**SUBMISSIONS TO THE TO THE UN WORKING GROUP ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN**

KAIH (Kenya Association of the Intellectually Handicapped)[[1]](#footnote-1) is a membership-based organization focusing on programs and initiatives that recognize the rights, meaningful participation, and full inclusion of Persons with Intellectual Disability (PWIDs) and their families in all aspects of life. USP-K (Users and Survivors of Psychiatry in Kenya)[[2]](#footnote-2) is a membership organization whose major objective is to promote and advocate for the rights of persons with psychosocial disability. KAIH and USP-K hereby make their submissions to the UN Working Group on the issue of discrimination againstwomen in law and in practice.

**Deprivation of Liberty in Law**

There are various laws that deprive women of their liberty in Kenya. The said laws are illustrated below:

1. **Constitution of Kenya**

The Constitution of Kenya is the supreme of law of the land of Kenya. [[3]](#footnote-3) The Constitution lays the foundation on the right to liberty. Article 29 of the Constitution states that every person has the right to freedom and security of the person, which includes the right not to be—

(*a*) deprived of freedom arbitrarily or without just cause;

(*b*) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(*c*) subjected to any form of violence from either public or private sources;

(*d*) subjected to torture in any manner, whether physical or psychological;

(*e*) subjected to corporal punishment; or

(*f*) treated or punished in a cruel, inhuman or degrading manner.

Every person includes both women and men; as a result, any other law that goes against Article 29 of the Constitution is unconstitutional to the extent of its inconsistency.[[4]](#footnote-4) The section below goes on to delve on laws that restrict or interfere with liberty of persons.

1. **The Criminal Procedure Code**

The Criminal Procedure Code (CPC) is an Act of Parliament to make provision for the procedure to be followed in criminal cases. [[5]](#footnote-5) Sections 162 to 167 of the CPC deal with the procedure in case on ‘lunacy’ (as referred to in the legislation) or other incapacity of accused persons. Sections 162 to 167 of the CPC reveal the three different procedures that are applied when the question of incapacity arises at trial, as discussed below.

The first procedure is found in section 162-164 of the CPC and it applies where the accused person, though legally ‘sane’ when committing the offence, is ‘insane’ at the time of his trial and incapable of making his defence. If the court is of the opinion that the accused is of ‘unsound mind’ and consequently incapable of making his defence, it shall postpone further proceedings in the case’.[[6]](#footnote-6) The court will order for the detention of the accused person in safe custody in such a place as it may think fit (if accused is not let out on bail) and afterwards transmit the certified copy of the court proceedings to the Cabinet Secretary responsible for Kenya Prisons Service, who shall, in turn transmit it for the president’s consideration.[[7]](#footnote-7)

The second procedure is found in section 166 of the CPC. It applies when the accused was legally ‘insane’ at the time of the offence. A special finding is reached to the effect that the accused is guilty but was ‘insane’ when he committed the crime. The trial court is then mandated to report the case for the direction of the president, and the accused is kept under custody in a place that the court directs.[[8]](#footnote-8)

The last procedure is laid down in section 167 of the CPC. It applies if the accused, ‘though not insane, cannot be made to understand the proceedings’. The court proceeds in hearing the evidence and if afterwards, if it is of the opinion that the evidence adduced cannot justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence heard would justify a conviction, it shall order the accused to be detained during the president’s pleasure.[[9]](#footnote-9)

The provisions in sections 162 to 167 of the Criminal Procedure Code allowing for detention at ‘the President’s pleasure’ of persons who due to disability are found either criminally not responsible or unable to participate in their defence violate fundamental tenets of criminal justice, constitutional rights and the rights of persons with disabilities. Being held not criminally responsible or unable to participate in one’s defence usually worsens the situation for the person; it brings aboutdetention at ‘the President’s pleasure’ with no predetermined end, in an environment where abuse often flourishes and rehabilitation is rarely possible. Often the detention/deprivation of liberty is longer (and sometimes with no set end) than what a person would have received as a sentence had the person been tried and convicted.

