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### Совет по правам человека

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**Поощрение и защита всех прав человека,  
гражданских, политических, экономических,  
социальных и культурных прав,  
включая право на развитие**

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## Приложение

*[Только на английском языке]*

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction.....	1-6	3
1.1 Kenya National Commission on Human Rights .....	1-2	3
1.2 Protection of the Human Rights of Persons Deprived of their Liberty .....	3-6	3
II. State of Persons deprived of their liberty in Kenya.....	7-19	4
2.1 Juveniles .....	7-8	4
2.2 Segregation of Juveniles from Adult offenders .....	9-10	4
2.3 Torture of juveniles.....	11	4
2.4 Legal Assistance .....	12-18	5
2.5 Minimum Age of criminal Responsibility .....	19	6
III. Persons with Mental Disability .....	20-31	6
IV. CAT Committee, 2013.....	32-34	8
V. Conclusion .....	35-36	8

## I. Introduction

### 1.1 Kenya National Commission on Human Rights

1. 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.

2. Pursuant to the KNCHR Act (No.14 of 2011), the Commission is mandated to promote the protection and observance of human rights in public and private institutions. In line with the new constitutional dispensation and in keeping with the expansive Bill of Rights which entrenches economic and social rights and explicitly recognizes that every person has the right to privacy<sup>1</sup>, KNCHR recognizes the realization of Civil political rights as one of its strategic priorities for the period 2013/18.

### 1.2 Protection of the Human Rights of Persons Deprived of their Liberty

3. Deprivation of Liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority<sup>2</sup>

4. Kenya is a monist state having passed a Constitution<sup>3</sup>Article 2(6) provides that all treaties ratified by Kenya form part of the Laws of Kenya. Article 21(4) states that *'the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.'*

5. The Kenyan Constitution<sup>4</sup> provides that Parliament shall enact legislation that provides for the humane treatment of persons detained, held in custody or imprisoned; and take into account the relevant international human rights instrument. Article 261(1) provides that parliament shall enact any legislation required by the constitution to be enacted to govern a particular matter within the period specified and Article 261(4). The import of this is that parliament should have enacted laws pertaining to Article 51<sup>5</sup> within four years of promulgation of the Constitution. The Person's Deprived of Liberty Bill and the Torture Bill were drafted and tabled before parliament but are yet to be enacted.

6. Kenya is a signatory to the International Covenant on Civil and Political Rights having ratified the same on the 1<sup>st</sup> of May 1972. Article 2(2) of the International Covenant on Civil and Political Rights provides that each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such laws or other measures may be necessary to give effect to the rights recognized in the present covenant. Kenya is a party to this covenant and should adhere to it.

<sup>1</sup> Article 31, Constitution of Kenya 2010, Available on <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

<sup>2</sup> Article 11(b) of the Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>3</sup> Article 2(6) provides that all treaties ratified by Kenya form part of the Laws of Kenya

<sup>4</sup> Article 51(3) of the Constitution of Kenya

<sup>5</sup> Rights of persons detained, held in custody or detained

## II. State of Persons deprived of their liberty in Kenya

### 2.1 Juveniles

7. A juvenile is defined as every person under the age of 18<sup>6</sup>, while deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave<sup>7</sup>

8. Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law and which are compatible with the deprivation of liberty.<sup>8</sup>

### 2.2 Segregation of Juveniles from Adult offenders

9. The Children Act<sup>9</sup> provides that ‘a child offender shall be separated from adults in custody, The Children’s Act mirrors the provisions of *the International Covenant on Civil and Political Rights*<sup>10</sup> (ICCPR) further states that an accused juvenile shall be separated from adults and brought as speedily as possible for adjudication. However, this is not the case in Kenya according to US Department of state report<sup>11</sup> the juvenile pre-trial detainees are not separated from the adult population during the initial detention periods at the police stations.

