



**MINISTRY OF PUBLIC SERVICE, GENDER,
SENIOR CITIZENS AFFAIRS & SPECIAL PROGRAMMES
STATE DEPARTMENT FOR SOCIAL PROTECTION, SENIOR CITIZENS
AFFAIRS & SPECIAL PROGRAMS**

Guiding questions for defining the normative content of the issues examined at the eleventh session of the General Assembly open-ended working group for the purpose of strengthening the protection of the human rights of older persons.

ACCESS TO JUSTICE

Definition

- 1. What is the definition of the right of older persons to access justice in the national legislation in your country? Or how should such a right be defined, considering existing national, regional and international legal framework?**
- Article 57 of the CoK ordains the State to take measures to ensure older persons fully participate in the affairs of society, pursue their personal development; live in dignity and respect and are free from abuse; and receive reasonable care and assistance from their Family and the State;
 - Article 22 (1) of the CoK on the Enforcement of Bill of Rights stipulates that every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bills of Rights has been denied, violated or infringed, or is threatened;
 - Article 47 of the CoK provides that the State shall ensure access to justice for all and Parliament enact legislation to give effect to the rights;
 - Article 48 of the CoK obligates the State to ensure access to justice for all persons and if any fees is required it shall be reasonable and shall not impede access to justice;
 - The National Policy on Older Persons and Ageing 2018 puts in place measures to ensure that the rights of older persons are protected and promoted.

Scope of the right



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1. What are the key normative elements of the right of older persons to access justice on an equal basis with others?

Please provide references to existing standards on such elements as below, as well as any additional elements:

a) The guarantee of older persons' legal capacity (legal standing and legal agency) on an equal basis with others and not denied on the basis of age;

- The Commission on Administrative Justice (CAJ) investigates complaints of abuse of power, unfair treatment and injustice;
- Office of the Judiciary Ombudsman investigates any allegations of misconduct of judicial officers/ staff, and addresses complaints from any litigants;
- The National Legal Aid and Awareness Programme under the Office of the Attorney General addresses issues pertaining to legal aid and access to justice;
- Advocates Complaints Commission which investigates complaints against advocates;
- Thematic Area 1 on Older Persons and the Law of the National Plan of Action on Older Persons and Ageing (2020-2025);

Intervention 3: Promote Alternative Dispute Resolution (ADR) mechanisms responsive to the needs of older persons.

b) Elimination of the influence of ageist stereotypes at any stage of judicial or no judicial proceedings, including the award of damages or compensation;

- Article 22 (1) of the CoK on the Enforcement of Bill of Rights stipulates that every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bills of Rights has been denied, violated or infringed, or is threatened;



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- Article 27 of the CoK guarantees every person equality before the law and the right to equal protection and benefit of the law;
- Section 5 (2) of the Employment Act 2007 prohibits against discrimination in employment and stipulates an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy and practice.

c) Access to timely legal proceedings, especially in situations of immediacy;

- Article 47 of the CoK provides that the State shall ensure access to justice for all and Parliament enacts legislation to give effect to the rights;
- Article 50, 50(2),50(2)(h) of the CoK and the Civil Procedure Act Orders 33 and 44) makes provisions for Application of pauper briefs and pro bono services;
- Legal notice no. 117 of the CoK provides for the protection of rights and fundamental freedoms;
- Practice and Procedure Rules, 2013 whose objective is to facilitate access to justice for all persons as required under Article 48 of the CoK;
- Article 159(2)(c) of the CoK makes provision for Alternative Dispute Resolution Mechanisms (ADR) and Mediation;
- Thematic Area 1 on Older Persons and the Law - Access of Legal Services of the National Plan of Action on Older Persons and Ageing (2020-2025).

Intervention 1: Promote establishment and restructuring of existing institutions to facilitate and enhance accessibility of legal services.

- The National Council of Elders provides a platform for affiliate councils to interact, negotiate and resolve conflicts and offer alternative dispute resolution.



