place for initiatives to address poverty, the more pertinent issue is the Kenyan culture and its relationship to money, and over and above civic education (or political education), there is a need to institute dialogue initiatives on values and principles that get to the heart of this culture, not just at a national level, but at the local level with a view to dealing with the culture of handouts.

#### **Objective 4: To assess the Impact of Zoning on Political Participation of Women and Youth in the 2022 General Elections**

#### **4.8. Concept of Zoning**

##### **4.8.1 Zoning: How it Manifested itself in the 2022 General Elections**

Asked what they understand by the term zoning, respondents portrayed a clear understanding of

<sup>9</sup> KII CSO

<sup>10</sup> The Cost of Politics in Kenya: Implications for political participation and development

<sup>11</sup> IBID

<sup>12</sup> KII Political Party

<sup>13</sup> Female candidate

what term means. The following are some of the definitions that were shared:

- A political agreement that is unconstitutional adopted by political candidate to have candidates where parties are deemed to have strong support.
- Zoning in Kenyan politics is whereby a coalition of parties agrees to share zones based on party popularity.
- Process whereby parties agree based on tribal considerations to field candidates in some areas to reduce competition in those areas and to increase their chances of capturing power and their numbers in Parliament.
- An illegal political tool that is used to stop other political entities into other regions. It an illegal activity because parties are supposed to have a national character.

Once you go to church,  
kidogo, kidogo  
harambee inatokea  
from nowhere...Unatoa  
pesa kuonyesha  
seriousness yako ya  
kutaka kiti!

While respondents seemed to express a grasp of the concept of zoning and its proscribing in law, it was still practiced in less overt ways. Respondents indicated that in areas that were considered certain party or coalition stronghold, there was a lot of intimidation and threats if an aspirant belonged to an opposing coalition. One respondent noted, “*We were affected when we joined Kenya Kwanza, we lost so many candidates, like Luo Nyanza. Anyone affiliated with Kenya Kwanza, was beaten or threatened.* It seems that it was the electorate that seemed to be ‘enforcing’ zoning. Conversely, political parties, while they indicated they did not engage in the practice, nevertheless, they had to weigh where their best chances of winning were and put more effort there. “*In regions that were not our strongholds, we did not give much support to candidates, we had to focus on our stronghold areas.*”<sup>14</sup> It seems therefore that parties self-censored and made choices that would adversely affect aspirants and candidate.

#### 4.8.2. The effects of zoning to the participation of women and youth in the 2022 General Elections

One political party official noted that for many women in their party, they opted to run as independent candidates in counties that were not their party strongholds, but for some, because they did not have the support of the party, gave up their political ambitions. According to the party official, the proportion of women elected in county legislatures in 2022 compared to 2017, fell by 76%.<sup>15</sup>

In another instance a youth was pushed out of a particular electoral area by a party in the same coalition, claiming that the latter was the dominant party and the young man needed to make way for this dominant party. On reflection, after their candidate lost the election officials of the ‘dominant’ party indicated that the youth would have likely won the election had they not pushed him out. A classic example of youth being adversely affected by zoning.

#### 4.9 Conclusion

This study has looked at the impact of negotiated democracy and the lack of campaign financing regulations on the participation of women and youth and as mentioned it sought to examine the impact of the triad of negotiated democracy, amendments to the Political Parties Act, 2022 and lack of Campaign Financing framework on the participation of women and youth in the 2022. Taken separately, these issues seemed to pose significant challenges for women and youth, however in combination, they made political participation for this group, an insurmountable challenge.

Women and youth were subjected to unconstitutional methods of nomination, and often because they were more vulnerable owing to their previously marginalised status, they were edged out of getting party tickets. Negotiated democracy which was supposed to work to increase the participa-

<sup>14</sup> KII Political Party

<sup>15</sup> IBID

tion of women and youth in politics, was systematically and consistently used to disenfranchise this group. If they were perceived to be popular, there would be the hurdle of finances. Political parties seemed to favour aspirants who had money to finance their campaigns as well as contribute to the party coffers and were less willing to give party tickets to individuals who had 'no money'.