10. ICCPR<sup>12</sup> further provides that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and status. The Beijing Rules<sup>13</sup> further states that juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of the institution also holding adults. This is a far cry from the situation in Kenya. Police cells are usually overcrowded with poor sanitation exposing the children to different types of diseases.<sup>14</sup> Over the years children and adults have been detained in the same police cells waiting to be charged but the government has never addressed this issue.<sup>15</sup>

### 2.3 Torture of juveniles

11. The Children Act<sup>16</sup> provides that no child shall be subjected to torture, of cruel treatment or punishment, unlawful arrest or liberty or deprivation of liberty. It further explains<sup>17</sup> that if a child infringes the law he should be informed promptly and directly of the charges against him. The child should be brought to court before 24 hours.<sup>18</sup> Despite these elaborate provisions of the law the practice is different, In a report published by Human Rights Watch<sup>19</sup>, it was discovered that some of the children are beaten up by the

<sup>6</sup> Article 11(a) of the Rules for the Protection of Juveniles Deprived of their Liberty

<sup>7</sup> Article 11(b) of the Rules for the Protection of Juveniles Deprived of their Liberty

<sup>8</sup> Article 13 Rules for the Protection of Juveniles Deprived of their Liberty

<sup>9</sup> See Section 18(3) of the Children’s Act

<sup>10</sup> See Article 10.2 *International Covenant on Civil and Political Rights*

<sup>11</sup> Human Rights Report 2011 available on <http://www.state.gov/j/drl/rls/hrrpt/2011/af/186208.htm>

<sup>12</sup> See Article 10.3 of *International Covenant on Civil and Political Rights*

<sup>13</sup> See Article 13.4 of the Beijing rules

<sup>14</sup> Ibid

<sup>15</sup> bid

<sup>16</sup> See Section 18(1) of the children’s Act

<sup>17</sup> See Section 186 (a) of the Children Act

<sup>18</sup> Juvenile Injustice: Police abuse and detention of street children in Kenya, <http://www.hrw.org/reports/1997/kenya/>

<sup>19</sup> Ibid

police men, denied food and in some cases they are released with no charges and told to go home.

## 2.4 Legal Assistance

12. The importance of providing legal assistance cannot be over emphasized; the Beijing Principles<sup>20</sup> provides that a juvenile shall have the right to be represented by a legal advisor or to apply for free legal aid where there is position for such aid in the country.

13. The Convention on the Rights of the Child<sup>21</sup> Provides that state parties shall ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court of other competent, independent and impartial authority and to prompt decision on any such action

14. The Children's Act<sup>22</sup> mirrors the position taken by the Beijing rules and the provisions of the Convention on the Rights of the Child and provides that upon being charged and tried in court a child should be provided with legal assistance by the government if he cannot afford assistance.

15. A report by the Human Rights Watch<sup>23</sup> found that street children were committed for years to juvenile correctional proceedings with no legal representation. Sadly this is still the case up to date. Even with the government trying to rehabilitate street children the police and the county government *askaris* still round up these children and in most cases they do not charge them but after beating and making them do work around the police stations they are released to go back to the streets only for this to happen again.

16. Kenya is in the process of putting up a legal framework<sup>24</sup> in respect to provision of free legal Aid by the state to indigent members of society, The Legal Aid Bill, 2013 will when enacted provide for legal aid to children as long as the application is made in accordance with the regulations and fulfill requirements prescribed in the Legal Aid Guide. The Bill is currently under review and is expected to be enacted into law before the end of 2014.

17. Measures relating to policy, decision-making, leadership and reform should be taken with the goals of ensuring that the Principles and Provisions of the Convention on the Rights of the Child and the United Nations Standards and Norms in juvenile justice are fully reflected in national and local legislation policy and practice, in particular by establishing a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of the children, promotes children's sense of dignity and worth and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to society<sup>25</sup>

18. Failure by Kenya to provide children with legal assistance indirectly affects the child's life in all aspects; after an unfair and unjust trial, this leads to prison terms which in turn lead to the violation of the right to privacy, right to education and freedom from torture.

<sup>20</sup> See Article 15.1 of the Beijing Principles

<sup>21</sup> See Article 37 of Convention on the Rights of the Child

<sup>22</sup> See Section 186 (b) and (c) of the Children Act

<sup>23</sup> Ibid

<sup>24</sup> The Legal Aid Bill, 2013

<sup>25</sup> The Vienna Guidelines on Action for Children in the Criminal Justice System

## 2.5 Minimum Age of criminal Responsibility

19. The legal age of criminal responsibility is 8 years<sup>26</sup>. Between the age of 8 and 12 years, a child is presumed not to be criminally responsible for his or her actions unless it can be proved that at the time of doing the act or making the omission, the child had the capacity to know that he or she ought not to do the act or make the omission. The minimum age of criminal responsibility should also be raised from 8 years to the generally accepted standard which is 12 years. However, Kenya made a commitment to the United Nations Human Rights Council that it would revise its age of criminal responsibility from 8 to 12 years. The Children Act (Amendment) Bill which is yet to be passed proposes that the age of criminal responsibility should be raised to 12 years.<sup>27</sup>

