UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

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Submission of the International Commission of Jurists and United Disabled Persons of Kenya in view of the Committee on the Elimination of Discrimination against Women's Consideration of Kenya's Ninth Periodic Report under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women

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The United Disabled Persons of Kenya (UDPK), established in 1989 and headquartered in Nairobi, is the national umbrella body that brings together diverse organizations of persons with disabilities (OPDs) in Kenya. UDPK consistently works to amplify the collective voices of persons with disabilities, advocates for disability rights, equal opportunities and meaningful participation in all spheres of life and, through over 200 member OPDs, has nationwide reach.

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Introduction

1. At its 93rd session, the United Nations Committee on the Elimination of Discrimination against Women (the Committee) will examine Kenya's implementation of and compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in light of Kenya's ninth Periodic Report[1] under article 18 of the Convention and its replies to the Committee's List of Issues and Questions.[2]

2. The International Commission of Jurists (ICJ) and the United Disabled Persons of Kenya (UDPK) wish to draw the Committee's attention to continuing legal, institutional and practical barriers affecting the enjoyment of Convention rights by women and girls with disabilities in Kenya, drawing primarily on ICJ and UDPK research, including:

    - ICJ's *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges*;[3]
    - ICJ's *An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa*;[4]
    - Ongoing multi-year research on access to justice for women and girls with disabilities aimed at developing guidelines to assist justice actors in eliminating gender- and disability-based stereotyping and discrimination.

3. The present submission focuses on Kenya's obligations under the following provisions of the Convention:

    - **Articles 1, 2 and 5:** in respect of gender, disability stereotypes and discrimination;
    - **Article 12:** with respect to women's the right to health, including sexual and reproductive health and bodily autonomy; and
    - **Article 15:** Equality before the law, legal capacity and access to justice.

A. Articles 1, 2 and 5: Gender and Disability Stereotyping and Discrimination

4. Article 2 of CEDAW requires that Kenya condemns "discrimination against women" as defined in Article 1 of the Convention and takes measures to eliminate such discrimination. Among other things, Article 5 of the CEDAW obligates States parties to actively combat and eliminate gender stereotypes, which are commonly significant contributors to discrimination against women and girls.

5. Kenya is bound, as a State party, by the Convention on the Rights of Persons with Disabilities (CRPD). Pursuant to Article 23 of CEDAW[5] — which provides that nothing in the Convention

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[1] Ninth periodic report submitted by Kenya under article 18 of the Convention, due in 2021, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FKEN%2F9&Lang=en.

[2] Replies of Kenya to the list of issues and questions in relation to its ninth periodic report, CEDAW/C/KEN/RQ/9, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FKEN%2FQ%2F9&Lang=en.

[3] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges,* July 2025, available at: https://www.icj.org/kenya-the-icjs-new-report-calls-for-an-end-to-discriminatory-laws-restricting-persons-with-disabilities-access-to-justice; A Summary of the report is available at: https://www.icj.org/wp-content/uploads/2025/07/Summary_Access-to-Justice-for-Persons-with-Disabilities-in-Kenya.pdf.

[4] ICJ, *An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa*, May 2025, available at: https://www.icj.org/wp-content/uploads/2025/05/An-Opportune-Moment_Realizing-the-Rights-of-Persons-with-Disabilities-in-Africa.pdf. A Summary of the report is available at: https://www.icj.org/wp-content/uploads/2025/05/Summary_An-Opportune-Moment_Realizing-the-Rights-of-Persons-with-Disabilities-in-Africa.pdf.

[5] Convention on the Elimination of All forms of Discrimination against Women (CEDAW), Article 23:
"Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:
a) In the legislation of a State Party; or
b) In any other international convention, treaty or agreement in force for that State."

shall affect other provisions more conducive to the achievement of equality — CEDAW's equality and non-discrimination obligations, outlined above, should accordingly be read, in respect of women and girls with disabilities, alongside Articles 5 (Equality and Non-Discrimination) and 6 (Women with Disabilities) of the CRPD. In this connection, the ICJ and UDPK draw the Committee's attention to the fact that the Committee on the Rights of Persons with Disabilities (CRPD Committee) has authoritatively interpreted the abovementioned CRPD provisions in its General Comment No. 6 (on equality and non-discrimination)[6] and General Comment No. 3 (on women and girls with disabilities), respectively.[7] In addition, Article 8 of the CRPD explicitly requires States parties to take measures to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities," including those partially based on sex.[8]

6. Combatting stereotypes against women and girls with disabilities requires an intersectional approach that understands and acknowledges stereotypes based on both disability and gender, and the interplay between disability and gender. As this Committee has acknowledged, stereotypes against women are the "root causes of gender-based violence", and combatting such stereotypes is specifically important to eliminating gender-based violence, which is itself a form of discrimination under the Convention.[9]

