



Asamblea General

Distr. general
3 de marzo de 2014
Español
Original: inglés

Consejo de Derechos Humanos

25º período de sesiones

Tema 3 de la agenda

**Promoción y protección de todos los derechos humanos,
civiles, políticos, económicos, sociales y culturales,
incluido el derecho al desarrollo**

Información presentada por la Comisión Nacional de Derechos Humanos de Kenya*

Nota de la Secretaría

La Secretaría del Consejo de Derechos Humanos transmite adjunta la comunicación presentada por la Comisión Nacional de Derechos Humanos de Kenya**, que se reproduce a continuación de conformidad con el artículo 7 b) del reglamento que figura en el anexo de la resolución 5/1 del Consejo, según el cual la participación de las instituciones nacionales de derechos humanos se basará en las disposiciones y prácticas convenidas por la Comisión de Derechos Humanos, incluida la resolución 2005/74, de 20 de abril de 2005.

* La institución nacional de derechos humanos tiene la acreditación de la categoría "A" ante el Comité Internacional de Coordinación de las Instituciones Nacionales para la Promoción y la Protección de los Derechos Humanos.

** Se reproduce en el anexo tal como se recibió, en el idioma en que se presentó únicamente.

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Anexo

[Inglés únicamente]

Access to justice for children in Kenya

Introduction

1. Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is an independent National Human Rights Institution with ‘A status’ accreditation. The Commission was originally a statutory body established under the KNCHR Act of 2003. With the promulgation of the 2010 Constitution, the Commission was re-established under Article 59 (4) of the 2010 Constitution and for that reason, enjoys Constitutional protection as a Constitutional Commission.

Under its constitutive Act, KNCHR is mandated, among others, to act as the principal organ of the State in protecting and promoting human rights in Kenya.

In line with the new constitutional dispensation and in keeping with the expansive Bill of Rights, KNCHR recognizes institutional reforms and access to justice as two of its strategic priorities for the period 2013 - 2018.

1.2 Overview of Access to Justice in Kenya

Access to justice revolves around the ease with which ordinary citizens are able to make use of the laws, legal procedures and legal institutions to resolve their problems in general and particularly to ensure their rights. Human Rights would be futile without an effective means of seeking redress for their breach. Some of the essential components of access to justice include: laws- that are fair and accessible to the citizens in their form and language, the availability of a variety of easily accessible and effective mechanisms for resolving disputes that are adequately resourced and organised; simple and affordable procedures for achieving justice, fairness in the results of dispute resolution processes and knowledge on the part of citizens to enable them easily use the law and legal institutions.¹

The Constitution is a significant document with regard to entrenching the right to access to justice for all in Kenya². Internationally the Government has legally committed to ensure access to justice to individuals under:

- The International Covenant on Civil and Political Rights (*Article 14 and 26*)
- The United Nations Convention against Torture (*Article 13 and 14*)
- The International Convention on the Elimination of All Forms of Racial Discrimination (*Article 6*)

¹ The Draft National Policy and Action Plan on Human Rights whose purpose is to give effect to the Bill of Rights contained in the Constitution by providing a comprehensive framework that elaborates broad human rights principles.

² See Article 10, Article 20 (4), Article 22(1) and (3), Article 27 (1), Article 48, Article 50, and Article 159 of the Constitution of Kenya > Available at <http://www.kenyalaw.org/kl/index.php?id=398>

- Convention on the Rights of Persons with Disabilities (Article 13)
- The African Charter on Human and Peoples' Rights (*Article 7*)
- Maputo Protocol³(*Article 8 and 15*).

Under the Vision 2030⁴, access to justice has been identified as critical component in alleviating poverty as it creates an enabling environment for investment and development. The goal for the 1st and 2nd Medium Term Plans of the Vision 2030 is to develop and implement a legal and institutional framework that is vital to promoting and sustaining fair, affordable, and equitable access to justice.

2.0 Rights of the Child

2.1. Access to justice for children in Kenya

Kenya is a signatory⁵ to the Convention on the Rights of the Child and is also a signatory to the African Charter on the Rights and Welfare of the Child⁶. Kenya has domesticated and implemented these international instruments domestically through the Children's Act, 2001⁷. The constitution of Kenya⁸ provides that the general rules international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution. The CRC and the ACRWC established the overarching legal framework to consider how countries are giving effect to the rights of children at the domestic level.

The Children's Act (hereinafter "the Act") sets forth legal obligations of all duty bearers - the government, parents, and civil society- to respect, protect and fulfil the rights of children. It has been hailed as a landmark by virtue of the fact that it is the first example of a comprehensive enactment in Kenya which gives effect to any international human rights treaty to which the country is a party.⁹ The long title of the Act describes the purpose of the Act as:

'An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the CRC and the African Charter on the Rights and Welfare of the Child and for connected purposes'.

The constitution of Kenya¹⁰ provides for a system of court system in Kenya, the constitution in Article 169 provides for the establishment of the subordinate courts¹¹.

³ Also known as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. It guarantees comprehensive rights to women in Africa.

