ADVANCING THE RIGHTS OF PERSONS WITH PSYCHOSOCIAL DISABILITY IN KENYA

USERS AND SURVIVORS OF PSYCHIATRY- KENYA
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B. ACKNOWLEDGEMENTS

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## C. ABBREVIATIONS

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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>DPOs</td>
<td>Disabled Persons Organizations</td>
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<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<td>NCPWD</td>
<td>National Council for Persons with Disabilities</td>
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<td>NGEC</td>
<td>National Gender and Equality Commission</td>
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<td>PWD</td>
<td>Persons with Disability</td>
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D. DEFINITION OF TERMS

Psychosocial Disability – This is a term that refers to persons who may define themselves in various ways: as users or consumers of mental health services; survivors of psychiatry or people experiencing mental health problems, issues or crises. The term psychosocial disability is meant to express the following: A social rather than medical model of conditions and experiences labelled as mental illness; and a recognition that both internal and external factors in a person's life situation can affect a person’s need for support or accommodation beyond the ordinary.

Peer support – These are initiatives where colleagues, members of self-help organizations and others meet as equals to give each other support on a reciprocal basis. In the case of supported decision making, peer support is a practical way through which a person is enabled to arrive at a decision that reflects the person’s will and preferences.

Support – It is a broad term that encompasses both informal and formal support arrangements of varying types and intensity. Support to persons with disabilities to exercise legal capacity may include a trusted friend, peer support, advocacy including self-advocacy support or assistance with communication.

Self-advocacy – This is about people with disabilities speaking up for themselves, making their own decisions and taking control of their lives.

Legal Capacity – This is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency).

Reasonable Accommodation – This refers to necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human right and fundamental freedoms.
**Intellectual Disability** - It is characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social and practical skills. Conditions associated with intellectual disability include autism, cerebral palsy and Down syndrome. A person with intellectual disability has lifelong support needs which must be individualized to lead to improved personal outcomes that may include more independence and enhanced opportunities.

**Advanced Directives** – This is a legal document in which a person specifies what actions should be taken if at a particular time they are unable to make decisions for themselves. Advanced directives are tools for advance planning and may be used by persons with disabilities in order to make known their life choices of health, financial, and property matters among others.
E. EXECUTIVE SUMMARY

This position paper sets out basic information and recommendations which Kenya should consider as it seeks to implement rights of persons with psychosocial disability. The paper focuses on five key thematic areas related to the enjoyment and exercise of fundamental rights by persons with psychosocial disability in Kenya namely: i) right to education, ii) right to health, iii) deprivation of liberty, iv) right to legal capacity and v) data and statistics.

The paper also illustrates the interrelationship between the exercise of legal capacity by persons with psychosocial disability and exercise (enjoyment) of other rights. It further examines universal claims and arguments that have been used to unjustifiably deprive persons with psychosocial disability their rights specifically the right to legal capacity.

USP-K would also like to underscore the absence of a proper institutional framework especially related to monitoring facilities that provide services to persons with psychosocial disability such as mental health facilities. The position paper also highlights the over emphasis of the medical model on provisions of mental health services and how stigmatization and prejudices have impacted on enjoyment of rights of persons with psychosocial disability.

In making its recommendations, the organization has relied on the concluding observations of the CRPD Committee, general comment No.1 on legal capacity, legal precedence on matters related to the exercise of legal capacity, and the trending global activism in advancing rights of persons with psychosocial disability. Finally, the organization has also been guided by its actual practices including lessons learnt from its peer support groups, self-advocacy by its members and law reform processes in Kenya.
F. RECOMMENDATIONS

Right to legal capacity

2. The State should implement the recommendations of the CRPD Committee on article 12 which call for support to the current supported decision frameworks by facilitating the operations of peer support groups in the country.
3. The State should create awareness on the right to legal capacity in collaboration with representative organizations of persons with psychosocial disability.

Right to health

1. Fast track the review and enactment of the mental health care bill 2013.
2. Recognize supported decision making systems within the health sector e.g. peer support and advanced directives.
3. Increase funding for mental health services and alternatives to medical treatment.
4. Develop a wide range of community-based services that respond to the needs of persons with psychosocial disability, and respect the person's autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health.

Right to liberty and Security of a person

1. Repeal the provisions of section 4 (e) of the Persons Deprived of Liberty Act 2014.
2. Repeal the Criminal Procedure Code as 'insanity defence' often deprives persons with psychosocial disability the right to due process and safeguards that are applicable to other defendants.
3. Recognize the right to reasonable accommodation and provide supports to persons with psychosocial disability to exercise their legal capacity and stand trial.
4. Operationalize the Consultative Committee on Persons deprived of liberty as provided in Persons Deprived of Liberty Act 2014 as this will provide a platform to address issues affecting persons with psychosocial disability in detention.
5. Facilitate the independent monitoring framework under article 33 (2) of the CRPD which include the Kenya National Commission on Human Rights and the National Gender and Equality Commission to monitor mental health facilities and any other institution where persons with psychosocial disability are placed. This should be done in consultation with representative organizations of persons with psychosocial disability.

6. Expand the social protection system to be more inclusive and avail economic empowerment programmes for persons with psychosocial disability.

Right to education

1. Equip Education Assessment Resource Centres (EARCs) financially and with qualified personnel in efforts to ensure proper assessment and placement.