7. Stereotypes affecting women, specifically women with disabilities, recur within Kenya's justice system and processes in a range of specific forms,[10] including:

- Women are physically weak;
- Women cannot make decisions independently;
- Women should be submissive and obedient;
- Women's testimonies are unreliable because women are emotional;
- A person's disability fully defines them as an individual and is the most important – or sometimes the only important – aspect in understanding them and incidents involving them;
- Persons with disabilities are inherently vulnerable and therefore require protection and are defenceless, dependent, reliant or unsafe;
- Persons with disabilities are victims, who are passive, continuously suffering and helpless and should be pitied;
- Persons with disabilities are inherently suspicious;
- Persons with disabilities are unreliable narrators of their own experiences;
- Persons with disabilities are easily influenced;
- Persons with disabilities are mystical or sinister, cursed, possessed by spirits, practitioners of witchcraft, harmful or bring either good or bad luck.
- Persons with disabilities are cursed with disability as a punishment for a personal or familial spiritual failing;
- Persons with disabilities, and especially women with disabilities, are sexually abnormal (either asexual or hypersexual), sexually undesirable, and incapable of consenting to sex; and
- Persons with disabilities, and especially women with disabilities, are reproductively "abnormal," cannot or should not reproduce for various reasons, including that their children may be born "abnormal".
- Persons with disabilities lack value, purpose and future prospects.

[6] CRPD Committee, General Comment No.3 (2016) on women and girls with disabilities, CRPD/C/GC/3.
[7] CRPD Committee, General Comment No.6 (2018) on equality and non-discrimination, CRPD/C/GC/6.
[8] Article 8(1)(b) of the Convention on the Rights of Persons with Disabilities (CRPD).
[9] CEDAW Committee, General Recommendation No.35 (2017), on gender-based violence against women, CEDAW/C/GC/35, paras 1 and 26.
[10] ICJ and UDPK research conducted for a forthcoming country guide on gender and disability stereotypes in access to justice in Kenya.

8. Reportedly, such stereotypes are ubiquitous among justice actors – including judges, prosecutors, lawyers – and within society at large.

9. In cases involving sexual offences specifically, women — including women with disabilities — consulted by ICJ and UDPK stressed that stereotypes have an overwhelming negative effect on their willingness to approach the courts and law enforcement officials in connection with such offences perpetrated against them. Some of the damaging stereotypes in this regard include:

    - "Good women" are sexually chaste;
    - Being alone at night or wearing certain clothes make women responsible for being harassed verbally, physically, sexually or otherwise being subjected to any form of sexual violence, including rape;
    - Women who are sexually active are less credible in sexual offence cases;
    - Lack of physical harm or injury in sexual offence cases implies consent to a sexual act;
    - Delay in reporting a sexual or domestic violence offences calls into question the accuracy or authenticity of the victim's stance;
    - An offender's offer to marry the victim should be accepted by the victim girl/woman and when so accepted will absolve the perpetrator completely or mitigate the severity of the punishment they would otherwise face;
    - Women with disabilities are assumed to have consented to sexual activity or to be incapable of consenting to it – particularly women with intellectual and/or psychosocial disabilities, including on the basis that they do not understand sex;
    - Women with disabilities are unreliable narrators of their own experiences relating to sex and sexual offences; and
    - Sexual offences against women with disabilities are not sufficiently serious to take forward through legal processes, are difficult to prosecute and are best dealt with as family or community issues.

10. Kenya is obligated, under Article 2 and 5 of CEDAW, as authoritatively interpreted by this Committee in its General Recommendation No.33, to ensure that its justice system be free from stereotyping and gender bias, which the Committee has recognized as impeding access to justice in all areas of law, distorting the assessment of facts by decision-makers, and diminishing the credibility given to women's voices, arguments and testimony as parties and witnesses.[11] Kenya is accordingly required to take concrete measures to eliminate stereotyping in the justice system because this is "a crucial step in ensuring equality and justice for victims and survivors".[12] Left unaddressed, such stereotyping compromises the impartiality and integrity of the justice system as a whole and may result in miscarriages of justice.[13]

11. These obligations are not confined to the judiciary – Kenya must also ensure that prosecutors, law enforcement officials and other justice actors are prevented from allowing stereotypes to influence investigations and trials, particularly in cases of gender-based violence.[14]

In light of the above concerns, the ICJ and UPDK recommend that the State party be urged to:

a. Ensure that all justice actors, including judges, magistrates, judicial officers, court staff, prosecutors, police and other law enforcement officials, and lawyers, be fully aware of and eliminate gender stereotyping, so as to be able, in turn, to discharge their mandates to ensure access to justice for women and girls with disabilities. To this effect, justice actors should receive consistent and continuous awareness-raising and capacity-building training

