



Users and Survivors of Psychiatry in Kenya (USP-K)

Submission to the Nyeri County Assembly on inclusion of rights of persons with psychosocial disability in the proposed draft Persons with Disabilities Bill

15 March 2017

INTRODUCTION: Interest and Expertise

1. Article 10 of the Constitution recognizes public participation as national value and principle for the implementation of the Constitution. Further Article 174 on objects of the devolution reaffirms participation of the people in making decisions that affect them. Section 91 of the County Government Act obligates Counties to establish modalities and platform for citizen participation. Against this backdrop, Users and Survivors of Psychiatry-Kenya (USP-Kenya) welcomes the opportunity by Nyeri County Assembly to contribute to the on-going drafting of Nyeri County Persons with Disabilities Bill 2017.
2. USP-Kenya is a non-governmental organization that was established and registered in Kenya in the year 2007.
3. It is a membership organization whose major objective is to promote and advocate for the rights of persons with psychosocial disabilities (mental health conditions) 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.
4. USP-Kenya has been operating in Kenya for the past 7 years and has transformed the lives of persons with psychosocial disabilities 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 on mental health issues. The organization has also participated in international conferences and other forums.
5. At the international level, USP-K contributed to the review of Kenya's compliance with the Convention on the Rights of Persons with Disabilities (CRPD) by making submission on enjoyment of rights by persons with psychosocial disability in Kenya. This positively influenced the Kenya's Concluding Observations 2015 which explicitly referred to rights of persons with psychosocial disability. Additionally, in 2016, USP-K made a submission to the CRPD Committee on interpretation of Article 19 of the CRPD on the right to live independently and be included in the community for persons with psychosocial disability.
6. Domestically, USP-K has been engaged in various policy dialogues on enjoyment of rights of persons with disabilities including: implementation of the Committee on the Rights of Persons with Disabilities Concluding Observations to Kenya, the Sustainable Development Goals (SDGs) and inclusive elections 2017.
7. In addition to the aforementioned USP-K runs 12 support groups comprising persons with psychosocial disability and carers of persons with psychosocial disability. This membership is spread out in different counties namely: Nyeri, Nairobi, Kiambu, Machakos, Makueni and Nakuru

B. General Comments: Facts on persons with psychosocial disability and current legislative and policy framework on rights of persons with disabilities

8. According to the 2009 Census, 1 330 312 million (3,5 per cent) of the Kenyan population of about 39 million people were reported to have a disability.¹ Of this number, 60,954 female persons and 75, 139 male persons have a mental disability.
9. Several strides have been made to ensure promotion and protection of rights of persons with disabilities. In 2003, Kenya enacted the Persons with Disabilities Act No.14 of 2003 which provides for the rights of persons with disabilities including the right to education, health, employment among others.
10. Rights of persons with disabilities are further reinforced in the Constitution that explicitly prohibits discrimination on basis of disability, ²obligates all state organs and public officers to address the needs of vulnerable groups within the society including persons with disabilities.³Article 54 entrenches the rights of persons with disabilities including the right to be treated with dignity and respect and to be addressed in a manner that is not demeaning, access to education, reasonable access to all places, public transport and information, use of sign language, braille or other appropriate means of communication and access to materials and devices to overcome constraints arising from a person with disability.
11. The Constitution further recognizes the progressive implementation of the five percent (5%) of members of the public in elective and appointive bodies are persons with disabilities. Article 100 provides that state shall enact a legislation to promote representation of persons with disabilities in Parliament. The Constitution further introduces election quotas⁴obligating political parties to nominate persons with disabilities (man and a woman) as members of the National Assembly, County Assembly and Senate.
12. At the international level, Kenya signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2007 and 2008 respectively. By dint of article 2 (6) ⁵of the Constitution, the CRPD which is the first international treaty to explicitly provide for rights persons with disabilities forms part of Kenya's law. The CRPD and the Constitution of Kenya 2010 reinforce each other. While the Constitution is the Supreme law in Kenya and provides for rights of persons with disabilities, the CRPD provides an interpretation of these rights and has been utilised by different actors to provide guidance on implementation of rights of persons with psychosocial disability including the courts, policymakers and non-state actors.