⁴ <http://www.vision2030.go.ke/>

⁵ Convention on the rights of the child, Kenya ratified the convention on 31 July 1990

⁶ African Charter on the Rights and Welfare of the Child ratified by Kenya on 25 July 2000,

⁷ Children's Act No.8 of 2001 (Chapter 586 Laws of Kenya)

⁸ Constitution of Kenya 2010 at Article 2(5) and 2(6), Available at <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

⁹ See 2005 'Rights Brought Home?: Human Rights in Kenya's Children Act 2001', Wabwire, MN in Bainhaim, A and Rwezaura, B (eds.) *The International Survey of Family Law 2005 Edition* Bristol: Jordan Publishing, p394 describes the Act as 'historic' and as having 'broken new ground in Kenya's human rights law'

¹⁰ Ibid, see Article 163 to 170

¹¹ Subordinate courts include Magistrates court, Kadhis court, court martial and any other court as may be established by an Act of parliament, other than the courts established under Article 162.

The Act¹² establishes child-specific (Children's) courts which are conferred with exclusive original jurisdiction to deal with cases involving children (except capital offences and where children are jointly charged with adults to be handled by ordinary trial courts).

Children in Kenya face a number of challenges accessing justice, these challenges include;

a) *Representation of children who are in conflict with the law*

The International Covenant on Civil and Political Rights¹³ ensures the right to a fair trial, which can be said in certain cases to include legal representation. Pursuant to ICCPR¹⁴, in the determination of any criminal charge against him; everyone shall be entitled to.... Be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, assigned to him in any case here the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it. Article 14 ICCPR also guarantees the right to a fair and public hearing.

The African Charter on Human and People's Rights also embodies the right to a fair hearing. It has been recommended by the Committee that States Parties to the African Charter on Human and peoples' rights to create awareness of the accessibility of the recourse procedure to provide the needy with legal aid.

The Act¹⁵ guarantees due-process rights for children alleged of/conflict with the law. These include the child's right to prompt and direct notification of the charges, the right to legal representation provided by the government (if the child is unable to obtain such representation), the right to a prompt determination of the case, the right to free assistance by a court interpreter and the right of appeal against the decision of a lower court. In relation to the right to legal representation it is noteworthy that although the government has published a legal aid bill¹⁶ an institutionalized legal aid scheme, not only for children, but also for the general Kenyan populace is largely non-existent and still ranks low in the Kenyan government's priorities.

To access the rights, children are often required to obtain legal advice. The Children's Act¹⁷ place the Government under an obligation to "take steps with a view to achieving progressively the full realization of the right of the child." In a state where legal aid is not a civil right, where there is no public defender system, it is incumbent that a system be developed that can avail access to legal advice for children.

b) *Child friendly courts/spaces*

Although there is no international standard explicitly requiring the establishment of a separate set of courts for children, there is nonetheless an implicit presumption that youth offenders should be dealt with differently from adults, in an understanding environment, and in compliance with the current norms regarding the well-being of the child. The four General Principles of the UNCRC¹⁸ should be complied with throughout the juvenile justice system, including during court proceedings.¹⁹ In Kenya children have had to be handled by adult courts which operate as *ad-hoc* children's courts (by the fact that court

¹² Part XIII, of the children's Act

¹³ Article 14 of ICCPR

¹⁴ Article 14.3(d) and Article 14 of ICCPR

¹⁵ Section 186 of the children Act

¹⁶ Legal Aid Bill 2012

¹⁷ Section 3 of the children's Act, 2001

¹⁸ The four principles are; survival and development; participation; best interest of the child; non-discrimination

¹⁹ https://www.essex.ac.uk/armedcon/story_id/save_jj_modern_concepts.pdf

officers convert them to serve as Children's courts and exclude the general public).²⁰ *Ad-hoc* courts lack the ambience necessary for a child-friendly environment. The enactment of the Children's Act highlighted the need for child-specific and dedicated courts in line with the ideal in article 40 of the CRC and article 17 of the ACRWC which encourage the development of child specific systems/forums. Since the Children's Act became law, there have been no new physically built Children's courts have been put up. It is significant however that since the enactment of the Act in 2002, the Chief Justice, has invoked the Act as a legal basis to appoint and gazette magistrates across the whole country to serve as Children's courts' magistrates with the mandate and jurisdiction to specifically handle matters related to the enforcement of the Children's Act, including juvenile justice.²¹

c) *Age of Criminal Liability*

The Act does not enact any new rule on the minimum age of criminal responsibility, therefore leaving a low age of eight under the Kenyan Penal Code. The low minimum age of eight falls short of the UN Committee on the Rights of the Child's consistent criticism of countries with a low minimum age. In its Concluding Observations on Kenya's Initial Report which it considered in the year 2001, the Committee expressed 'concern that the minimum age of eight was too low'.²² It specifically urged Kenya to consider raising this minimum age to a higher age. Since the Act was passed almost a year after the Committee's observations, it would have been expected that the Committee's recommendations would find expression in the provisions of the Act.

d) *Sentencing child offenders*

There is a range of non-custodial community-based sentences that can be applied to children who come into conflict with the law. They include supervision orders (with or without requirements); probation orders; combination orders (combining community service and probation orders); community treatment orders; community service orders, and attendance centre orders.