[11] CEDAW Committee, General Recommendation 33 on women's access to justice, CEDAW/C/GC/33, paras 26-28.
[12] Ibid.
[13] Ibid.
[14] Ibid.

about barriers in access to justice commonly faced by women and girls with disabilities. Such a training should focus on:

- Disability rights and disability identification (recognition);
- Identification and elimination of gender and disability stereotypes;
- The negative impact of stereotyping in the justice system;
- The application of domestic and international human rights law and standards relating to the prohibition of discrimination against women, including CEDAW;
- Provision of procedural accommodations;
- Disability and gender-sensitive practices in the specific context of gender-based violence cases.

b. The judiciary, through the Chief Justice as its leader, design, develop and adopt, in full consultation with women and girls with disabilities, and their representative organizations, guidelines for justice actors in respect of the elimination of gender and disability stereotypes.

B. Article 12: Health, Sexual and Reproductive Health Rights, and Bodily Autonomy

12. Article 12 of CEDAW guarantees non-discrimination in women's access to healthcare services, including sexual and reproductive health services, as elaborated by this Committee, for example, in its General Recommendation No. 24 (Women and Health) and General Recommendation No. 35 (on gender-based violence against women). This Committee has made clear that health services must be "acceptable" to women – namely, that they be delivered in a way that ensures a woman's fully informed consent – and has explicitly prohibited coercive practices such as non-consensual sterilization.[15] This Committee has further characterized forced sterilization as a form of gender-based violence[16] and has specifically called on States parties to repeal all legal provisions allowing medical procedures to be performed on women with disabilities without their informed consent.[17]

13. In respect of women and girls with disabilities, relying on Article 23 of CEDAW, these guarantees can helpfully be read together with relevant provisions of the CRPD, including, in particular, Article 25 (Health) and on the specific question of free and informed consent to health care and Article 12 of the CRPD (Equal Recognition before he Law) as elaborated by the CRPD Committee's General Comment No.1.[18]

<u>Restrictions on legal capacity and the right to free and informed consent in the context of sexual and reproductive health</u>

14. The Kenya **Persons with Disabilities Act, 2025** guarantees the right to health, including sexual and reproductive health, of persons with disabilities,[19] explicitly affirming the right to access healthcare "on the basis of free and informed consent".[20] The Act also prohibits medical procedures that could lead to infertility without "expressed consent".[21] The Act features a specific provision on women with disability, which guarantees the right to sexual and reproductive health services and the right to "retain and control" fertility.[22]

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[15]CEDAW Committee General Recommendation No. 24 (1999), on women and health, A/54/38/Rev.1, paras 22, 31(e).
[16] CEDAW Committee, General Recommendation No.35 (2017), para.18.
[17] Ibid, para 29 (c) (i); See also CESCR Committee, General Comment No. 22 (2016), on the right to sexual and reproductive health, E/C.12/GC/22, paras 2, 24, and 30.
[18] CRPD Committee, General Comment No.1(2014), Article 12: Equal Recognition before the law, CRPD/C/GC/1.
[19] Persons with Disabilities Act No. 4 of 2025, section 24(1)-(2).
[20] Ibid, section 24(8).
[21] Ibid section 24(9).
[22] Ibid section 10(d)-(e).

15. Section 9 of the **Health Act** requires "informed consent" for the provision of a health service,[23] while explicitly creating an exception, including where consent is given by a "next of kin".[24] This is a substituted decision-making mechanism and is of particular concern as it may create a legal pathway through which decisions about sexual and reproductive health could be made by a relative rather than the woman herself. In addition, concerningly, the Act defines "informed consent" to mean consent provided by a person "with legal capacity to do so",[25] a provision that is likely to have a discriminatory impact in its application against persons with psychosocial and/or intellectual disabilities. This is because a woman's psychosocial and/or intellectual disability could be treated as removing her legal capacity to consent altogether, rather than triggering a duty to provide her with the support she needs to exercise that capacity herself.