## III. Persons with Mental Disability

20. Mental health is defined as “the successful performance of mental function, resulting in productive activities, fulfilling relationships with other people, and the ability to adapt to change and to cope with adversity; from early childhood until later life, mental health is the springboard of thinking and communication skills, learning, emotional growth, resilience and self esteem<sup>28</sup>”

21. Persons with mental disorder are often vulnerable to human right violations with the most common being discrimination, abuse of personal dignity, inhuman and degrading treatment, torture, forced medical interventions, sexual violence, domestic violence and psychological stress. Others include reduced access to basic rights such as health care, education, food, housing and employment, restriction on civil liberties such as right to vote. The Constitution of Kenya as well as international human rights instruments have elaborate protection of the rights of persons with mental disorders.

22. Article 27 on equality and freedom from discrimination guarantees the right of persons with mental illness before the law and equal benefit of the law just like any other persons. Persons with mental illness have the right to fully enjoy all the rights and fundamental freedoms. In addition, the state is obligated not. The state is further obligated not to discriminate persons with mental disorders because of their health status or disability. Article 27 therefore calls for review of all policies and laws that may be discriminating persons with mental disorders.

23. Article 28 recognizes that even persons with mental disorders have inherent dignity and the right to have that dignity respected and protected. The treatment of persons with mental disorders and family, community or health institutions level must therefore observe Article 28 whenever they are dealing with a person with mental illness.

24. Article 29 protects persons with mental disorders from being deprived of their freedom arbitrarily or without just cause for example in relation to forced admission or confinement. It also protects them from any form of violence from either public or private sources or from being treated or punished in a cruel, inhuman or degrading manner.

25. Under Article 43, a person with mental disorders has the right to the highest attainable standard of health, which shall include the right to health care services. The highest attainable standard of health must be related to the quality, accessibility, responsiveness, equity and appropriateness of mental health services provided. Connected to this, further, under Article 21, the state and every state organ is obligated to observe,

<sup>26</sup> See Section 14(1) of the Penal Code

<sup>27</sup> Section 14(1) of the Penal Code to be amended

<sup>28</sup> WHO:210 pg 116

respect, protect, promote and fulfil the rights and fundamental freedoms of persons with mental disorders. Specifically, the state is obligated to take legislative, policy and other measures including setting the standards to achieve the progressive realization of the rights to persons with mental disorders in Article 43.

26. Under Article 54, persons with mental disorders, which is a form of disability, must be treated with dignity and respect and to be addressed or referred to in a manner that is not demeaning. De-stigmatization of mental disorders will be anchored on this Article. The state is also obligated to ensure that persons with mental disorders are integrated into society to the extent compatible with their interests.

27. In 2011, CNN aired a documentary titled 'Locked Up and Forgotten'<sup>29</sup> on the decaying health infrastructure in Kenya particularly in Mathari Psychiatric Hospital<sup>30</sup> the leading public mental health institution. The documentary reported that persons with mental disorders were being held in inhumane and degrading conditions. Alleged human rights abuses highlighted included: forced medication, crowded wards; and rape and sodomy by the other patients.

28. In Kenya up to 25%<sup>31</sup> of out-patients seeking health care in health facilities will suffer from some kind of mental condition whereas for in-patients this estimates leaps up to 40%. Vulnerable groups such as people with serious or chronic physical illness, children and adolescents with disrupted upbringing, people living in poverty or difficult conditions, the unemployed, survivors of violence and elderly persons are more likely to have higher rates of mental health conditions. Rates of alcohol and substance abuse disorders have been estimated at around 25% among patients in general healthy facilities in Kenya.

29. There is a very low detection rate for mental disorders including alcohol and substance abuse disorders. In a study only 4.1% of patients had been diagnosed with a mental health condition while the researchers' diagnoses showed a prevalence rate of 42.3% for depressive symptoms<sup>32</sup> At the Mathari Hospital the average bed occupancy is 85% for the Maximum Security unit and 105% for the civil units. Moi Teaching and Referral Hospital had the highest rate of over 200%<sup>33</sup>. Poor physical infrastructure was one of the challenges undermining effectiveness of mental health facility. Sanitation conditions are also poor<sup>34</sup>

30. A report by Kenya National Commission on Human Rights<sup>35</sup> observed that accommodation at the psychiatric ward was unclean and unhygienic with rooms smelling and covered in urine. Water shortage also plays a major role in sanitation and insecurity. This is in contravention with Principle 14 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care which lays down the appropriate resources for mental health centers to include appropriate professional care and that every mental institution should be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with these principles.