2. Promote inclusive education and implement recommendations of the CRPD committee on ‘establishing a timeframe for the transition process from segregated to inclusive quality education and ensure that budgetary, technical and personal resources are available to complete the process and collect disaggregated data on the advancement of the inclusive education system.’

3. Provide reasonable accommodation and relevant supports to learners with psychosocial disabilities in all levels of learning including: Educational counselling, Encouraging formation and running of peer support groups at all education levels, Flexible test methods that can accommodate people’s learning styles specifically at secondary school level and institutions of higher learning.

4. The National Council for Persons with Disabilities to expand funding and bursaries to learners with psychosocial disability at all levels of learning including tertiary institutions and institutions of higher learning.

Data and Statistics

1. Carry out awareness campaigns to policy makers and professionals on the right of persons with psychosocial disabilities to be registered as persons with disability as envisioned in the CRPD and the Persons with Disabilities Act 2003.

2. Review the current assessment and registration guidelines to ensure there is a clear distinction between persons with psychosocial and intellectual disability.

3. That NCPWD conducts a registration campaign targeting persons with psychosocial disability.

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Para 44 (a), CRPD Committee, Concluding Observations for Kenya CRPD/C/KEN/CO/1.
G. BACKGROUND INFORMATION

USERS AND SURVIVORS OF PSYCHIATRY- KENYA

5. Users and Survivors of Psychiatry in Kenya (USP-K) is a non-governmental organization that was established and registered in Kenya in the year 2007.

6. It is a membership organization whose major objective is to promote and advocate for the rights of persons with psychosocial disabilities in Kenya. The organization is affiliated with the World Network of Users and Survivors of Psychiatry and its African affiliate the Pan-African Network of People with Psychosocial Disabilities.

7. USP-Kenya has transformed the lives of persons with psychosocial disability in Kenya especially through influencing policy and legislation, rights-based advocacy and also through participatory public education programs using different media such as TV, radio, newspapers, magazines and e-platforms. The organization has also participated in international conferences and other forums.

8. USP-Kenya runs 8 peer support groups comprising persons with psychosocial disability and their caregivers. This membership is spread out in different counties namely: Nairobi, Kiambu, Nakuru and Nyeri.

H. INTRODUCTION

9. One of the strategic objectives of USP-K is to provide leadership in shaping the human rights discourse of persons with psychosocial disability in Kenya. This is guaranteed by the Constitution which recognizes public participation as a national value and principle of governance. With respect to the rights of persons with psychosocial disability, legislative reforms at national, regional and international level have catalysed the efforts of USP-K to effectively deliver its mandate. With the adoption of the UN Convention on Rights of Persons with Disabilities (CRPD) in 2006, a paradigm shift was celebrated. The Convention’s approach to the exercise of human rights offers amazing opportunities for all persons with disabilities globally. It also provides policy and law-makers, as well as implementers, with advanced tools for ensuring the rights of persons with disabilities.

2 Article 10 (2); Constitution of Kenya 2010.
Persons with disabilities are now subjects with equal rights. Unlike before where they were viewed as individuals lacking capacity to decide and make binding decisions, they are now recognized as full persons before the law having both the capacity to hold rights and the capacity to act and exercise those rights. Kenya signed and ratified the CRPD on 30th March 2007 and 19th May 2008 respectively. By dint of article 2 (6) of the Constitution of Kenya 2010 (the Constitution) which provides that all treaties and conventions that Kenya has ratified form part of the laws of Kenya, the CRPD now forms part of national laws.

10. Further in line with its international obligations, Kenya submitted its national report on implementation of the CRPD in 2012 and was later reviewed by the Committee on the Rights of Persons with Disabilities (CRPD Committee) during its 14th Session on 18th August 2015. Explicitly the CRPD Committee called upon the State to review its commitment to fulfilling the rights of persons with psychosocial disability with respect to exercise of legal capacity, right to liberty and security of person and right to health.

11. At the national level, the Constitution provides for an expansive bill of rights including rights of persons with disabilities. The Constitution requires that all State organs and public officers address the need of vulnerable groups within the society including persons with disabilities. It further obligates the State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. The Constitution recognizes every person as equal before law and having right to equal protection and equal benefit before the law. Article 27 (4) prohibits discrimination on the basis of disability. Article 54 explicitly provides for the rights of persons with disabilities including the right to be treated with dignity and not to be referred to in a demeaning language, right to access educational facilities and facilities of persons with disabilities integrated into society, access to transport, right to access assistive devices and progressive inclusion in employment.

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6 Article 21 (3); Constitution of Kenya 2010.
7 Article 21 (4).
8 Article 27 (1).
9 Article 54 (2).
12. It is against this backdrop that USP-K finds it critical to provide further interpretation and guidance with regard to promotion, protection, and fulfilment of rights of persons with psychosocial disability in Kenya.

13. This position paper therefore sets out basic information and suggestions which Kenya should consider as it seeks to implement rights of persons with psychosocial disability in Kenya. The paper focuses on five key thematic areas related to the enjoyment and exercise of their fundamental rights namely: i) right to education, ii) right to health, iii) deprivation of liberty, iv) right to legal capacity and v) data and statistics.

I. OBJECTIVES

14. The general objective of this position paper is to set out basic information and suggestions which Kenya should consider as it seeks to implement rights of persons with psychosocial disability.

15. The specific objectives are:
   • To set out basic information and suggestions which Kenya should consider when:
     (i) Implementing rights of persons with psychosocial disability specifically the right to health, right to education, right to legal capacity, and right to liberty and security of a person.
     (ii) Maintaining data and statistics specifically the role in data collection of persons with psychosocial disability.
   • To illustrate the interrelationship between exercise of legal capacity by persons with psychosocial disability and exercise (enjoyment) of other rights.