16. These concerns are heightened by a full reading of the **Mental Health (Amendment) Act**,[26] which, despite appearing to attempt to adopt a human rights-based framework grounded in supported decision-making for persons with disabilities, allows for substituted decision-making.[27] While the Act provides in various provisions for supported decision-making in line with the will and preference of an individual, it does so through a "supporter", who is defined by the Act as a person appointed to "make decisions *on behalf of* the person with mental illness".[28] The Act also conflates the will and preferences and the best interest principle, for example, when it provides that information on the care and treatment of a "mentally ill" person is confidential, except where disclosure "is in the best interest of the person with mental illness".[29]

17. For women and girls with disabilities in Kenya, the failure to properly guarantee the right to free and informed consent in the context of sexual and reproductive health has a detrimental impact on their human rights, including as attested by continued reports of forced sterilization[30] and forced abortion of women and girls with disabilities.[31] With respect to this, in submissions to the CRPD Committee in 2023, UPDK indicated that forced treatment of this nature may be a common occurrence.[32]

Reproductive healthcare

18. Under the **Constitution** of Kenya, abortion is "not permitted" unless "there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law".[33] The High Court has interpreted Kenya's Constitution to permit abortion where a pregnancy endangers the life or physical, mental, or social well-being of a pregnant person, a danger which, the High Court held, extends to pregnancies resulting from rape or "defilement".[34]

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[23] Health Act No. 21 of 2017, section 9 (a-f).
[24] Ibid.
[25] Ibid, section 9(3).
[26] Mental Health (Amendment) Act 14 of 2022.
[27] Ibid, sections 6 (3I (5)); 15 (9E), 22.
[28] Ibid, section 2's definition of "supporter" read with section 3J "decisions by a supporter". See also ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges*, p 10-11.
[29] Mental Health (Amendment) Act 14 of 2022, sections 6 (3I (5)); 15 (9E), 22.
[30] Mental Disability Advocacy Center, *The Right to Legal Capacity in Kenya*, 2014, https://validity.ngo/wp-content/uploads/2024/02/mdac_kenya_legal_capacity_9apr2014.pdf, pages 47, 71; https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FICS%2FKEN%2F53133&Lang=en.
[31] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FICS%2FKEN%2F53133&Lang=en.
[32] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FICS%2FKEN%2F53133&Lang=en.
[33] Constitution of Kenya, 2010, Article 26(4).
[34] *Federation of Women Lawyers v Attorney General* (2019), available: https://new.kenyalaw.org/akn/ke/judgment/kehc/2019/6928/eng@2019-06-12, paras 362-365, 372, 399.

19. Kenya's **Penal Code** contains various provisions criminalizing abortion procedures and related activities.[35]

20. Section 146 of the Code headed "defilement of person suffering from mental illness" criminalizes having sex with (or attempting to have sex with) a person with knowledge that they are "suffering from mental illness".[36] It explicitly specifies that such acts of "unlawful carnal connection", even under "circumstances not amounting to rape", are criminal offences subject to a sentence of imprisonment of up to 14 years.[37] As a result, consensual sexual relations with persons with psychosocial and/or intellectual disabilities are criminalized even in circumstances when such relations are consensual.

21. Additionally, in defining situations in which a sexual offence is considered to be "intentional and unlawful", the **Sexual Offences Act** indicates that an act meets this requirement if it is committed against "a person who is incapable of appreciating the nature" of the act.[38] The Act explicitly clarifies that a person is so incapable if, among other things, they are "mentally impaired".[39]

22. These provision amount to an extreme and fundamental limitation of the sexual autonomy of persons with intellectual and/or psychosocial disabilities and their partners to engage in consensual sexual conduct on an equal basis with other persons.[40] With respect to this, a High Court judge has already found that the assumption that a person who is "mentally retarded" is "incapable of making a free choice to engage in sexual intercourse" is contrary to the CRPD and the Kenyan Constitution.[41] Despite this recognition, however, neither the **Sexual Offences Act** nor the **Penal Code** has been amended, and both continue to enshrine precisely the presumption of incapacity the High Court has already rejected.

In light of the above concerns, the ICJ and UDPK recommend that the State Party be urged to:

a. Conduct a review of its laws pertaining to free and informed consent for decision-making in the context of the provision of healthcare to ensure compliance with international human rights law and standards, including CEDAW. The review should result in the repeal and/or amendment of the following laws and provisions:

    - Section 9 of the **Health Act,** including its definition of "informed consent", which deprives persons with disabilities of legal capacity.
    - Sections 2, 6, 15 and 22 of the **Mental Health (Amendment) Act**, including the definition of "supporter", and the provision for substituted decision-making by such a supporter.

As defined under Section 8 of the Sexual Offences Act, 2006, "defilement" is "an act which causes penetration with a child," and it carries a mandatory minimum sentence ranging from fifteen years' imprisonment to life imprisonment, depending on the age of the child. In the context of women and girls with disabilities, this extends in particular to defilement as defined under Section 146 of the Penal Code.

[35] Penal Code Act (Cap.63), sections 158-160, 228 and 240.

[36] Ibid, "Section 146 – Defilement of idiots or imbeciles:
Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."

[37] Ibid, section 146.

[38] Sexual Offences Act No. 56 of 2006, section 43(1)(c).