1. Persons Deprived of Liberty Act

An Act of Parliament to give effect to Articles 29 (f) and 51 of the Constitution and for connected purposes.[[10]](#footnote-10) According to Section 4 (e) and (f) of the Act, the right to privacy as set out in Article 31 of the Constitution,[[11]](#footnote-11) may be limited in respect of a person deprived of liberty where there is need for psychiatric treatment of persons with mental, or sensory disabilities; or if the limitation of the right is for the purposes of the security and safety of children, elderly persons and persons with disability.

According to section, 20 of the Act the Cabinet Secretary[[12]](#footnote-12) should take such reasonable and practical measures to ensure the establishment of recreational and cultural facilities in all institutions in which persons deprived of liberty are held for the benefit of their mental and physical health.

Section 23 (I) goes on to state that where persons with disabilities are deprived of liberty under any legal process, they shall be treated on an equal basis with others and shall be entitled to such guarantees as are in accordance with the Constitution and the law relating to the protection of the rights of persons with disabilities.

(2) Persons with disabilities deprived of liberty shall be accommodated in facilities that adequately meet their personal needs, taking into account the condition and nature of their disability.

(3) The Competent Authorities[[13]](#footnote-13) shall take appropriate measures to facilitate humane treatment and respect for the privacy, legal capacity and inherent human dignity of persons with disabilities deprived of liberty.

In short the sections above are saying, yes we know you have been detained. What we will do is ensure that the living conditions and the manner in which you are treated are humane. We shall also ensure that you can exercise you right to legal capacity and consider your nature of disability. Further, if you are a threat to your family/community or you are in need of psychiatric treatment we shall infringe your right to privacy. Our laws permit deprivation of liberty on the basis of a perceived danger or presence of a psychosocial or intellectual disability.

1. Power of Mercy Act

An Act of Parliament to make further provision with respect to the power of mercy pursuant to Article 133 of the Constitution; to provide for the appointment, tenure of office of the members and the powers and functions of the Advisory Committee on the Power of Mercy, and for connected purposes.[[14]](#footnote-14) The provisions of this Act govern all matters relating to a petition for the exercise of power of mercy by the President pursuant to Article 133 of the Constitution. [[15]](#footnote-15) The Act goes on to define a “convicted criminal prisoner” as any criminal prisoner under sentence of a court or a court martial, and includes a person detained in prison under sections 162 to 167 of the Criminal Procedure Code (Cap. 75). This therefore means that the power of mercy is applicable to persons who are found to have mental disabilities at the time of committing the offence or during trial.

In short, the Act is saying, yes we know you have been detained but you can make an application to us, the Advisory Committee on the Power of Mercy. The committee then recommends to the President a list of people who should be pardoned. However, the Act makes it clear that being pardoned is not being acquitted. [[16]](#footnote-16)

1. Penal Code

The Penal Code is an Act of Parliament to establish a code of criminal law in Kenya.[[17]](#footnote-17)

Section 12 of the Penal Code states that, a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

Once a person is found not guilty by reason of insanity or guilty but insane, the person is detained in a mental hospital. Concerns have been raised that once this finding is made, detention is indefinite. One is released only ‘at the discretion of the president.’ It also brings about questions of the extent to which the executive should interfere with matters concerning the judiciary.

USP-K and KAIH are concerned that the current legislative framework is inadequate and fails to meet universal standards on the right to liberty and security of a persons. As seen in Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD),[[18]](#footnote-18) which forms part of the laws of Kenya by virtue of Article 2(6) of the Constitution of Kenya.[[19]](#footnote-19)

**Recommendations on the law**

1. The whole set of provisions on ‘unsoundness of mind’ require re-examination and revision, in accordance with CRPD, in particular, articles 12 and 14 of the Convention. It is our submission that a person may not be held criminally responsible if found of ‘unsound mind’ when committing the crime, or not able to make a defence on account of being of ‘unsound mind’ at the time of the trial. However, use of these “defences” which are exceptions to basic tents of criminal justice process should be minimized, at the same time as accommodations (such as intermediaries and other accommodations) are provided to ensure a fair process. In most cases, providing accommodations would enable an individual to participate in his/her defence. It would also mean that in the absence of culpability (if one were to follow the insanity defense), and if the mental state that dominated one’s action without possibility of choice is no longer present, ‘dangerousness’ can no longer serve as grounds for deprivation of liberty. But community supports must be put in place to support such individuals so that protecting the public does not come at the expense of the individuals’ most fundamental rights.
2. Recommendation on the Persons Deprived of Liberty Act, 2014

* Repeal the provisions of section 4 (e) of the Act to reflect the role of supports and accommodations as envisaged in the CRPD.
* Implementation of Section 20 and 23 of the Act.
* Operationalize section 29 of the Act, which provides for the establishment of a Consultative Committee on Persons deprived of liberty. This will provide a platform to address issues affecting persons with psychosocial disability in detention.