J. METHODOLOGY

16. In developing this position paper, USP-K examined: 1) enabling legislative framework that has advanced rights of persons with psychosocial disability in Kenya; 2) unfavourable legal framework and 3) practices that impede the exercise and enjoyment of rights by persons with psychosocial disability.
17. It further examined universal claims and arguments that have been used to unjustifiably deprive persons with psychosocial disability their rights specifically the right to legal capacity.

18. In its submission, USP-K relied on treaty bodies’ guidance specifically the CRPD Committee on matters related to: 1) Enjoyment of rights by persons with psychosocial disability, 2) Legal precedence on matters related to the exercise of legal capacity and, 3) The trending global activism in advancing rights of persons with psychosocial disability.

19. Finally, USP-K was guided by its actual practices including lessons learnt from its peer support groups and self-advocacy by its members.

K. PROBLEM STATEMENT

20. Oppressive doctrines such as guardianship regimes and archaic mental health laws have prejudicially created a perception that persons with psychosocial disability lack capacity to decide or make life decisions related to their health, education, where to live or even what is considered as ‘small decisions’ like what to wear or what to eat. This is besides the recognition of equality before the law being a basic principle of human rights protection and exercise of other rights. Traditionally, presumption has been held that persons with psychosocial disability are ‘insane’, ‘mad’, irrational and are likely to cause harm to themselves or others. Our society has also developed demeaning terms and codes in our local languages such as ‘muguruki’, ‘mundu wa nduuka’, ‘raura’, ‘chebiywat’ and ‘omulalu’. These demeaning and derogatory terms define our world view constructing an image of what persons with psychosocial disability are incapable of doing.

21. Universally, a tripartite approach has over time been used to deprive persons with psychosocial disability their right to make decisions which subsequently impacts on the exercise of other rights.

10 Article 6, Universal Declaration on Human Rights; Article 4 (2), International Covenant on Civil and Political Rights; Article 12, Convention on Rights of Persons with Disabilities; Article 3, African Charter on Human and People’s Right.
11 References to persons with psychosocial disability in Kikuyu, Kamba, Dholuo, Kalenjin and Luhya respectively.
22. The status approach deprives persons with disability the right to legal capacity on the basis of a diagnosis. For instance, if one has been diagnosed with bipolar or schizophrenia, then the family assumes the right to make all decisions on his/her behalf.

23. The outcome based approach focuses on decisions made by a person with disability. For example if a person with a psychosocial disability makes a decision that is considered ‘irrational’ or ‘bad’ by other people then they may decide to reverse the decision and choose what they think is appropriate as opposed to what the person prefers. For instance, a person with psychosocial disability withdraws money and goes out with his friends and buys drinks all night, then the family interprets this as ‘abnormal’ yet in real life there are individuals without psychosocial disability who make such financial decisions without being questioned.

24. The third approach is the functional test of mental capacity. In this kind of attribution, a criteria is used to assess the capacity of a person to make certain decisions. In other words, disability is used as a threshold condition under which a person is incapable if by reason of such disability he is unable to perform a specified function. The law subjects one to the ‘appreciate and understand’ test by ‘experts’ where one is scrutinised whether they are able to interpret and understand the nature and consequences of certain actions. These tests are discriminatory as they are only subjected to people with disabilities mainly persons with psychosocial disability and persons with intellectual disability. Such tests are mainly administered to assess an individual’s capacity to consent to sex or stand a trial. An illustration here would be a medical report that is required in court proceedings to assess whether an individual with psychosocial disability can stand a trial or be a witness in court.

25. Anecdotal evidence indicates that in most cases these attributions are in one way or another used to deprive persons with psychosocial disability their right to legal capacity. Decisions of persons with disabilities are disregarded by different authorities, family members and the general community which results to human rights violations such non-consensual treatment, disinheriance, institutionalization and denial of universal suffrage among others. A report by Kenya National Commission on Human Rights (KNCHR) attested to this. In its findings, the report indicated that persons with psychosocial disability are discriminated against, detained in mental health facilities, abandoned by relatives and family members and
face challenges accessing mental health services due to lack of adequate facilities including provision of community based services.\textsuperscript{13}

‘Families never respect the will and preferences of people with mental health conditions. The people who come here for counseling, I have hardly seen a person who has come for counseling here, whose will has been respected. They are pushed to come for counseling. It is very hard for me to initiate counseling, because the people are brought to me involuntarily. Rarely have I seen voluntary cases, and where there are voluntary cases, the healing is almost automatic. With regard to treatment, with regard to admission in hospital - it is all involuntary; they are forced to do what they don’t want. We even exaggerate their condition because we want them away from home, where we see them as a bother’\textsuperscript{14}

26. The report further indicated that the existence of a retrogressive mental health law in Kenya has adversely affected the exercise and enjoyment of the highest attainable standard of health by persons with psychosocial disability. The Mental Health Act has also been faulted for its overemphasis on an outdated medical model of in-patient treatment thus allowing forced treatment through its broad categorisation of involuntary treatment.\textsuperscript{16}

27. These legal barriers are not just within the mental health system but also in other aspects of life. Marriage laws such as the Marriage Act 2014 incapacitate persons with psychosocial disability perceiving them as individuals lacking capacity to consent to marriage.\textsuperscript{17} The Civil Procedure Code fails to recognize procedural accommodations such as provision of support to stand a trial and instead provides for insanity defence hence depriving persons with psychosocial disability a right to fair trial. The Persons Deprived of Liberty Act 2014 permits limitation of privacy of detainees with psychosocial disability for purposes of psychiatric treatment.\textsuperscript{18} The Political Parties Act 2011 prohibits persons with psychosocial disability from vying for political office on the basis of insanity/ unsound mind.