[39] Ibid, section 43(4)(e).

[40] ICJ, *An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa*, pages 104-107.

[41] *Wilson Morara Siringi v Republic* (2014), available: https://kenyalaw.org/akn/ke/judgment/kehc/2014/2963/eng@2014-09-22, paras 15-16.

b. Conduct a review of its laws pertaining to the sexual and reproductive autonomy of women with disabilities to ensure compliance with international human rights law and standards, including CEDAW. The review should result in the repeal and/or amendment of the following laws and provisions:

- Article 26(4) of the **Constitution** and sections 158-160, 228 and 240 of the **Penal Code**, which criminalize abortion.
- Section 146 of the **Penal Code** and section 43 of the **Sexual Offences Act**, to the extent that they deprive persons with disabilities of sexual autonomy and criminalize consensual sex.

C. Article 15: Equality before the Law and Equal Access to Justice

23. This Committee has affirmed in its General Recommendation 33, that "access to justice for women is essential to the realization of all [CEDAW] rights".[42] It has affirmed the need for accessibility of justice systems and processes and has explicitly stated that States must "pay special attention to access to justice systems for women with disabilities".[43] More specifically, as this Committee noted in General Recommendation No. 33, States are required to: ensure the physical accessibility of justice institutions; remove economic barriers to justice by providing, among others, legal aid; and improve the overall gender responsiveness of the justice system.[44]

24. Article 15 of CEDAW guarantees women's right to "legal capacity identical to that of men and the same opportunities to exercise that capacity."[45] Although, on its face, this provision focuses on women's legal capacity in the civil context, this Committee applied the right to legal capacity more broadly, including in criminal law contexts.[46]

25. This Committee has clearly stated that States must enforce the right to legal capacity, including by ensuring that instruments of "any kind with a legal effect directed at restricting the legal capacity of women" are "deemed null and void".[47] Pursuant to Article 23 of CEDAW — and in light of Kenya's obligations, as a State party, under the CRPD — this statement should, in the context of women with disabilities, be interpreted alongside the relevant provisions of the CRPD, including Articles 12 (Equal recognition before the law) and 13 (Access to Justice). This approach is consistent with, and reinforced by, the CRPD Committee's own recognition that women and girls with disabilities are exposed to intersecting and mutually reinforcing forms of discrimination on the grounds of both gender and disability, requiring States to address the specific ways in which restrictions on legal capacity entrench inequality.[48]

26. For women with disabilities specifically, this means, for instance, that States must:

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[42] CEDAW Committee, General Recommendation No. 33, on women's access to justice (2015), CEDAW/C/GC/33, para 1.
[43] Ibid, para 17(g).
[44] Ibid, paras 14-21.
[45] CEDAW, Article 15(2).
[46] CEDAW Committee, General Recommendation No.33, para 47; CEDAW Committee, Guidance note for States parties for the preparation of reports under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women in the context of the Sustainable Development Goals, CEDAW/C/74/3/Rev.1, 27 September 2022, available at: https://docs.un.org/en/CEDAW/C/74/3/rev.1, para 53(c and d).
[47] CEDAW Committee, General Recommendation No.33, para 44(b).
[48] CRPD Committee General Comment No. 1, para 6 and 35; General Comment No.3 (2016) on women and girls with disabilities, CRPD/C/GC/3, paras 44 and 51. Also see The Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf.

- Abolish "denials of legal capacity that are discriminatory on the basis of disability in purpose or effect";[49]
- Revise policies, laws and practices that allow for forced treatment and institutionalization on the basis of disability;[50]
- Abolish regimes of substitute decision-making (replacing them with "supported decision-making, which respects the person's autonomy, will and preferences");[51] and
- Provide all procedural accommodations and supports necessary for the exercise of legal capacity by persons with disabilities.[52]

Access to Justice

27. Kenya's **Persons with Disabilities Act, 2025** entrenches the right to access to justice of persons with disabilities in "all legal proceedings", including through the "provision of procedural [...] accommodations".[53] In order to ensure the provision of such accommodations in practice, the Act mandates the Chief Justice to make rules providing procedural accommodations for persons with disabilities.[54]

28. While the Chief Justice has not yet promulgated these rules, she has made a public commitment to fast-track their adoption.[55]

29. Nevertheless, in the continued absence of such rules, the provision of such procedural accommodations remains the exception, not the rule in legal proceedings in Kenya. ICJ's research reveals the following significant challenges in this regard:

    - The physical inaccessibility of court and other buildings;[56]
    - The inaccessibility of services, information and communication systems;[57]
    - The widespread unavailability of critical procedural accommodations, including support persons, such as sign language interpreters and justice intermediaries, in courts and other justice processes;[58] and
    - The inadequate training of judges, court staff and other justice actors on the rights and accommodation needs of persons with disabilities.

