

## Kenya

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### INTRODUCTION

The history of juvenile justice systems in Africa is more recent compared to other contexts such as Europe and the USA. The development of juvenile justice systems in Africa was shaped by a colonial legacy under which the legal framework in most of the countries mirrored laws received from the colonizing country—Britain in the case of Kenya and most of Anglophone sub-Saharan Africa. This meant that a law received from the British, the Children and Young Persons Act of 1969, was the legal framework for dealing with issues affecting children, including juvenile crime, for over four decades after Kenya's independence in 1963. It was only in 2001 that Parliament enacted a new law—the Children's Act. The new law and subsequent constitutional reform processes motivated the inclusion of a comprehensive children's rights clause in Kenya's Constitution in 2010. Child law reform was impacted by normative legal standards regarding children's rights (e.g., UN Convention on the Rights of the Child ("the CRC")) and the African Charter on the Rights and Welfare of the Child (African Children's Charter), which Kenya has ratified.

This chapter discusses the extent to which children's rights norms have shaped the legal framework governing the Kenyan juvenile justice system across an array of issues such as age and the legal status of children, pretrial diversion, the requirement for separate courts, institutions and procedures specific to children accused of committing crimes, and sentencing practice that could be distinguished from the regular criminal justice system. The author argues that following a trajectory that mirrored competing ideals of welfarist, just deserts, and other philosophies that underpinned Western juvenile justice systems, Kenya is

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an example of a country whose ongoing quest for a full-fledged juvenile justice system is impacted by children's rights norms contained in international treaties to which Kenya is legally bound.

## THE HISTORICAL CONTEXT OF KENYA'S JUVENILE JUSTICE

From the 1960s until the 1990s, most African juvenile justice systems mirrored the juvenile justice philosophies that informed the legal systems of their colonizing countries (Alemika and Chukwuma 2001). Juvenile justice systems in most of Africa in the period before the CRC in 1990 reflected debates about the influence of "welfarist," "back to justice/just deserts," or "crime control" theories. Thus, examples from Kenya (South Consulting 1999), Nigeria (Owasanoye and Wernham 2004), Uganda (Parry Williams 1993), and Zimbabwe (Kaseke 1998) (all former British colonies) reveal that colonially inherited juvenile justice laws tended to mirror the philosophy of their British counterpart with a strong emphasis on welfarist-oriented provisions. Welfarist-oriented juvenile justice laws were not the norm in all African countries. In the context of countries such as Namibia, juvenile justice law encompassed the major features of what may be described as a "justice model" informed by a theory of "just deserts" (Schulz and Hamutenya 2004).

For Kenya and other former British colonies, the legal architecture that anchored juvenile justice remained "welfarist" on paper despite changes in British juvenile justice, including the end of the dual child care and crime jurisdiction of the family proceedings court and the ushering in of a just deserts approach allied with crime control through the Crime and Disorder Act adopted at the end of the twentieth century. For Kenya, the perceived benign and "rehabilitative" notions of the juvenile justice system mirrored what was recorded in the 1940s in the US context or earlier in the UK. One study discusses:

... [T]he Kenyan conceptualization of the criminal justice process for children is generally a benign one, focusing on 'rehabilitation' and 'education' rather than on punishment. This is seen in the fact that even the current law [Children and Young Persons Act, 1969] does not use the terms 'conviction' and 'sentence'. Imprisonment is rarely used and children do not get criminal records. These features indicate a leaning toward welfarism in the criminal justice system for children. The danger in this is that in reality the system may be far less benign than it seems on paper. Children are not sent to prisons but alternatives to imprisonment may also be damaging.... (South Consulting 1999)

The fact that the earlier laws applying in countries such as Kenya were enacted before the recognition of children's rights under international law meant that

children's rights ideology was not part of the juvenile justice theoretical debate in Africa before the CRC was adopted in 1989. Since the CRC's adoption, the concept of children's rights has developed to usher in a significant prism in which children are viewed to have "rights" of their own. This counters the concept of "welfarism" in which children could be viewed or treated as objects of intervention. Under the CRC the concept of children's rights impacts all issues concerning children including juvenile justice (Van Bueren 1995). The convention's provisions in Article 37 and Article 40 specifically speak to the subject of juvenile justice. In the African context the influence of children's rights is furthered through the African Children's Charter, whose provisions on juvenile justice (under Article 17) applies to all persons under the age of 18. It is a subject of debate whether the CRC, the African Children's Charter, and other related international instruments can be viewed as providing a new philosophical frame for juvenile justice with an emphasis on children's rights (beyond welfarism or justice theories).