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d) Accessibility of courtrooms, legal tribunals and other justice-related facilities to all older persons;

- The CoK under Article 47 obligates the government to guarantee access to justice by ensuring the cost of justice does not impede access;
- Article 159(2)(c) of the CoK makes provision for Alternative Dispute Resolution Mechanisms (ADR) and Mediation;
- Thematic Area 1 on Older Persons and the Law - Access of Legal Services of the National Plan of Action on Older Persons and Ageing (2020-2025);

Intervention 3: Promote Alternative Dispute Resolution (ADR) mechanisms responsive to the needs of older persons.

e) Access to legal services, including legal assistance, legal aid, counselling and hotlines, on an equal basis with others;

- Legal Aid Act 2016 gives effect to Article 19(2), 48, 50 (2)(g) and (h) of the CoK to facilitate access to access justice and social justice, to establish the National Legal Aid Service, to provide for legal aid, and for funding of legal aid;
- Thematic Area on Older Persons and the Law - Access of Legal Services of the National Plan of Action on Older Persons and Ageing (2020-2025);

Intervention 1: Promote establishment and restructuring of existing institutions to facilitate and enhance accessibility of legal services;

- The Judicial Service Commission has the Directorate of Public Affairs and Communications dedicated to providing public information;
- The National Legal Aid and Awareness Programme facilitates access to justice for those who cannot afford legal representation;
- Court Users' Committees (CUCs) resolve court-level problems and offer avenues for Alternative Dispute Resolution;
- Courts hold Open Days hold informal meetings with the public to answer



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questions about the judiciary and its work;

- The National Council of Elders provide a platform for affiliate councils to interact, negotiate and resolve conflicts and offer alternative dispute resolution.

f) Access to alternative, non-judicial pathways to justice, including, but not limited to, one-stop community justice centres, paralegal support, ombuds procedures or specialist commissioners;

- Article 159(2)(c) of the CoK on ADR and Mediation;
- Section 8 (K) of the National Gender and Equality Commission (NGEC) Act 2011 makes provisions for NGEC to work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaborations in the protection and promotion of rights related to the principle of equality and freedom from discrimination;
- Section 16 of the Kenya National Commission on Human Rights (KNCHR) Act, 2002 makes provision for KNCHR to investigate on its own initiative or upon complaints made on human rights violations;
- The Commission of Administrative Justice (CAJ) Act, 2011 provides for the functions of CAJ among others to work with public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;
- Thematic Area 1 on Older Persons and the Law - Access of Legal Services of the National Plan of Action on Older Persons and Ageing (2020-2025)

Intervention 3: Promote Alternative Dispute Resolution (ADR) mechanisms responsive to the needs of older persons;

- We have the Court Annexed Mediation by the judiciary



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g) Access to reasonable accommodation in all legal and administrative proceedings at any stage to facilitate older persons' effective role as direct or indirect participants in justice proceedings;

- The Geriatric Bill, 2021: Part III—Rights and Obligations of the Family and the State in Caring for Older Members of Society Section 37 (1). The law enforcement agencies shall take the age of an older member of society into account during arrest, detention, trial, or other forms of lawful confinement;
- Thematic Area 1 on Older Persons and the Law - Access of Legal Services of the National Plan of Action on Older Persons and Ageing (2020-2025)

Intervention 1: Promote establishment and restructuring of existing institutions to facilitate and enhance accessibility of legal services;

- The Court Users Committees (CUCs) encourage the courts to become more customer service oriented. Membership varies widely often including advocates, NGOs, Government Agencies, Chiefs, religious leaders and elders in addition to judiciary officers. The CUCs also advises or makes recommendations on the practicability of judiciary policies and legal notice.

h) Adequate and appropriate training to all those working in the administration of justice and law enforcement, including the judiciary, police and prison staff, on the rights of older persons;

- Art.172 (d) of the CoK mandates the Judicial Service Commission to prepare and implement programmes for continuing education and training of judges and judicial officers. The Judiciary Training Institute (JTI) is responsible for preparing and implementing programmes for continuing education and training Judges and other Judicial officers. One of its programs is Continuing Judicial Education (CJE) for Judges and Magistrates which helps keep them in touch with community dynamics, aware of pressing social issues, and up-to-date with latest