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{15} Kenya National Commission on Human Rights, (n 12)\textsuperscript{19}.
  \item \textsuperscript{16} Mental Disability Advocacy Center, 'The Right to Legal Capacity in Kenya' (2014) 26; Kenya National Commission on Human Rights (n12); (n 13)44.
  \item \textsuperscript{17} Section 11 (2), Marriage Act.
\end{enumerate}
\end{footnotesize}
28. In relation to education, lack of proper data and statistics coupled with conflating of psychosocial disability with intellectual disability has led to improper planning and lack of provision of appropriate supports and accommodations for learners with psychosocial disability.

29. On the contrary, the Constitution under the expansive bill of rights guarantees every citizen equal rights to access the highest attainable standard of health, equal recognition before the law, right to marry, right to education, right to participate in political life without unreasonable restriction and right to freedom and security of a person.

30. A close analysis of these discrepancies indicates that the law narrowly defines legal capacity as capacity to hold rights (legal standing) and fails to recognize persons with psychosocial disability as legal agents (capacity to exercise rights). Subsequently, persons with psychosocial disability are not recognized as legal agents thus depriving them the right to universal suffrage, own property, marry and found a family or even consent to treatment. These challenges are affirmed by research conducted by KNCHR in 2013 and from USP-K daily interaction with its members who have shared their experiences at work places, within families, in the community and within the broad mental health spectrum.

31. Indeed Kenya acknowledged these challenges in its first report to the CRPD committee and admitted that there are laws that permit guardianship where a person is considered of ‘unsound mind’. The report further recognized that lack of awareness has contributed to challenges in exercising of legal capacity specifically for persons with mental and cognitive disabilities.

18 Section 4 (e).
19 Article 43.
20 Article 27 (1).
21 Article 45 (2).
22 Article 43 (f).
23 Article 38.
24 Article 29.
25 Kenya National Commission on Human Rights (n13); see also Mental Disability Advocacy Center (n 16).
32. Treaty bodies have also sought to understand Kenya’s interpretation of legal capacity. In accordance to their jurisdiction, the CRPD Committee sought further clarification from the State with regard to the exercise of legal capacity. In its review of Kenya’s State report, the CRPD Committee requested Kenya to provide more information on interpretation of the concept of legal capacity including its efforts to implement supported decision-making.28

33. Indeed, the struggle by States Parties’ understanding the interpretation of article 12 on equal recognition before the law has been witnessed over time by the CRPD Committee. These include conflating of mental and legal capacity, where impaired decision making skills are equated to lack of legal capacity.29 Subsequently within its jurisprudence, the CRPD Committee developed General Comment No.1 on equal recognition before the law to aide States understand their obligations under article 12.30

34. In this position paper, USP-K reiterates the CRPD Committee General Comment No.1 and illustrates how it can be utilised at national level to resolve some of the key challenges towards implementation of rights of persons with psychosocial disability.

35. In summary, USP-K holds that the challenges faced by persons with psychosocial disability in Kenya are driven by lack of recognition of capacity to act whether formally or informally. As demonstrated earlier, Kenya’s legislative framework conflates the concept of legal capacity by interpreting legal capacity narrowly only recognizing persons with psychosocial disability as holders of rights and not actors. The other challenge is the uniqueness of the Kenyan context of limited respite care where social protection programmes only target persons with severe disabilities. Secondly, there is minimal formal institutionalization and prevalent informal guardianship where once a child is born with disability the family assumes responsibility and makes decision on behalf of the person even after reaching majority age. Finally lack of formal support systems such as person’s ombudsperson or independent third person as it is in the case of other jurisdiction.31

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27 Paragraph 126, Ibid.
31 Personal ombudsperson is support model established in Sweden, while independent third person is a support model by Office of Public Advocate in Australia.
Family remains as the core source of support. USP-K commends the existence of family support as this has limited state intervention in private life. However, USP-K also presents this as a challenge too.

Factors such as lack of inclusive social protection systems and high unemployment rates among persons with disabilities result to overdependence on families. As a result some families coerce and issue threats of withdraw of support to their members with psychosocial disability who subsequently are forced to ‘accept’ curtailing of their decisions especially health decisions. On the other hand, lack of inclusive social protection results to families overriding the duty to care with the right to liberty of person - many cases have been reported of people with psychosocial disability locked in houses. The challenge for many families is how to strike a balance in providing support and respecting the person’s will and preference while at the same time being able to earn a sustainable livelihood.

37. USP-K would also like to underscore the absence of a proper institutional framework especially related to monitoring facilities that provide services to persons with psychosocial disability such as mental health facilities. We also highlight the over emphasis of the medical model on provisions of mental health services. Finally, we highlight how stigmatization and prejudices have impacted on enjoyment of rights of persons with psychosocial disability.