With an entirely novel emphasis on children's autonomy, these normative frameworks provide, at the very least, a standard within which to examine whether children's rights have had an impact on juvenile justice systems across countries around the world that are parties to these treaties and legally bound to implement their provisions (Doek 2002). Six features can be discerned from the CRC which usher in a new normative standard for juvenile justice (Sloth Nielsen 2001):

- (a) The establishment of separate laws, institutions, and procedures applicable to children accused or alleged of committing crimes
- (b) The setting of a minimum age of criminal capacity
- (c) The principle of detention as a last resort and for the shortest period of time
- (d) The desirability of diversion as a binding obligation on State Parties to the CRC
- (e) The extent to which procedural guarantees under the CRC and related international instruments, such as the UN Beijing Rules on the Administration of Juvenile Justice, are accommodated in a juvenile justice framework
- (f) The limitation of certain sentences and need for alternative dispositions at the sentencing stage

Article 40 (1) of the CRC also refers to reintegration as the primary objective of the juvenile justice system and the need for the child to assume a constructive role in the society. These have been said to hint at a more restorative justice approach (Skelton 1996). Thus, State Parties should consider the need for community-based approaches to crime that offer opportunities for the juvenile justice system to communicate denunciation of wrongdoing while establishing in a young offender a sense of empathy with the victim and connectedness to the family and community.

## LEGAL STATUS OF CHILDREN AND ISSUES OF AGE OF MAJORITY AND MINORITY

Article 260 of the Kenyan Constitution and section 2 of the Children's Act, drawing from the CRC's and the African Children's Charter's definitions of children, provide that a "child" is any person under the age of 18 years. This definition is an advancement in Kenyan law. Although the law is now explicitly clear in the definition of children, there are still issues about conceptions of childhood including societal and cultural frames (e.g., marriage) to defining who a child is. In the juvenile justice sphere, however, there is no doubt as to the age of majority under Kenyan law in light of the definition in the constitution and the Act that envisages that any persons below the age of 18 should, when accused of crimes, be subjected to separate child-specific procedures and processes. The CRC and the African Children's Charter do not explicitly specify an age below which children are deemed not to have capacity to commit crime or be deemed to bear responsibility for criminal conduct (i.e., a minimum age of criminal capacity or responsibility). The UN Committee on the Rights of the Child, the body charged with monitoring implementation of the CRC, has recommended that State Parties should, at the very minimum, set this age at 12. The Kenyan Children's Act leaves this question to an old legal order—the general penal code—in which the minimum age of criminal capacity is set at 8 years. Children between the ages of 8 and 12 years are legally presumed to lack criminal capacity unless the prosecution provides evidence to prove (or rebut) this presumption. However, the code appears to enact a minimum age of capacity of 12 years for boys in the case of sexual offenses. The UN Committee has twice been unequivocal that these provisions fail to meet the CRC standards. It has urged Kenya to increase the minimum age of criminal responsibility from 8 to "at least the age of 12 years, and consider increasing it" (UN Committee on the Rights of the Child 2007).

A review of the Law Reform Commission's report that led to the enactment of the Children's Act reveals that the commission did not consider the issue of minimum age as a distinct stand-alone legal obligation subject under the CRC. While expressing support for the retention of the current minimum age of 8 years (with a presumption against capacity for children between the ages of 8 and 12 years), the commission appeared to downplay the need to increase the minimum age. Rather, the commission sought to emphasize the need for distinct (exclusive) juvenile courts and procedures for children in direct response to the issue of a low age of criminal responsibility (Kenya Law Reform Commission 1993). With the benefit of hindsight, this position appears contrarian to that of the UN Committee. In 2007, during an examination of the country's record by the UN Committee, the Kenyan government expressed a commitment that it would embark on a review of this issue. As of the time of writing, such a review remains pending. In the absence of detailed disaggregated statistics on children arrested and charged with crimes (including with reference to age), the extent to which very young children are caught up in the criminal justice system because of the low minimum age of criminal responsibility is not fully clear.