30. In addition to the unavailability of procedural accommodations, ICJ's research also shows that persons with disabilities struggle to access legal services to assert their legal claims through legal processes.[59] While the **Legal Aid Act** makes provision for legal aid services in both criminal and civil matters,[60] it fails to explicitly refer to persons with disabilities as beneficiaries.[61] The Act, however, prioritizes provision of services to "marginalized groups," referencing Article 260 of the Constitution, which, in turn, refers to Article 27(4) of the Constitution, which includes persons with disabilities.

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[49] CRPD Committee, General Comment No.1, para 25.
[50] Ibid, para 42.
[51] Ibid, para 26.
[52] Ibid, para 39. See also, The Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Principle 5.
[53] Persons with Disabilities Act No. 4 of 2025, section 28(1).
[54] Ibid, section 28(3).
[55] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges*, pages 9, 18-19; Honourable Chief Justice Martha Koome, Keynote Address during the Africa Regional Conference on Access to Justice for Persons with Disabilities, held at Ole Sereni Hotel, Nairobi – 14th May 2025, available at: https://www.youtube.com/watch?v=w8LSuKZszN4&embeds_referring_euri=https%3A%2F%2Fwww.icj.org%2F&source_ve_path=MjM4NTE.
[56] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges*, pages 30-31.
[57] Ibid, pages 31-32.
[58] Ibid, pages 35-38.
[59] Ibid, pages 9-10.
[60] Legal Aid Act No. 6 of 2016.
[61] Ibid, section 36.

31. Nevertheless, seemingly contrary to the Act, the regulations enacted to enforce the Legal Aid Act limit the scope of its application to court proceedings concerning civil matters exclusively.[62] The regulations also generally base eligibility for legal assistance on a means test. In practice, this excludes persons with disabilities from accessing such support as a matter of preference based on their marginalization. It also excludes access to support in civil matters, such as settings and processes relating to mental health facilities or care and rehabilitation centres in which persons with disabilities may be institutionalized.[63] Overall, this "means-tested" approach falls short of this Committee's guidance that States remove economic barriers to access to justice, including by ensuring that court fees are reduced or waived for women living in poverty.[64]

32. Like its predecessor Act,[65] the **Persons with Disabilities Act, 2025** requires the Attorney-General to develop regulations to provide free legal aid services to persons with disabilities.[66] It also mandates the Chief Justice to establish rules for exempting persons with disabilities from court fees in matters described in the Attorney General's regulations.[67] At the time of this submission, to ICJ and UPDK's knowledge, no progress has been made in respect of the enactment of any of these recommendations or rules.

Legal capacity

33. Further compounding the barriers to access to justice experienced by women and girls with disabilities, various laws in Kenya directly limit their legal capacity. This effect is particularly pronounced in respect of women with intellectual and/or psychosocial disabilities.

Criminal context restrictions on legal capacity

34. Kenya's **Penal Code** declares the general principle that every person is presumed to be of "sound mind", while allowing the contrary to be proved.[68] The Code recognizes far-reaching exceptions to this rule with respect to a person who is purportedly affected by a mental health condition with the result that such persons are "not criminally responsible for an act or omission if at the time of doing the act or making the omission", the person became incapable of understanding what he is doing because of a "disease affecting his mind."[69]

35. The Code, therefore, identifies "mental illness" as a condition that can negate the presumption of sound mind, which, in turn, may lead to distinct legal considerations and potentially severe consequences for the individual. Laws of this kind specifically require justice actors to discriminate against persons with psychosocial and/or intellectual disabilities, contrary to international human rights law and standards, including the CEDAW and the CRPD.[70] For women with such disabilities, this presumption operates alongside, and is reinforced by, the gendered stereotypes documented in Section A above. This includes, for example, the assumption that a woman's account of her own experience cannot be trusted, which compounds the risk that she will be denied the opportunity to participate in, and be believed within, criminal proceedings on an equal basis with others.[71]

[62] The Legal Aid (General) Regulations, 2022, sections 4, 6, 15.
[63] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges,* page 9.
[64] CEDAW Committee, General Recommendation No. 33, paras 36 and 37.
[65] Persons with Disabilities Act 14 of 2003, section 38.
[66] Persons with Disabilities Act No. 4 of 2025, section 28(2).
[67] Ibid, section 28(3)(a).
[68] The Penal Code Act (Cap 63), Sections 11.
[69] The Penal Code Act (Cap 63), Sections 11, 12.
[70] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges*, page 12.
[71] CEDAW Committee, General Recommendation No. 33, para 8.