38. In a nutshell, we summarise the main challenges facing persons with psychosocial disability in Kenya as follows:
Main Challenges Facing Persons With Psychosocial Disability In Kenya

- Overemphasis of medical model on mental health
- Unfavorable legislative framework
- Lack of proper monitoring framework
- Stigmatization and prejudice
- Lack of support services
- Lack of inclusive social protection framework
- Unemployment
L. THE POSITION OF USP-K

Interpretation of legal capacity

39. The current interpretation of the term legal capacity as presented in various legislations insufficiently captures the full meaning of the term as it has been defined in International Law and specifically the CRPD.\textsuperscript{32} It is clear from the analysis of various legislations that the exercise of legal capacity by persons with psychosocial disability is narrowed to capacity to hold rights and that mental capacity has been misused to justify denial of capacity to act. This practice inadequately represents the two key elements of legal capacity as entrenched in the CRPD which Kenya is party to.

40. Further to this, the practice conflates mental and legal capacity. The system also lacks uniformity in recognition that in all situations where one is unable to make decisions, support is required to exercise legal capacity. However, some legislation e.g. The Sexual Offences Act permits provision of support in sexual offences by allowing participation of an intermediary in situations where one has been identified as a vulnerable witness.\textsuperscript{33} Support is also permitted during elections where a voter with disability may choose to be assisted by persons of their choice in voting.\textsuperscript{34}

41. The CRPD Committee General Comment no.1 on equal recognition before the law interprets legal capacity as ‘the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency)’\textsuperscript{35} A distinction is also drawn between mental capacity and legal capacity. Mental capacity is ‘The decision making

\textsuperscript{32} Article 12 of the Convention on the Rights of Persons with Disabilities on equal recognition before the law states:
1. State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. State Parties shall take appropriate measures to provide access by persons with disabilities to support they may require in exercising their legal capacity
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

\textsuperscript{33} Section 31, Sexual offences Act 2006.
\textsuperscript{34} Section 29 (1), Persons with Disabilities Act 2003.
\textsuperscript{35} General comment no 1, para 12.
\textsuperscript{36} Ibid.
\textsuperscript{37} General comment no 1, para 15.
skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors including environmental and societal factors’.  

42. Conflating these two concepts to deny a person with psychosocial disability the right to make their own decision is unjustifiable. On the contrary, decision making skills deficits should be complemented with support to exercise one’s capacity. Support is interpreted as: ‘Both informal and formal support arrangements, of varying types and intensity which may include peer support, a trusted person to assist in making certain decisions, self- advocacy support or assistance in communication’  

Lessons learnt from USP-K peer groups  

43. From our local practice, USP -K has established peer groups in four counties namely: Nairobi, Kiambu, Nyeri and Nakuru. One of the main objectives of the peer support groups is to empower members to make decisions in various aspects of life. Substantial changes have been recorded:

• We have witnessed individuals with psychosocial disability empowered to defend their rights such as the right not to be subjected to non-consensual treatment, right to tax exemption among others;
• About 200 people are are able to access mental health services within their community;
• Reduction in cases of forced treatment by creating awareness on the human rights, personal responsibility, collective communal responsibility and to respect the inherent dignity of persons with psychosocial disabilities within the community;
• Enhanced independent living in the community by promoting sustainable livelihoods, self-help, merry go rounds and the right to self determination;
• Promoting better access to justice and reducing violence by working with the peer support group, families and the local administrative authority;
• Empowered users/survivors to self-advocate e.g. waiver of daily market access fees, reduction in the cost of medication in the local hospitals, benefits accrued from the Community Development Funds (CDF) e.g education bursaries for their children.
Gradual restoration of voice, power and authority to persons with psychosocial disabilities thereby enhancing pathways to independent living and greater participation within the society.

**Legal precedence**

44. In a recent ruling *Wilson Morara Siringi VS Republic*, it was held that it is improper to deny one the right to make a decision merely on the basis of a psychosocial disability. In his ruling, the judge held: ‘In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse.

This approach is inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of Article 2(6) of the Constitution it forms part of the law of Kenya.’

‘It is therefore improper and inconsistent with the Convention and an affront to the right of dignity of a person protected by Article 28 to label any person as mentally retarded and proceed on the basis that the person is incapable of making a free choice to engage in sexual intercourse.’

45. It is evident that there are efforts to reform the old regime and USP-K holds that such efforts can be catalysed further by the existence of laws that recognize persons with psychosocial disability as right holders as well as with capacity to exercise those rights.
46. In light of this, USP-K reiterates the recommendations of the briefing paper by KNCHR and recommends the review of laws that deprive persons with psychosocial disability their right to legal capacity including but not limited:
   - The Constitution of Kenya
   - The Mental Health Act
   - Age of Majority Act
   - Sale of Goods Act
   - Law of Succession Act
   - Traffic Act
   - Penal Code
   - Criminal Procedure Act
   - Sexual Offences Act
   - Evidence Act
   - Elections Act
   - HIV and AIDS Prevention and Control Act
   - Persons with Disabilities Act
   - The Marriage Act 2014
   - The Persons Deprived of Liberty 2014

47. Secondly, USP-K also recommends that the state assumes responsibility in providing support to persons with psychosocial disability to exercise their legal capacity. In implementing this, the State must ensure participation of persons with psychosocial disability and their representative organizations.
48. USP-K recommends that as an initial commitment and in the letter and spirit of complying with international obligations, the State should implement the recommendations of the CRPD Committee on article 12 which call for support to the current supported decision making frameworks initiated by Disabled Persons Organizations.