The Act also enacts an array of measures by which a court may deal with a child upon a finding of guilt. By enacting these options, the Act substantially seeks to comply with relevant international law²³ on juvenile sentencing. The Act provides for alternative sentences for child offenders.²⁴ A trial court may upon recording a finding of guilt, deal with a child offender by placing him or her in a probation programme, in the care of an adult or charitable institution, committing the child to counselling, an educational institution, vocational training or to community service. The trial court may also have recourse to the options of ordering the discharge of a child (where this is appropriate) or ordering a friendly settlement between the child and victim(s) of the crime or the payment of fines/compensation. Section 190(1) of the Act specifically excludes *imprisonment* as a punishment for children. This absolute prohibition of imprisonment is broader than the CRC, Article 37(1) (a) and the ACRWC, Article 17(2) (a) both of which only prohibit *life imprisonment without the possibility of parole*. This leaves the option of rehabilitation schools (for children aged between 10 and 15 years) and borstals (for children aged between 16 and 18 years) but specifies these as a last resort in line with article 37 of the

²⁰ See Human Rights Watch (note 52 above) generally. See also, 2003, *Juvenile Justice Journal: After the Promise - A Situational Analysis of Child Rights Protection under the Children's Act*, The CRADLE and Odhiambo, M

²¹ See the CRADLE and Odhiambo (note 93 above) and Chambers of Justice (note 21 above), p7

²² UN Committee on the Rights of the Child *Concluding Observations: Kenya*, CRC/C/15/Add.160 07 November 2001 Para 22

²³ Article 40(3) of the CRC

²⁴ The children's Act, section 191(1)

CRC and article 17 of the ACRWC.²⁵ Further, the Act prohibits the use of both the death penalty and for the first time in Kenyan criminal procedure law, the use of corporal punishment for children²⁶

e) Training of Actors in the Juvenile Justice Sector

The successful implementation of children's justice programmes requires co-operation and co-ordination between the various government bodies involved in the criminal justice system and other agencies, institutions and individuals working to help children in conflict with the law. Training programmes are also essential, to ensure that personnel are properly equipped to work with these children. Training is vital to bringing about changes to criminal justice systems. The setting up of a child friendly justice system requires that personnel working within the justice system be knowledgeable about international standards and guidelines and about how these international standards are to be applied locally. They need to know their own national policies and how to put these into practice. A juvenile justice system will function better if all parties concerned gather together, interact

and exchange ideas on the possibilities and constraints (legal or material) of their role in the administration of juvenile justice. Relevant children's justice personnel should also be trained within each of their roles to better work with children in conflict with the law. A juvenile justice system will function better if all parties concerned gather together, interact and exchange ideas on the possibilities and constraints (legal or material) of their role in the administration of juvenile justice. Relevant children's justice personnel should also be trained within each of their roles to better work with children in conflict with the law.

f) Lack of social protection

The realisation of children's rights has a direct relationship with widespread and endemic poverty levels that exist in Kenya; poverty alone accounts for many of the problems faced by children in Africa.

The legal framework under Kenyan Children's Act affirms the parental duty of support where parents bear the primary obligation to provide for children's needs including education, health, housing, clothing etc., while the State's role is envisaged as secondary and predicated on the inability or unwillingness of parents to take care of their children due to poverty or indigence.

The Act does not provide for mechanisms for securing financial support from public funds [which is] necessary for the survival and development of children in financially disadvantaged family situations.

²⁵ Article 37 of the CRC and Article 37 of the ACRWC provides that for children 'deprivation of liberty' should only be resorted to 'as a last resort and for the shortest appropriate period of time'. The UN Rules on Juveniles Deprived of their Liberty (Rule 11(b)) broadly defines the term 'deprivation of liberty' to include all instances of confinement whether in closed institutions such as prisons or open child-specific institutions such as reform/rehabilitation schools and borstals which exists in Kenya

²⁶ sections 190(2) and 191(2).

g) *Establishment of institutional framework for the implementation of children's rights*

The Council of children services²⁷ remains far from effective in discharging its role in the implementation of children's rights in Kenya and therefore there is need for it to be made effective and efficient and could play a role in terms of the states under the CRC and the ACRWC.

Conclusion

Ultimately, the full realisation of the rights guaranteed under the Children's Act, CRC and ACRWC requires extra-legal measures. This involves four key areas; (a) sensitisation of professionals and the general public, (b) training of professionals, (c) budgeting for children's rights at all levels of government (national, regional and local) and (d) procedural reform within state institutions requiring innovation and dedication of different officials in the implementation process.

Unless something is done to introduce a national regime of state-funded child support benefits, the rights of the child will remain paper rights and pipe dreams for the hundreds of thousands of poor children in Kenya who are ravaged daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country.

²⁷ NCCS has the mandate to formulate policies, develop plans, monitor, co-ordinate and mobilize resources for the implementation, realization and safeguarding of the rights and welfare of the Child. Vision To be a vibrant agency in the realization and protection of the rights and welfare of Children for National Prosperity> available on http://www.nccs.go.ke/index.php?option=com_content&view=article&id=59&Itemid=62