## **KENYA'S STANCE TOWARD THE UN COMMITTEE ON THE RIGHTS OF THE CHILD**

Kenya ratified the CRC in July of 1990 and became a party to the African Children's Charter a decade later in July 2000. The UN Committee has stated:

... A comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation...The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation. (UN Committee on the Rights of the Child 2003)

In keeping with this obligation, soon after ratifying the CRC, Kenya embarked on a law reform process. The final product was the Children's Act. The law's child care protection and juvenile justice issues are captured in the preamble, which also explicitly speaks of Parliament's intention to domesticate children's rights provisions under international law. The child rights ideology were to subsequently impact discussions about the content of legal provisions in various iterations of draft constitutions, eventually leading to the inclusion of a comprehensive children's rights clause in Kenya's Constitution in 2010. Article 53 provides for the "rights of every child." Article 53(2) provides that "a child's best interests are of paramount importance in every matter concerning the child." In relation to juvenile justice, the Kenyan Constitution provides for the child's "right not to be detained, except as a matter of last resort, and when detained, to be held for the shortest appropriate period of time; separate from adults and in conditions that take into account the child's sex and age."

Kenya has thrice, in 2001, 2007 and 2016 had its progress reports examined by the UN Committee on the Rights of the Child as part of its reporting obligations under the CRC. In its 2007 observations, the Committee appreciated the enactment of legislation aimed at promoting and protecting children's rights, among other areas of positive practical and legal reforms. The Committee, however, pointed to a litany of gaps regarding juvenile justice where it noted that the system fell short of being fully in line with the CRC.

## **DEMOGRAPHIC, GENERAL, AND JUVENILE CRIME TRENDS IN KENYA**

As of 2015, Kenya's population was estimated at 46 million people (United Nations et al. 2015). The country's population, as with most of Africa, is especially young. Kenya's population median age as of 2015 was 18.9 years (compared to a median age of over 40 years in some of the European countries, for

example, France and Germany). The age group 0–14 years comprised 41.9% of the population. Persons aged 18 years and below constituted well over half of the population. The number of crimes reported by the public to the police was on the rise in the period 2010–2014 but stayed steady in 2013 and 2014 at an approximate 70,000 cases in each of the 2 years (Kenya National Bureau of Statistics 2015). Cases of homicide, 67.5% of which are murder cases, constituted a small percentage of the overall reported cases (3.8% in 2013, 4% in 2015), as with sexual and related offenses “against morality” (6.6% in 2013; 7% in 2014). A majority of reported cases were characterized as “other offenses against persons” including assault, affray (scuffle) (26.9% of such cases in 2013, 28.7% in 2014). Cases of stealing, theft (of property, livestock, property), robbery, and break-ins collectively comprised 38.6% of all reported cases in 2013 and 34.7% in 2014.

A total of 109,629 people were sentenced to prison in 2014—a 41.6% increase between 2010 and 2014. Prison inmates aged 26 years and above constituted about half of the total prison population. The number of inmates below 18 years was recorded at 2570 in 2013 and 3455 in 2014 (1.1% of the total prison population in 2013; 1.4% in 2014). The government has previously stated that the majority of children formally found guilty of crimes that would warrant a prison term (if committed by adults) are in the 16–17 year age bracket. This is borne out by the data in the 2014 government survey which indicates that compared to the low numbers of children aged 16 and below in prison, thousands of 16–17 year olds were convicted and given prison sentences in the years 2009–2014. The numbers for prison term for children hold despite the prohibition under the Children’s Act of imprisonment as a punishment measure for children (as discussed later in this chapter). Even with the low numbers of very young children (aged 16 years and below) in prison, Kenya’s overall prison inmate population is young. As of 2014, 52.3% of the total prison population was composed of youth aged 25 years and below.

### Causes of Juvenile Crime (Pretty Short)

The situation in Kenya is characterized by high rates of poverty, unemployment, and an increasing number of family and kinship structures under severe socio-economic difficulties. Hence, poverty is a major factor accounting for the vulnerability of the Kenyan youth to commit crimes. In addition, there are questions of the effectiveness of Kenya’s criminal justice system in achieving its broad goals of deterrence and the rehabilitation of offenders. A previous government survey has attributed a 76.9% general increase in the number of recidivist offenders between 2012 and 2013 to the fact of “inadequate facilities and rehabilitation programs in prisons, coupled with social stigma that ex-convicts experience from their communities upon release” (Kenya National Bureau of Statistics 2015: 252).



## POLICING AND JUVENILES

Under the Kenyan Children's Act children arrested for committing crimes must be brought by the police before a children's court. The act also provides that in general and non-capital offences, before a plea is taken, and pending trial, children should be released on police bail or on the basis of recognizance of their parents and guardians. Further, statutory provisions appear to restrict the use of pretrial detention. The constitution's Article 53 (1) (f) prohibits detention for children, except as a last resort, to be restricted for the shortest period of time. It also provides that in the event of detention, children should be held separate from adults and in conditions that take the child's sex and age into account. However, in the absence of system-wide pretrial diversion programs and procedures, these provisions have remained more theoretical than reality.