36. Moreover, sections 162-167 the **Criminal Procedure Code** (CPC), which are featured in a section titled "Procedure in Case of the Lunacy or other Incapacity of an Accused Person," explicitly discriminate against individuals with intellectual and/or psychosocial disabilities in their interactions with Kenya's criminal justice system.

37. Read together, these provisions assume that persons with intellectual and/or psychosocial disabilities are incapable of defending themselves. When a court deems an accused person "of unsound mind" under these provisions, their trial is postponed indefinitely. This effectively denies them their right to have the criminal charges against them determined in "a fair and public hearing"[72] culminating in the court rendering a public verdict about their alleged criminal liability. Such individuals are, on the basis of their disability, also deprived of their right to be presumed innocent until proved guilty according to law, along with the other key elements of their right to a fair trial, including the right to defend themselves, and due process of law.[73]

38. Making matters worse, the same provisions of the CPC empower courts in these circumstances to order the indefinite detention of women and girls with intellectual and/or psychosocial disabilities "at the President's pleasure" in prisons or hospitals — without their participation in the very proceedings that result in that detention. This directly contravenes Article 15 (1) of CEDAW, which guarantees women equality before the law and Article 15 (2), which guarantees women equal treatment "in all stages of procedure in courts and tribunals." This concern is compounded, under the CRPD, by the fact that such detention also constitutes institutionalization and deprivation of liberty on the basis of disability, contrary to that Convention.[74] In practice, such detention can extend far beyond any period a criminal court could lawfully have imposed as a sentence. ICJ's research found that Kenya's largest mental health facility continues to hold individuals originally committed under these provisions for periods exceeding 40 years, with hospital officials citing the absence of a clear legal framework for their discharge.[75] This practice is in clear contravention of provisions of Article 15 of CEDAW, As this Committee underscored in its General Recommendation No.33, States parties have the obligation to "abolish discriminatory criminalization and review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women."[76]

39. Various court challenges have been brought to these provisions, with some High Court judges having found some of the provisions of the CPC to be unconstitutional, on various different bases.[77] Despite clear declarations of unconstitutionality of the relevant provisions of the CPC, these decisions did not however clearly amend the provisions themselves, and Parliament has yet to amend the CPC.

40. In practice, judges and justice actors therefore continue to apply and implement these provisions despite the fact that they have been found to fall short of the standards required by

[72] The International Covenant on Civil and Political Rights (ICCPR), Article 14 (1).
[73] Ibid, Article 14 (3).
[74] CRPD Committee, Guidelines on Deinstitutionalization including in Emergencies (2022), https://www.ohchr.org/en/documents/legal-standards-and-guidelines/crpdc5-guidelines-deinstitutionalization-including; Guidelines on the right to liberty and security of persons with disabilities, https://www.ohchr.org/en/documents/reports/a7255-report-committee-rights-persons-disabilities-13th-through-16th-sessions.
[75] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges*, pages 25-26.
[76] CEDAW Committee, General Recommendation No. 33, paras 51 (l).
[77] Ibid, pages 15-29; the court cases include: *Hassan Hussein Yusuf v. Republic*, Criminal Appeal No.59 of 2014, High Court of Kenya at Meru, 10 May 2016, eKLR; *HM v. Republic*, H.C.C.R.A No. 17 of 2017, High Court of Kenya at Meru, 9 November 2017, eKLR; *BKJ v. Republic*, Criminal Appeal No.16 of 2015, High Court of Kenya at Meru, 10 May 2016, eKLR; *Joseph Melikino Katuta v. Republic*, Criminal Appeal No. 12 of 2016, High Court of Kenya at Voi, 20 July 2017, eKLR; *Republic v. SOM*, Criminal Case No. 6 of 2011, High Court of Kenya at Kisumu, 30 April 2018, eKLR; *Kimaru & 17 others v. Attorney General & another*, Petition 226 of 2020, High Court at Nairobi, 1 February 2022, eKLR.

the Kenyan Constitution and their clear contravention of international human rights law and standards.[78] In the absence of legislative intervention, ICJ has documented several cases in which High Court judges have not only applied but indeed upheld the constitutionality of these provisions, in explicit disagreement with judgments declaring the provisions unconstitutional.[79] The Court of Appeal, while acknowledging the conflicting High Court judgments, neglected an opportunity to settle the confusion, though expressly indicating that section 166 of the CPC was "clearly unsatisfactory and in dire need of reform."[80]