<sup>29</sup> [www.youtube.com/watch?v=gM4meNCLYAA](http://www.youtube.com/watch?v=gM4meNCLYAA)

<sup>30</sup> Mathari Psychiatric Hospital is a national referral and teaching hospital. The institution admits patients whose behavioral disturbances cannot be managed within the community

<sup>31</sup> Psychiatric morbidity among patients attending the district hospital outpatient clinics in Kenya. MD thesis Nairobi, Kenya: University of Nairobi, Department of Psychiatry

<sup>32</sup> Silenced Minds: The Systematic Neglect of the Mental Health System in Kenya, Page 19

<sup>33</sup> Ibid, Page 31-32

<sup>34</sup> Ibid

<sup>35</sup> Silenced Minds: The Systematic Neglect of the Mental Health System in Kenya.

31. The government has failed to take deliberate, concrete and targeted steps to realize the right to mental health<sup>36</sup>. The mental health sector is underfunded by the government leading to poor quality of services in the mental health facilities. Sufficient steps should be taken by the government to progressively realize the right to people with mental disorder.

#### IV. CAT Committee, 2013

32. Despite substantially increasing populations and crime rates in recent decades, the capacity of Kenyan prison systems has barely changed. Whilst the government claims reform and rehabilitation as the aim of criminal justice, in practice prison systems fail to deliver this; at the root of the challenges faced by the Kenyan penal system is the issue of overcrowding. Prison congestion puts pressure not only on accommodation facilities but also on the ability to ensure appropriate nutrition, sanitation, exercise and medical care; it puts greater demands on prison staff who are often too few, poorly trained and lowly paid. A research<sup>37</sup> Conducted by the Kenya National Commission on Human Rights found out that torture, degrading and inhuman treatment, unsanitary conditions and extreme overcrowding were very common in prisons. Death in prisons was also rampant in prisons and these cases were not investigated.<sup>38</sup>

33. To eliminate the problem of congestion in Kenya prisons requires a broader perspective which includes taking into account how the other actors within the criminal justice system such as the Police, the Office of the Attorney General, Prosecution, the Judiciary, Children's Department, and the Lawyers contribute to the problem. For instance, shortage of judicial staff, prosecution officers and investigators, and their frequent transfers, missing court files, and fewer courts, and unnecessary adjournments by advocates do greatly negate on the trial process by making the cases to drag in courts for a long time thus the high number of un-convicted offenders in prison custody has contributed to the rise in prison population. Inability to pay fines in cases where offenders have the option due to poverty and underutilization of alternative methods such as Community Service Order (CSO) by courts also contribute to overcrowding in prison institutions.

34. These other actors in the criminal justice system should be streamlined so that they do not negatively affect rehabilitation of offenders in prisons due to congestion. For instance the courts must employ alternatives to imprisonment such as Community Service Order (CSO), suspended sentence, and affordable fines to ensure that the many petty offenders do not congest prisons and remand homes. Measures to ensure speedy conclusion of cases must also be put in place within the police and the judiciary.

#### V. Conclusion

**35. Persons deprived of liberty face a myriad of challenges, the state being the greatest and primary duty bearer must ensure that the conditions in which persons deprived of Liberty are in accordance to internationally accepted standards; this will ensure that the rights of persons deprived of liberty are secured and legally protected.**

**36. Kenya should specifically enact persons deprived of liberty legislation given that the constitution provides for enactment of the law. Kenya must also in the meantime address itself to the following recommendations;**

<sup>36</sup> Ibid

<sup>37</sup> KNCHR A true Measure of Society: An account of the status of human rights in Kenyan Prisons

<sup>38</sup> KNCHR A true Measure of Society: An account of the status of human rights in Kenyan Prisons, Page 31



- The State must fast track the enactment of Children Act (Amendment) Bill, 2014 which proposes that the age of criminal responsibility should be raised from the age of 8 to 12 years.
  - The state should ensure that persons under 18 years in conflict with the law have access to free legal aid to ensure fair trial. The Legal Aid Bill, 2014 which provides for such should be passed to ensure that each and every accused person is able to access legal services
  - The government should establish public education and awareness raising programs at the community level that promote good mental. It should push for mental health awareness and sensitize the public on the same.
  - The government should address the backlog in the judiciary to ease up congestion in the prisons considering that the Office of the Director of Public Prosecution's office is employing more lawyers and phasing out police prosecutors.
-