49. USP-K urges the State to facilitate the operations of peer support groups and replication in other counties. We further urge the State in collaboration with persons with psychosocial disability and USP-K to create awareness to the general public and professionals who interact with persons with psychosocial disability including lawyers, mental health professionals, human right institutions and the private sector including banks.

**Right to health**

50. Article 43 of the Constitution provides that every person has the right to the highest attainable standard of health. Article 25 of the CRPD obligates States to ensure that persons with disabilities enjoy the highest attainable standard of health without discrimination on the basis of their disability. USP-K is concerned that despite firm protection of the right to health in the law,
the practice remains undesirable. Provision of mental health services in Kenya fails to meet the four key elements of health: accessibility, availability, acceptability and quality.\textsuperscript{39}

51. With regard to accessibility, mental health services continue to lack even after the new framework where health has been devolved to County government which opens up opportunities for enhancing health services within the counties and establishing community based services.

52. USP-K is concerned that despite devolving health, mental health services within the community remains lacking. It is also concerned that even within the existing referral hospitals, conditions have not improved. In a recent media report, it was highlighted that conditions in provincial hospitals are deplorable.\textsuperscript{40}

53. Further, USP-K is concerned that the State continues to rely on laws that discriminate on the basis of disability and emphasize on an outdated medical model towards provision of mental health services. Efforts to review and enact a new Mental Health Act remain uncertain as the proposed Mental Health Bill 2014 continues to be a draft to date.

54. Subsequently, the Mental Health Act 1983 which permits non-consensual treatment, detention in hospital and introduces guardianship continues to be enforced. As the current guiding legislation, the Mental Health Act 1983 fails to meet the standards set by the CRPD in relation to the right to health. It fails to recognize the autonomy of a person thus allowing other people to make health decisions on behalf of the person.\textsuperscript{41} It allows for involuntary treatment which contradicts the human rights standards that treatment shall be based on free and informed consent.

55. With regard to availability of quality services and alternatives to mental health services, USP-K is concerned of the absence of such services. Recovery plans mainly focus on medical treatment and members from USP-K peer groups have expressed dilemmas posed by absence of options. Persons with psychosocial disability ‘consent’ to forced treatment as this is the only available alternative.

\textsuperscript{39} Committee on Economic and Social Cultural Rights, General Comment No.14 (2000).
\textsuperscript{40} Winnie Atieno, For Mentally ill patients in Kisumu, it’s a hard life available at <http://www.nation.co.ke/counties/kisumu/For-mentally-ill-patients-in-Kisumu/-/1954182/2914030/-/m9yxl/-/index.html>
Caregivers have also expressed concerns that while they would like to uphold a family member’s right, lack of alternatives on how to deal with ‘crisis’ results to forced treatment.

56. In its efforts to resolve some of these challenges, USP-K is training family members on managing crisis and rights of persons with psychosocial disability. USP-K is also encouraging members to identify triggers of crisis so as to intervene by sharing and counselling through peer support thus minimising chances of getting into crisis which often results to forced treatment. An ideal situation where government fulfils its obligation to provide quality services available to all, would require counselling services to be provided in the nearest clinic or health center where an individual can establish a relationship with counsellors and walk in for services anytime. It would also require the State to create awareness about autonomy, dignity and rights of persons with psychosocial disability among family members. USP-K is concerned that this lacks in our system.

57. Finally, USP-K is concerned that despite research and evidence that reforms are required in the provision of mental health services, the State has been slow to commit and implement recommendations from these reports.42

58. Therefore, USP-K recommends:
   - Fast tracking and enactment of the mental health care bill 2014 and ensure it is compliant with the CRPD.
   - Recognition of supported decision making systems within the health sector e.g. peer support and advanced directives.
   - Increase funding for mental health services and provision of alternatives to medical treatment. Specifically we recommend that community health services provide counselling services for users and survivors and peer-led respite centres.

CRPD Committee recommendations to Kenya on right to health (article 25)

‘Develop a wide range of community-based services that respond to the needs of persons with disabilities, and respect the person’s autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health.

Right to Liberty and Security of a person

59. Article 29 of the Constitution states that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. The right to liberty and security of a person is also protected in the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (CAT).\(^{43}\) Article 14 of the CRPD provides a broad interpretation of the right to liberty and security of persons with disabilities. The article prohibits deprivation of liberty on the basis of disability\(^ {44}\) and calls upon States to provide reasonable accommodation in any situations where persons with disabilities are deprived of their liberty.\(^ {45}\)

60. USP-K is concerned that the current legislative framework is inadequate and fails to meet universal standards on the right to liberty and security of a person specifically the CRPD. Our laws permit deprivation of liberty on the basis of a perceived or presence of a psychosocial disability. The Mental Health Act 1983 allows involuntary detention in hospitals on the basis of perceived danger to oneself or others and alleged need to treatment.\(^ {46}\) The Persons Deprived of Liberty Act 2014 allows limitation of privacy for detained persons with mental disability for purposes of psychiatric treatment.\(^ {47}\) The Criminal Procedure Code allows indefinite detention of offenders not found responsible due to ‘insanity’ and incapacity to be held criminally responsible in a mental hospital and leave it to the discretion of the president to pardon them.

61. With regard to monitoring exploitation, violence and abuse of persons with psychosocial disability detained either in mental hospitals or other places of detention, adequate and effective monitoring mechanisms are not in place.