Civil context restrictions on legal capacity

41. The **Civil Procedure Act**[81] takes away the legal capacity of persons with disabilities by allowing the appointment of "guardians" or "next friends" to substitute their decision-making and purportedly act on their behalf.[82] The **Civil Procedure Rules**[83] — regulations enacted under Section 81 of the Civil Procedure Act that provide more detailed procedures governing civil proceedings before the courts — in various sections, use the derogatory term "persons of unsound mind" to refer to persons with intellectual and/or psychosocial disabilities,[84] and equate persons of "unsound mind" with minors and subjects them to the procedures that apply to children.[85] Under these rules, once an individual is declared a person of "unsound mind", such a person is prohibited from representing themselves or appointing a lawyer and filing a lawsuit in their own name,[86] and a guardian is appointed by the Court to make decisions on their behalf more generally.[87]

42. Read together, the **Civil Procedure Act** and the **Civil Procedure Rules** explicitly deny legal capacity and mandate the application of a substituted decision-making regime. For women with disabilities specifically, this regime of substituted decision-making compounds pre-existing gendered barriers to property and inheritance. ICJ and UDPK's ongoing research has found, for example, that women with disabilities are frequently presumed unable to manage financial affairs, to hold property or inherit without the involvement of a male relative. Laws requiring declaration of "unsound mind" provide a ready legal mechanism through which such exclusion can be formalized. Read in light of Articles 15(2) and 16(1)(h) of CEDAW, which guarantee women equal legal capacity in civil matters and equal rights of spouses in respect of ownership of property, the **Civil Procedure Act** and **Civil Procedure Rules** therefore place women with disabilities at particular risk of dispossession by family members purporting to act as their "next friend" or guardian. Therefore, when applied to women and girls with disabilities, this legal framework is in clear contravention of both the CEDAW and the CRPD.[88]

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[78] ICJ, *Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges,* 2025.
[79] Ibid.
[80] *Mwachia Wakesho v. Republic,* Criminal Appeal No. 8 of 2016, Judgement of the Court of Appeal at Mombasa, 3 December 2021, eKLR, para 56-57.
[81] Civil Procedure Act, Cap 21.
[82] Ibid, section 93.
[83] Civil Procedure Rules (2010).
[84] Ibid, Order 4, Rule 1; Order 10, Rule 1; Order 27, Rule 10; and Order 32, Rule 15.
[85] Ibid, Rule 15.
[86] Ibid, Order 32, Rule 1.
[87] Ibid, Order 32, Rules 2, 3 and 4.
[88] KNCHR, '*Briefing Paper on How to Implement Article 12 of the Convention on Rights of Persons with Disabilities Regarding Legal Capacity in Kenya*,' 2012, available at: https://www.knchr.org/Portals/0/GroupRightsReports/Briefing Paper on Legal CapacityDisability Rights.pdf?ver=2014-01-09-114052-403, pages 54-55; Disabled People's Organizations in Kenya, 'Implementation of the UN Convention on the Rights of Persons with Disabilities in the Republic of Kenya,' Submission to the CRPD Committee of the response to the List of Issues – LOI 2015, June 2015, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FCSS%2FKEN%2F21296&Lang=en, pages 18-19.

In light of the above concerns, the ICJ and UDPK recommend that the State Party be urged to:

The legislature

a. Conduct a review of its laws pertaining to access to justice and legal capacity with the aim of reforming them to ensure compliance with CEDAW and other relevant international human rights law and standards. The review should result in the repeal and/or amendment of the following laws and provisions:
    - Sections 162-167 of the **Criminal Procedure Code**;
    - Sections 11-12 of the **Penal Code**;
    - The **Legal Aid Act**, to explicitly recognize persons with disabilities as beneficiary groups; and
    - Section 93 of the **Civil Procedure Code**.

The executive

b. Conduct a review of the relevant policies, regulations, rules and guidelines pertaining to access to justice and legal capacity to ensure compliance with CEDAW and other relevant international human rights law and standards. The review should result in the repeal or amendment of the following instruments and provisions:
    - Order 4, Rule 1; Order 10, Rule 1; Order 27, Rule 10; and Order 32, Rule 15 of the **Civil Procedure Rules**.
    - The **Legal Aid (General Regulations)**, Regulations 4, 6 and 15.
c. Through the Attorney-General, develop regulations to provide free legal aid services to persons with disabilities, as mandated under section 28(3) of the **Persons with Disabilities Act**.

The judiciary

The Chief Justice, as the head of the judiciary, should:

d. Issue practice guidance to courts to support persons with disabilities and to avoid reliance on the provisions of the **Criminal Procedure Code** found unconstitutional by the High Court, and other legal provisions which deny legal capacity in contravention of CEDAW and other relevant international human rights law and standards.
e. Take all necessary steps, in consultation with persons with disabilities, to adopt Rules, as mandated under Section 28(3) of the **Persons with Disabilities Act** to ensure the provision of procedural accommodations to persons with disabilities.