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developments in the law. JTI also offers training to different cadres of staff to equip them with skills necessary for the performance of their duties;

- Article 244 of the CoK obligates the National Police Service to train their staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity;
- Thematic Area 1 on Older Persons and the Law - Access of Legal Services of the National Plan of Action on Older Persons and Ageing (2020-2025)

Intervention 2: Advocacy, Lobbying and awareness creation on rights of older persons;

i) Accommodation of the needs of older prisoners, including necessary physical adaptations, protection against violence and extortion, appropriate educational and vocational opportunities, and support with reintegration into the community;

- Thematic Area 10 on Cross cutting issue of the National Plan of Action on Older Persons and Ageing (2020-2025)

Intervention 1: Sensitize and create awareness to older persons on the cross-cutting issues;

- The Kenya Prisons Service has a Directorate in charge of Research, Statistics and Legal Unit that is tasked with training and sensitizing prison officers and inmates on human rights.

j) Equal access of older prisoners to services, including physical, mental and cognitive health, dental, hygiene and hospice services, and social and other support services available to the general population; and

- Article 51 of the CoK make provision for the Rights of persons detained, held in custody or imprisoned and stipulates - A person who is detained, held in custody



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or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned; A person who is detained or held in custody is entitled to petition for an order of habeas corpus; Parliament shall enact legislation that provides for humane treatment of persons detained, held in custody or imprisoned and take into the relevant international human rights instruments.

k) Access to prompt remedies and redress when older persons' right to access justice is denied.

- Commission on Administration of Justice investigates complaints of abuse of power, unfair treatment, injustice, oppressive and unfair official conduct;
- Office of the Judiciary Ombudsman investigates any allegations of misconduct of judicial officers/ staff and addresses complaints from litigants;
- Kenya National Human Rights Commission investigates complaints and submits annual reports on the overall performance of the Government in the promotion and protection of human rights;
- National Gender and Equality Commission spearheads efforts to reduce gender inequalities and discrimination.

State obligations

- 1. What mechanisms or measures are necessary to ensure the enjoyment and to monitor implementation of the right of older persons to access justice, including State obligations to respect, promote, protect, and fulfill the right?**
 - Consider ring-fencing funds for legal aid for older members of society within the legal aid fund;



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- Ensuring all courts are older persons friendly and physically accessible to them;
- Prioritizing older persons cases especially cases on land and succession by expediting the litigation processes;
- Ensure promotion of the role of the older persons in the traditional conflict resolution mechanism to complement the judicial system;
- Ensuring financial independence of the judiciary through sufficient budget allocation;
- Continuous trainings and exchange programs for judicial officers, prison officers and the National police service officers;
- Hire more magistrates and judges;
- Conducting studies on access to justice by older persons;
- Enacting specific laws and domesticating the international and regional laws that seek to promote access to justice for older persons.

Special considerations

2. What special considerations or specific issues should be included in the right of older persons to access justice, including procedural and age-appropriate accommodations as well as responsibilities of non-State actors?

- Scaling up paralegals especially in rural areas as an important measure towards enhancing access to justice for older persons;
- Advocacy for older persons specific court days.



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Implementation

3. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to access justice for older persons?

Best practices

- Kenyan traditional values and norms that give priority to older persons. There is need to enhance these traditional values and norms through awareness creation;
- NGEK, KNCHR, Civil Society and Non-Governmental agencies educate the general public and older persons on their rights through public forums, press conferences and human rights-based forums;
- The adoption of Court Annexed Mediation;
- Court Open Days to respond to questions from the public about the judiciary and its work.

Challenges

- Ageism
- Inability by vulnerable older persons to pay the statutory judicial fees/fines
- Dependency on perpetrators/ abusers
- Ignorance towards accessing their rights to justice
- Overcrowded Courts hamper effective access to justice by the older persons
- Inadequate legal pro bono services
- Unfriendly and inaccessible Courts
- Lengthy and prolonged judicial proceedings. Some taking years especially cases on succession
- Costly Cash bails and bonds