In concert, these factors contributed significantly to suppressing the participation of women and youth. As one respondent noted "As a woman or a youth, you had lost the election before you started."

**Objective 5: To identify policy, legislative and Institutional recommendations in relation to the Political Parties Act, 2021 and campaign financing regulations for post-2022 electoral reforms.**

Based on the findings of this study, the following recommendations are made to specific institutions as detailed below.

**To the IEBC: -**

1. Make proposals to Parliament on the amendments of the Elections Act 2011 to align sections 27, 28 and 35 of the Elections Act with the provisions of the Political Parties Amendment Act 2022 as provided in section 31 of the political parties Amendment Act, 2022.
2. IEBC ensures that nominations by political parties meet the requirement of the two-thirds principle and rejects the nomination list of parties that are not compliant. This is in line with the high court ruling of petition No. 19 of 2017 by Katiba Institute vs IEBC, where the court ruled that the Commission should reject party nomination lists that are not compliant.
3. Provide reasonable limits to election campaign spending that are scientifically arrived at and have had the public's input.
4. IEBC to push for its complete independence to enhance its capacity technically, financially, and in its human resource to address election campaign financing and other electoral demands.
5. Initiate public participation on the Elections Campaign Financing Regulations and Campaign Expenditure Limits with the aim of operationalising the Elections Campaign Financing Act, 2011.
6. To enforce the second schedule of the elections Act, 2011 on elections code of conduct for Political parties. The schedule provides, among other things, that political parties should affirm the rights of all participants in an election to canvass freely for membership and support from voters
7. The IEBC, in concert with other law enforcement bodies such as the Office of the Director of Public Prosecutions (ODPP), proactively take action to enforce the Electoral Code of Conduct. This includes the identification, arrest, and prosecution of voter bribery offences in order to deter the practice.

**To the ORPP: -**

3. The ORPP should enforce the implementation of section 26 (1)(a), which requires at least 30% of monies received by parties to be used to promote the representation of women and youth in Parliament. This is in line with section 26 (1)(a) of the Political Parties Act, 2011.
4. ORPP collaborates with CSOs and other stakeholders to undertake political education on the Political Parties Amendment Act, 2022, targeting youth, women, PWDs and CSOs.

#### **To the Political Parties:-**

- 3) Ensure compliance with the two-thirds gender rule during the party nomination process and compilation of the party list. This is in line with the high court ruling of petition No. 19 of 2017 by Katiba Institute vs IEBC, where the court ruled that political parties are bound by the constitutional principles of the two-thirds gender, and therefore their nomination of candidates for members of Parliament must be compliant.
- 4) Ensure women and youth occupy key decision-making positions in the party and coalition structures.

#### **To the Parliament:-**

- 4) Parliament to initiate the process of amending the Elections Act, 2011, to align it with the Political Parties Amendments of 2022.
- 5) The Justice and Legal Affairs Committee (JLAC) of the senate to fast-track debate and approval of the representation of the Special Interest Group Bill that was passed by the National Assembly on 11<sup>th</sup> March 2020
- 6) Enact a law on the not more than two-thirds gender principle on elective and appointive positions as provided for in the constitution

#### **To NGECC: -**

1. Sensitise the public on the special interest groups Bill once it is approved by the Parliament to promote informed citizens' accountability mechanisms