C. Specific Comments: specific provisions in light rights of persons with psychosocial disability and Harmonisation in drafting

13. Article 174 of the Constitution envisages the objects of devolution. Among these include the right to protect and promote the interests and rights of minorities and marginalised communities. The Constitution defines marginalised group to include 'a group of people who, because of law or practices before on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds article 27 (4) which include disability'.⁶Different arms of the County Government have different roles in promoting and protecting rights and interests of persons with

¹ Kenya National Bureau of Statistics 'Number of Persons with Disabilities'
<http://www.knbs.or.ke/index.php?option=com_content&view=article&id=155:number-of-persons-with-disability&catid=112&Itemid=638> accessed 16 February 2016

²Article 27

³Article 21 (3).

⁴Article 98; 99 & 177.

⁵Article 2 (6) states 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

⁶Article 260, Constitution 2010.

disabilities. The County Assembly in line with Constitution have the obligation to enact laws that are necessary for effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule of the Constitution.

14. Against this background and in line with the mandate of the Nyeri County Assembly, USP-K submits the following propositions for consideration in the drafting of Nyeri County Persons with Disabilities Bill. While the Bill is expected to broadly address rights of persons with disabilities, USP-K would like to narrow down to the following areas: Definitions and Obligations, right to equal recognition before the law/ legal capacity, right to health, right to education and harmonisation with existing laws in the proposed draft Nyeri County Persons with Disabilities Bill.

Definitions and Obligations

Defining Persons with Disabilities

15. The Constitution defines disability to include any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out the ordinary day-to-day activities.⁷The CRPD defines persons with disabilities to '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'.
16. USP-K submits that the definitional term disability in the Constitution is subjective and the eligibility criteria may inadvertently affect enjoyment of rights by certain groups of persons with disabilities those with invisible disabilities such as people with psychosocial disability. For instance, persons with psychosocial disabilities have in the past been forced to fulfil a broader criterion to qualify for tax exemption compared to those with visible disabilities. Conversely, the CRPD definition adopts a social model that interprets disability as an interaction between the impairment and environmental barriers. States parties to the CRPD including Kenya have an obligation to review legislations to address discrimination of persons with disabilities. USP-K submits that the current opportunity to legislate at the County level presents an opportunity for law reform hence requests the County Assembly to consider the CRPD definition.

Obligation to actively engage persons with psychosocial disability and their representative organizations

17. Public participation is national value and principle.⁸ One of the objects of devolution is 'to give powers of self-governance and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them'.⁹
18. Some of the inbuilt tools in the County Government Act of ensuring public participation are the thorough establishment of modalities and platforms for citizen participation.¹⁰ These include town hall meetings, notice board, citizen fora, budgeting preparation and validation fora among others.
19. Public participation is further reinforced in article 4 (3) and article 33 (3) of the CRPD which obligates states to actively consult persons with disabilities and children with disabilities through their representative organisations in decision-making processes.
20. Evidence indicates that in many occasions persons with disabilities are locked out of key decision processes including budgeting and planning mainly because of dissemination of information in inaccessible formats attitudinal challenges and lack of specific efforts to target them as active

⁷Article 260, Constitution 2010.

⁸Article 10, Constitution 2010.

⁹Article 174 (c), Constitution 2010.

¹⁰Section 91, County Government Act 2012.

participants. For people with psychosocial disability this is further perpetuated by assumption that they are incapacitated to make informed decisions.

21. USP-K submits that recognition of the obligation to include persons with disabilities and their representative organizations in decision-making processes is fundamental and that the proposed Bill should explicitly include this obligation.