**Deprivation of Liberty in Practice**

Below are highlights of deprivation of liberty in practice in the Kenyan context.

1. Prevalence of violence and abuse of persons with psychosocial and intellectual disability detained either in mental hospitals or other places of detention. More so, adequate and effective monitoring mechanisms are not in place.
2. Prevalence of forced and non-consensual medical health interventions against women with intellectual and psychosocial disabilities in psychiatric medication, sterilization, forced abortion and contraception which most of them happen in psychiatric facilities, care institutions and residential facilities i.e. boarding schools both public and private.
3. In addition to deprivation of liberty in mental health facilities and within criminal settings, deprivation of liberty within civil settings also persists. Amid prevalent stereotypes and seclusion of families of persons with psychosocial and intellectual disability by the community; some families in ‘goodwill’ have been forced to lock family members with psychosocial and intellectual disability for the fear that they may be abused or for economic reasons since they need to go and earn a living for their families. USP-K and KAIH does not dispute that indeed this is deprivation of liberty within civil settings, however we would like to clarify that limited support to families has forced them to override rights with ‘duty to care’. Our limited respite care which is determined by severity of disability supports only a limited number of persons with disabilities. Currently our social protection system (the Cash transfer programme) caters for 70 households per constituency targeting specifically people with high support needs.[[20]](#footnote-20) It is also to be noted that the primary objective of the current cash transfer programme is to empower caregivers in order to improve the lives and livelihoods of persons with severe disabilities within their household. The challenge in such a system is power relations and how this can impact on choice and control especially if the person is an indirect beneficiary.
4. USP-K and KAIH commends the State for continuous efforts to expand the programme, however the targeting approach[[21]](#footnote-21) and the objective of the cash transfer programme may require review to ensure that support directly benefits both persons with disabilities thereby enhancing their choice and control; and families of persons with disabilities thereby enhancing their income security.
5. In light of this, USP-K and KAIH in its position reiterates the CRPD Committee guidelines on implementation of the right to liberty and security of person;[[22]](#footnote-22) and basic principles and the guidelines on remedies and procedure on the right of anyone deprived of their liberty to bring proceedings before the Court by the working group on arbitrary detention [[23]](#footnote-23) and makes the following recommendations:
6. The State:

* Should refrain from security measures and diversion programmes which include mental health commitment unless it’s based on free and informed consent. USP-K and KAIH firmly observes that individuals should be liable for their actions and therefore ought to fulfil their duty to obey the law. Therefore recommends that the State explores alternative diversion programmes such as community service sentence for petty offenders with intellectual and psychosocial disability.
* Facilitate the independent monitoring framework under Article 33 (2) of the CRPD which include the Kenya National Commission on Human Rights and the National Gender and Equality Commission to monitor mental health facilities and other places of detention. This should be done in consultation with representative organizations of persons with intellectual and psychosocial disability.
* Expand the social protection system to be more inclusive and avail economic empowerment programmes for persons with intellectual and psychosocial disability.

In conclusion, KAIH (Kenya Association of the Intellectually Handicapped) and USP-K (Users and Survivors of Psychiatry in Kenya) would like to thank the UN Working Group for the opportunity to make submissions in this regard.

1. Kenya Association for the Intellectually Handicapped, retrieved from< <https://www.kaihid.org/>> accessed on 10 September 2018. [↑](#footnote-ref-1)
2. Users and Survivors of Psychiatry in Kenya retrieved from <<http://www.uspkenya.org/>> accessed on 10 September 2018. [↑](#footnote-ref-2)
3. Constitution of Kenya, 2010 < [www.kenyalaw.org/lex/actview.xql](http://www.kenyalaw.org/lex/actview.xql)> accessed on 15 September 2018.