#### **To the CSOs: -**

1. Seek a judicial interpretation of the concept of negotiated democracy and its application in the Kenyan political context, given the apparent risk it poses to the inclusion of women and youth in political processes.
2. Undertake a study on the use of negotiated democracy and its compatibility with Kenya's majoritarian - First-Past-The-Post electoral system.
3. Undertake a multi-stakeholder, multi-pronged advocacy campaign that seeks reforms to the entire election legal framework. This would include engagement with Parliament to amend laws, seeking judicial opinions on grey areas of the constitutions, overlapping mandates and any other electoral issues identified.
4. Civil society organisations undertake an exploratory study on the application of the proportional representation electoral system to all other electoral positions, not just for elections contemplated in 177 of the constitution.
5. Mzalendo Trust, in collaboration with organisations that work with marginalised groups, engage with the senate Justice and Legal Affairs (JLAC) to advocate for the fast-tracking and passing of the Special Interest Groups Bill, 2020
6. Support women and youth to organise themselves better and demand for their political rights
7. Support in capacity strengthening of women and youth to strengthen their negotiation, leadership and campaign management skills
8. To create spaces at the community level for dialogue targeting the council of elders, chiefs, men, women, PWDs, and religious organisations on how to address retrogressive cultural practices and mindsets that inhibit political participation among women and youth.





**To the Youth and Women Aspirants:**

1. Women and youth should join political parties in numbers, aggressively seek party leadership positions and present themselves for elective positions in numbers
  2. Demand that 30% of political party fund allocated to one's party is used to promote representation of women, youth and PWDs
  3. Join women and youth movements / formations to leverage on the opportunities for greater political inclusion.
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## REFERENCES

- . Tracing the Journey Towards, the Implementation of Two-Thirds Gender Principle. CREAW.
- \_\_ (2022). EU Elections Observation Mission Final Report of the Kenya 2022 General Elections. Election Observation Mission.
- \_\_\_. (2022). Commission Lauds Record SIGs Elected in the 2022 General Elections. Accessed at <https://www.ngeckeny.org/news/8270/commission-lauds-record-sigs-elected-in-the-2022-general-elections> Accessed on 1st November 2022
- Abraham, Dalle. (2022). Negotiated Democracy, Mediated Elections and Political Legitimacy <https://www.theelephant.info/long-reads/2021/09/03/negotiated-democracy-mediated-elections-and-political-legitimacy/>
- Ahmed, Muna. (2021). Patriarchy and Negotiated Democracy Knock Wajir Women off the Ballot. <https://www.theelephant.info/features/2021/10/01/patriarchy-and-negotiated-democracy-knock-wajir-women-off-the-ballot/>
- Armingeon, Klaus. (2002). The Effects of Negotiation Democracy- A Comparative Analysis. European Journal of Political Research
- Bilinga, Kosi Diba. (2022). Negotiated Democracy & Council of Elders as Unseen Roadblock to Wimen Leadership among Pastoralist's Communities in Northern Kenya. Borana Global Media
- Bilinga, Kosi Diba. (2022). Negotiated Democracy & Council of Elders as Unseen Roadblock to Wimen Leadership among Pastoralist's Communities in Northern Kenya. Borana Global Media
- Cheeseman, Nic et al. (2019). A Dictionary of African Politics. Oxford University Press  
Constitution of Kenya (CoK)
- Election Campaign Financing Act (No. 42 of 2013)
- Elfverson, Emma & Anders Sjögren. (2019). Do Local Power-Sharing Deals Reduce Ethnopolitical Hostility? The Effects of 'Negotiated Democracy' in a Devolved Kenya. Routledge, Taylor & Francis Group
- Etyang, O. (2021). The Politics of Coalition Formation in Kenya: 1992-2017. (Doctoral Thesis). Johannesburg: University of Johannesburg. Available from: <http://hdl.handle.net/102000/0002>
- Fisher, Manuel. (2014). Coalition Structures and Policy Change in a Consensus Democracy. Policy Studies Journal
- Gichana, Philip, (2018). Campaign Financing and Corruption in Kenya. <https://www.capitalfm.co.ke/eblog/campaign-financing-and-corruption-in-kenya/>
- Guleid, Mohammed. (2016). Of Clans and Negotiated Democracy in Kenya. <https://www.standardmedia.co.ke/commentary/Article/2000212865/of-clans-and-negotiated-democracy-in-kenya>
- Hur, Judah Ben. (2022). <https://www.standardmedia.co.ke/north-eastern/Article/2001434042/idea-of-negotiated-democracy-under-scrutiny-as-many-aspirants-cry-foul>
- IRI/ NDI (2022). Preliminary Statement of Initial Findings and Recommendations of the IRI/NDI International Election Observer Mission to Kenya's 9th August 2022 General Elections: <https://www.iri.org/resources/preliminary-statement-of-initial-findings-and-recommendations-of-the-iri-ndi-international-election-observer-mission-to-kenyas-august-9-2022-general-elections>