Specific Rights

Right to Legal Capacity

22. Article 27 of the Constitution recognizes that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 27 (2) further provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms. The Convention on the Rights of Persons with Disabilities (CRPD) recognizes that every person has the right to legal capacity which includes capacity to hold rights and exercise these rights. It also recognizes that persons with disabilities have right to support to make decision. The Constitution broadly recognizes equality but does not explicitly define this in context of the persons with disabilities as it is in the CRPD. The County Assembly has powers to interpret issues to guide implementation of rights within the County.
23. Evidence indicates that many persons with psychosocial disability are assumed to lack capacity to make decision and this right taken away by parents or state authorities which results to violation of rights such as right to own property, marry or even vote.¹¹In HCCR APPEAL No. 17 of September 2014 in *Wilson Morara Siringi v. Republic of Kenya* the court overruled this approach and argued that disability should not be used to assume that one lacks capacity to make decisions.¹²
24. USP-K submits that recognition of right to legal capacity is fundamental to enjoyment of other rights and urges the Nyeri County Assembly to consider in its drafting a specific provision that recognizes the right to legal capacity, the right to support to make this decision and the right to own property and manage finances.

Right to Health

25. Health is a devolved function¹³ and Counties play a fundamental role in the implementation of the recently adopted Sustainable Development Goals including Goal 3 on Good Health and Well-being. Section 20 of the draft Health Bill 2016 outlines the functions of proposed County Executive department of health. This include implementing the national health policy and ensuring and coordinating the participation of communities in the governance of health services at the county level so as to promote a participatory approach in health care governancethe functions of the County. USP-K submits that the right to health can only be achieved if the 3A's: Accessibility, Acceptability, and Availability are fulfilled. That is availability of functioning public health and healthcare facilities, accessibility of health facilities without discrimination and physical reach for all sections of populations, respect of medical ethics and availability of skilled medical personnel.
26. People with psychosocial disabilities face a myriad of challenges while accessing health care facilities. This results from discriminatory laws compounded by attitudinal challenges. The Mental Health Act for instance allows forced treatment and involuntary detention in mental hospitals.

¹¹The Kenya National Commission on Human Rights (2013), 'How to implement Article 12 of the Convention on the Rights of Persons with Disabilities: A Briefing paper, available <<http://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf>> ; Mental Advocacy Center (2014), 'The right to legal capacity in Kenya', available <http://mdac.info/sites/mdac.info/files/mdac_kenya_legal_capacity_2apr2014.pdf>.

¹²Judgment available online at: <http://kenyalaw.org/caselaw/cases/view/101502/>.

Additionally, access to integrated community based health services remain a great challenge to many people with psychosocial disability.

27. The Draft Health Bill 2016 defines “informed consent” as a process of getting permission before conducting a health care prevention on a person. The CRPD in article 25 obligates states parties to provide health care services as close as possible to people's own communities, including in rural areas. It further requires health professional to provide services based on free and informed consent, respect of human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.
28. In light of this, USP-K submits that it will be paramount the proposed Persons with Disabilities Bill explicitly states the specific obligations of the County government of Nyeri in providing inclusive health care services taking in to account mental health care services like counselling. Secondly, the Bill should clearly state that no one shall be denied health care services on basis of their disability, and that persons with psychosocial disability shall be actively engaged in designing health programmes to promote ownership and inclusion.

Right to Education

29. Article of the Constitution 43 (1) (f) recognizes that ‘every person has a right to education. Article 54 (2) that ‘every person with disability is entitled to access to educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person’. The Convention on the Rights of Persons with Disabilities recognizes the right to inclusive education.
30. The Basic Education Act 2014 decentralises management of pre-school and obligates County government to establish and maintain pre-schools.
31. USP-K submits that the proposed Bill recognizes right to inclusive education from the lowest level-pre-school and more importantly because pre-school is a devolved function. We further urge the County Assembly to prioritise inclusive education in legislating as opposed to special education. Additionally, USP-K urges the County Assembly of Nyeri to specifically state disability shall not be a basis to deny anyone admission to an inclusive school.
32. Regarding specific obligations under this article, the Bill should explicitly spell out the obligation the County to provide reasonable accommodations and support to persons with psychosocial disability to learn in mainstream schools. USP-K urges the County Assembly to recognize flexible timetables as an accommodation and support for learners with psychosocial disability even at the lowest level in pre-school.

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