\(^{43}\) Article 9; Article 10.
\(^{44}\) Article 14 (1) (b).
\(^{45}\) Article 14 (2).
\(^{46}\) Section 16.
\(^{47}\) Section 4 (e).
\(^{48}\) According to ‘Guidelines for identifying people with disabilities for cash transfer 2011’, the eligibility criteria include:
• poverty level of a household
• number of persons with severe disabilities in a household
• number of chronically ill persons in a household with a person with severe disability
• number of persons in a household with other forms of disabilities other than the severe disability
• must not be enrolled in any other cash transfer programme
62. USP-K would also like to highlight that in addition to deprivation of liberty in mental health facilities and within criminal settings, deprivation of liberty within civil settings also persists. Amid prevalent stereotypes and seclusion of families of persons with psychosocial disability by the community; some families in ‘goodwill’ have been forced to lock family members with psychosocial disability for the fear that they may be abused or for economic reasons since they need to go and earn a living for their families. USP-K does not dispute that indeed this is deprivation of liberty within civil settings, however USP-K would like to clarify that limited support to families has forced them to override rights with ‘duty to care’. Our limited social protection framework which is determined by severity of disability supports only a limited number of persons with disabilities. Currently our social protection system (the Cash transfer programme) caters for 70 households per constituency targeting specifically people with high support needs. It is also to be noted that the primary objective of the current cash transfer programme is to empower caregivers in order to improve the lives and livelihoods of persons with severe disabilities within their household. The challenge in such a system is power relations and how this can impact on choice and control especially if the person is an indirect beneficiary.

63. USP-K commends the State for continuous efforts to expand the programme, however the targeting approach and the objective of the cash transfer programme may require review to ensure that support directly benefits both persons with disabilities thereby enhancing their choice and control; and families of persons with disabilities thereby enhancing their income security.

64. In light of this, USP-K in its position reiterates the CRPD Committee guidelines on implementation of the right to liberty and security of person; and basic principles and the guidelines on remedies and procedure on the right of anyone deprived of their liberty to bring proceedings before the Court by the working group on arbitrary detention and makes the following recommendations:

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49 For details on targeting and eligibility see the UN Special Rapporteur on the Rights of Persons with Disabilities on Social Protection A/70/297 available at <
The State:

- Should repeal the provisions of section 4 (e) of the Persons Deprived of Liberty Act 2014.
- Should repeal the Criminal Procedure Code as ‘insanity defence’ often deprives persons with psychosocial disability the right to due process and safeguards that are applicable to other defendants. Instead, the right to reasonable accommodation should be recognized and supports provided to the person to exercise their legal capacity and stand trial.
- Should refrain from security measures and diversion programmes which include mental health commitment unless it’s based on free and informed consent. USP-K firmly observes that individuals should be liable for their actions and therefore ought to fulfil their duty to obey the law. USP-K therefore recommends that the State explores alternative diversion programmes such as community service sentence for petty offenders with psychosocial disability.
- Operationalize the Consultative Committee on Persons deprived of liberty as provided in Persons Deprived of Liberty Act 2014 as this will provide a platform to address issues affecting persons with psychosocial disability in detention.
- Facilitate the independent monitoring framework under article 33 (2) of the CRPD which include the Kenya National Commission on Human Rights and the National Gender and Equality Commission to monitor mental health facilities and institutions where persons with psychosocial disabilities are placed. This should be done in consultation with representative organizations of persons with psychosocial disability.
- Expand the social protection system to be more inclusive and avail economic empowerment programmes for persons with psychosocial disability.

Right to education

Every person has a right to education. Article 54 of the Constitution provides that every person with disability is entitled to access educational institutions that are integrated into society to the extent compatible with the interests of the person. Further, the Constitution provides that affirmative action programmes shall be instituted to ensure that persons with disabilities are provided with special opportunities in educational fields. The Basic Education Act 2013 prohibits denial of admission to a learning institution of one’s choice on grounds of disability. Under the Basic Education Regulations 2015, provision of reasonable accommodation to
learners with disabilities is obligatory to all institutions offering basic education. USP-K commends this strong legal framework on the right to education. However, USP-K would like to point out a number of gaps in practice and in policy that impede the enjoyment of the right to education for persons with psychosocial disability.

67. Promotion of segregated education

68. It has been observed that in our legal framework, both inclusive and segregated education is encouraged. Specifically the Basic Education Act 2013 gives prominence to special education by encouraging the establishment of special learning institutions for children with disabilities. This emphasis is also provided for in the Persons with Disabilities Act 2003. Promotion of segregated education promotes seclusion and isolation of persons with psychosocial disability and is against the basic principles of the CRPD of inclusion, non-discrimination, equality of opportunity and participation and inclusion in the society.

69. Indeed the CRPD obligates States to ensure an inclusive education system at all levels. The State’s practice and commitment towards inclusive education is worrying. In its statistics to the CRPD Committee, the State reported that more children with disabilities were attending special schools. This is despite the challenges faced in special schools including lack of adequate resources, support services, adaptable curriculums and examinations and being located far away from the homesteads which denies learners with disabilities including persons with psychosocial disability the opportunity to live and be included in the community on an equal basis with their peers.

70. A unique challenge for learners with psychosocial disability is that many a times, misidentification during assessment occurs placing children with psychosocial disability in institutions for learners with intellectual disability. USP-K categorically points out that psychosocial disability and intellectual disability are two distinctive
disabilities. USP-K therefore recommends that the State acknowledges this distinction and placement be done appropriately.

71. We further urge the State to equip Education Assessment Resource Centres (EARCs) financially and with qualified personnel in efforts to ensure proper assessment and placement.