   [↑](#footnote-ref-3)
4. Art.2 (4) of the Constitution of Kenya states that any law, including customary law, that is inconsistent with

   this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. [↑](#footnote-ref-4)
5. Criminal Procedure Code, Cap 75 <[www.kenyalaw.org/lex/actview.xql?ac](http://www.kenyalaw.org/lex/actview.xql?ac)> accessed on 10 September 2018. [↑](#footnote-ref-5)
6. Sec 162 (1) (2) Criminal Procedure Code. [↑](#footnote-ref-6)
7. Sec 162 (4) Criminal Procedure Code. [↑](#footnote-ref-7)
8. Sec 166 Criminal Procedure Code. [↑](#footnote-ref-8)
9. Sec 167 (1) Criminal Procedure Code. [↑](#footnote-ref-9)
10. Persons Deprived of Liberty Act, 2014 <[www.ilo.org/dyn/natlex/natlex4.detail?p\_lang=en&p\_isn=101067&p](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=101067&p)> accessed on 18 September 2018. [↑](#footnote-ref-10)
11. Article 31 states that every person has the right to privacy, which includes the right not to have—

    (a) their person, home or property searched;

    (b) their possessions seized;

    (c) information relating to their family or private affair unnecessarily required or revealed; or

    (d) the privacy of their communications infringed. [↑](#footnote-ref-11)
12. According to the Persons Deprived of Liberty Act, 2014, Cabinet Secretary means the Cabinet Secretary responsible for matters relating to the administration of justice. [↑](#footnote-ref-12)
13. According to the Persons Deprived of Liberty Act, 2014, Competent Authority means any person, officer or body responsible for or dealing with matters relating to persons deprived of liberty. [↑](#footnote-ref-13)
14. Power of Mercy Act, 2011 <<http://www.constitutionnet.org/sites/default/files/the_power_of_mercy_act_2011_0.pdf> > accessed 18 September 2018. [↑](#footnote-ref-14)
15. Article 133 (1) of the Constitution of Kenya states that:-

    On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by—

    (a) granting a free or conditional pardon to a person convicted of an offence;

    (b) postponing the carrying out of a punishment, either for a specified or indefinite period;

    (c) substituting a less severe form of punishment; or

    (d) remitting all or part of a punishment. [↑](#footnote-ref-15)
16. Section 25 (1) (b) [↑](#footnote-ref-16)
17. Penal Code, Cap 63 <[www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063](http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063) > accessed 10 September 2018. [↑](#footnote-ref-17)
18. United Nations Convention on the Rights of Persons with Disabilities < <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> > accessed 12 September 2018. [↑](#footnote-ref-18)
19. Kenya ratified the CRPD in 2008 see <[https://tbinternet.ohchr.org/Treaties/CRPD/.../INT\_CRPD\_NHS\_KEN\_21336\_E.doc](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=2ahUKEwi4nvb2_-TdAhWJPI8KHSfmDJAQFjAFegQIARAC&url=https%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCRPD%2FShared%2520Documents%2FKEN%2FINT_CRPD_NHS_KEN_21336_E.doc&usg=AOvVaw1cOlqknHScgawyxb_zqP4M)> accessed 20 September 2018. [↑](#footnote-ref-19)
20. According to *‘Guidelines for identifying people with disabilities for cash transfer 2011’*, the eligibility criteria include:

    poverty level of a household

    number of persons with severe disabilities in a household

    number of chronically ill persons in a household with a person with severe disability

    number of persons in a household with other forms of disabilities other than the severe disability

    must not be enrolled in any other cash transfer programme [↑](#footnote-ref-20)
21. For details on targeting and eligibility see the UN Special Rapporteur on the Rights of Persons with Disabilities on Social Protection A/70/297 available at <<http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/297> > accessed on 25 September 2018. [↑](#footnote-ref-21)
22. Committee on the Rights of Persons with Disabilities, ‘Guidelines on Article 14 of the Convention on the Rights of persons with Disabilities- the right to liberty and security of persons with disabilities’ (adopted at the CRPD 14th Session (17 August- 4 September 2015) available at <<http://ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>> accessed on 25 September 2018. [↑](#footnote-ref-22)
23. The Working Group on Arbitrary detention, ‘The basic principles and the guidelines on remedies and procedure on the right of anyone deprived of their liberty to bring proceedings before court’, available at <<http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx>> accessed on 25 September 2018. [↑](#footnote-ref-23)