tions/

Kanyi, Mary Wambui & Fatuma M Mohamed. (2017). Negotiated Democracy in North-Eastern Kenya and Women's Participation in elective politics in Kenya. Research gate.

Kanyinga, Karuti & Tom Mboya (2021) The Cost of Politics in Kenya: Implications for political participation and development. Mzalendo Trust

Kimani, Winnie. (2017). The Elections Network. Here's what you need to know about campaign financing in Kenya's most expensive election. <http://theelectionnetwork.com/2017/06/03/heres-need-know-campaign-financing-kenyas-expensive-election/>

Lane, J.-E., & Preker, A. M. (2018). Political Parties, Coalitions and Democracy. Open Journal of Political Science, 8, 447-466. <https://doi.org/10.4236/ojps.2018.84029> accessed on 31st October 2022.

Letoo, S. (2022). Majority Stand-Off: Registrar of Political Parties Says UDM, MCC, PAA, MDG Still In Azimio. <https://www.citizen.digital/news/majority-stand-off-Registrar-of-political-parties-says-udm-mcc-paa-mdg-still-in-azimio-n306029>

Masese, Eric Rosanna. (2014). Negotiating History for Negotiated Democracy in 2013 election: A Case Study of Kisii County, Kenya. In Christian Thibon, Marie-Aude Fouéré, Mildred Ndeda, et al. (Eds). Kenya's Past as Prologue: Voter Violence and the 2013 General Elections. (pp 130-141) African Studies. <https://books.openedition.org/africae/1527>

Muiruri, F. (2022). Women had to fight even with direct tickets in party strongholds. [www.awcfs.org/Article/women-had-to-fight-even-with-direct-tickets-in-party-strongholds/](http://www.awcfs.org/Article/women-had-to-fight-even-with-direct-tickets-in-party-strongholds/)

Munene, Macharia. (2001). Political Coalitions and Mergers In Kenyan History. Commonwealth Legal Information Institute. <http://www.commonlii.org/ke/other/KECKRC/2001/23.html#Heading1>

Ndayala, Enock. (2022). Negotiated Democracy? Ruto, Raila Allies Forced to Sacrifice Their Political Ambitions. <https://kivumbi.co.ke/negotiated-democracy-ruto-raila-allies-forced-to-sacrifice-their-political-ambitions>.

Obadha, Vincent. (2022). The widening influence of negotiated democracy across Kenya. <https://www.citizen.digital/opinion-blogs/opinion-the-widening-influence-of-negotiated-democracy-across-kenya-n298542>.

OECD (2016), Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture, OECD Public Governance Reviews, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264249455-en>

Okechukwu, E.I. & Nkechi, A. (2014). Political Financing in Africa: A Comparative Study of Kenya and Nigeria: Proposal for Reform, Mediterranean Journal of Social Sciences, 5(27)

ORPP (2022). Kenya's Political Education Source Book, A training Tool Box for Party members, Election Aspirants and Political Leaders.

Otieno, Rawlings. (2021). Negotiated deals to shape choice of 2022 leaders <https://www.pd.co.ke/news/negotiated-deals-to-shape-choice-of-2022-leaders-86887/>

Republic of Kenya (2021). Judgment; Consolidated Constitutional Petitions No. E540 & E546 of 2021, High Court of Kenya, Constitutional and Human Rights Division, Nairobi  
The Political Parties Amendment Act, 2022