72. USP-K also urges the State to promote inclusive education and implement recommendations of the CRPD committee on establishing a timeframe for the transition process from segregated to inclusive quality education and ensure that budgetary, technical and personnel resources are available to complete the process and collect disaggregated data on the advancement of the inclusive education system.\textsuperscript{62}

73. Provision of reasonable accommodation and relevant supports to learners with psychosocial disabilities in all levels of learning.

74. The Constitution of Kenya entitles persons with disability to educational facilities that are compatible to their interest. The Basic Education Regulations 2015 provides that all institutions shall provide reasonable accommodation for learners with disabilities.\textsuperscript{63} It further provides that all institutions shall ensure that the pace of instruction is commensurate with the learners’ physical, mental or intellectual abilities.\textsuperscript{64} USP-K expresses its concern that despite recognition of reasonable accommodation, the term is yet to be defined in our policies and legislations.

75. Further, the CRPD defines discrimination on the basis of disability to include denial of reasonable accommodation. ‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others,
of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.\textsuperscript{66}

76. USP-K holds that providing interpretation of reasonable accommodation in national policies and statutes will resolve the dilemma of interpreting the concept and the limitation of entitlements.

77. The second issue is in relation to accommodations provided for learners with psychosocial disability. In most cases accommodations have been interpreted in a narrow approach to include time allocation for examinations, provision of assistive devices therefore not sufficiently addressing the real accommodation needs for learners with psychosocial disability. These challenges are heightened by misidentification and conflating of psychosocial disability and intellectual disability.

78. Therefore USP-K urges the State to provide appropriate supports and accommodations including:
   - Educational counselling,
   - Encouraging formation and running of peer support groups at all education levels,
   - Flexible test methods that can accommodate people’s learning styles specifically at secondary school level and institutions of higher learning.

79. Respect of choice

‘I was helped to choose a course which I did not know much about (....) But one month later I started having emotional problems adjusting to university life and therefore chose to change the course to Bachelor of Education’

‘I have a degree in engineering and work on contractual basis. I started experiencing mental health problems and misusing substances while studying at university. The choice of the degree was my father’s. He said this is an opportunity he has gotten for me to better my life. At some level I protested about it, but all he said was that I can’t quit (...). I felt like it was some sort of blackmail, since I did not have support of my own (....) I lost my esteem and felt powerless.’\textsuperscript{66}

\textsuperscript{66} Excerpts from Mental Disability Advocacy Centre (n16).
\textsuperscript{67} Article 1, CRPD.
\textsuperscript{68} Article 260.
80. The above lived experiences illustrate the experiences of persons with psychosocial disabilities in making decisions related to education specifically at post-secondary level. On a positive note, some families support members with psychosocial disability to pursue courses of their choice. In other occasions persons with psychosocial disability are forced to take courses against their choices with the fear of losing support.

81. USP-K holds that at post-secondary education, individuals are adults with capacity to make choices and their choices should be respected. Coercion and threats are unacceptable, instead families should provide support by giving adequate information to the individual on the consequences of such choices.

82. USP-K also urges the National Council for Persons with Disabilities to extend funding and bursaries to learners with psychosocial disability at all levels of learning including tertiary institutions and institutions of higher learning.

Data and Statistics

83. Data disaggregation is key to policy design and implementation. Disaggregation of data by disability remains a great challenge. For persons with psychosocial disability, the challenge begins at the assessment level. In the recent past, USP-K has observed that persons with psychosocial disability have been disproportionately required to submit more details to justify that psychosocial disability is indeed a disability and not an illness. This practice has been observed in hospitals certifying individuals to be registered as persons with disabilities with the National Council for Persons With Disabilities (NCPWD) and also at the Kenya Revenue Authority for tax exemption.

84. USP-K holds that such practice marginalizes persons with psychosocial disability and would like to clarify that persons with disabilities ‘include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Disability results from the interaction between an impairment and the environment’. If therefore a person with a mental illness cannot manage to comply with certain fixed working hours due to the illness, then the person has disability. The Constitution also recognizes disability to include mental disability.
85. USP-K urges the State through line institutions including the NCPWD and the Ministry responsible for matters of disability to clarify and issue directive in relation to the above matter.

86. USP-K also recommends that awareness campaign to policy makers and professionals be carried out.

87. The last dynamic with regard to data and statistics is that psychosocial disability is still conflated with intellectual disability. As a result maintenance of accurate records is lacking. Further, arbitrary detention of persons with psychosocial disability in mental health institutions and lack of awareness on the registration process continues to impede the process of maintaining accurate data. USP-K urges NCPWD together with other line departments to update their system and recognize the distinction between psychosocial disability and intellectual disability.

88. It also recommends that NCPWD conducts a registration campaign targeting persons with psychosocial disability.
M. CONCLUSION

89. In conclusion, USP-K commends on-going efforts both from State and non-state actors to ensure rights of persons with psychosocial disability are upheld. We therefore urge State commitment towards the implementation of the recommendations of the CRPD Committee on the right to legal capacity, liberty and security of person and right to health among others.

We further urge the State to fund initiatives to build supported decision making models including the on-going peer support group initiatives by organizations of persons with psychosocial disabilities. In addition, we urge the State to review its targeting approach for social protection to ensure inclusivity including families of persons with psychosocial disability. Finally, we encourage the State to effectively engage and involve persons with psychosocial disability and their representative organizations in designing, implementing, and monitoring programs on persons with psychosocial disability including review of policy and legislative frameworks.
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