There is no specialized police force dedicated to deal with juvenile crime in Kenya. Spurred in part by the child rights ethos of the Children's Act of 2001, the government established child-friendly child protection units staffed by dedicated and specially trained officers equipped with child-friendly holding facilities in a few police stations. However, because of inadequate public resources allocated for the police and the criminal justice system, these units are few and far between, thus limiting their impact. As of 2013 there were only 14 such units in police stations countrywide, constituting less than 10% of the total number of police stations. With limited child-specific dedicated facilities, the risk of mixing children with adults in pretrial detention is high.

A major issue in Kenya is that most children arrested are usually in need of care and protection; they are usually living on the streets (Ennew 1994). Previous studies have indicated that up to 80–85% of the children arrested and placed in pretrial detention in Kenya are children in need of care and protection rather than children accused or suspected of committing crimes (Odongo 2004). An overwhelming number of street children are usually arrested by the police for no reason other than that they are in “need of care and protection”—a term used in past and current Kenyan law dealing with child care and protection. This is exacerbated by the reality that until 1997 (when parliament repealed the Vagrancy Act which had criminalized “vagrancy” or homelessness), street children were deemed to be criminals merely by the fact of their status: that they were on the streets. Detailing the types of abuses and harassment of street children by Kenyan police, Human Rights Human Rights Watch (1997: 52–53) has previously observed that “street children are apprehended and beaten by police, held in lock ups usually with adult criminal offenders, and processed in regular courts.”

The culture and attitude of law enforcement authorities in which street children are harshly treated and considered criminals has endured because of a number of factors, including the entrenched nature of this practice. In its consideration of Kenya's record in implementing the CRC in 2007, the UN Committee acknowledged the vulnerability of street children to arbitrary arrest and treatment and urged Kenya to “make sure that street children are not systematically treated as

children in conflict with the law.” It further called on Kenya to “identify and address the root causes of children living in the streets and develop a comprehensive strategy to address the large number of street children, with the aims of reducing and preventing this situation.”

The Kenyan government’s broad response has involved an emphasis on economic growth in addition to experimental welfare programs aimed at addressing the vulnerability of families and children to poverty. Broader socioeconomic changes in Kenya have impacted the socioeconomic welfare of families. These include rapid urbanization and the continued deterioration of the family because of deaths from the pandemic of HIV/AIDS among other factors. Due to high levels of poverty (with nearly half of the population considered to be living below the poverty line according to agencies such as the World Bank), thousands of children live, work, and fend for themselves begging for food and money in urban streets. One of the key government programs, implemented since 2004, involves the granting of limited forms of social cash transfers to targeted households considered poor with orphans or vulnerable children—explicitly defined as persons under the age of 18 and not receiving benefits from another program (Odongo 2012). Another program, implemented since 2005, is the Street Family Rehabilitation Trust Fund, which seeks to rehabilitate children working and living on the streets by providing affected children with special protection, education, health care, and psychosocial support. The government estimates that 8820 children, out of which over 800 were reintegrated into their families, benefited from the program between 2005 and 2010. The success of these kinds of programs is qualified to the extent that there remain thousands of children living in and off the streets in part because of the deep-rooted impact of rampant poverty and other factors impacting the socioeconomic welfare of families.

## PRETRIAL DIVERSION

Kenya’s legal framework, including the Children’s Act, is silent on the extent of the applicability of pre- and on-trial diversion programs. The act does not explicitly recognize the possibility of a formal referral of children away from criminal justice processes before trial. In the period since 2001, the government has implemented a “pilot diversion” program with support from some of the development partners. The main aim of the project, which has involved the police since 2005, is to assist in the removal of children who have not committed criminal offenses from the juvenile justice administration into community-based alternatives. Its overall aim is to filter social welfare and child care and protection cases out of Kenya’s criminal (juvenile) justice system.

Kenya’s criminal procedural law provides the Director of Public Prosecutions with wide powers of discretion over any criminal charges against any person: children or adult at any stage of a criminal trial process (before or during trial). This may be interpreted to provide some room for the state or the prosecution to



conduct pretrial diversion of children accused of crimes. To date, however, there is little or no evidence that Kenyan prosecutors view their authority to include pretrial diversion processes. This is largely attributable to the lack of direct statutory provisions and the reality that pretrial diversions of any kind are generally alien to Kenya's general criminal justice system. Hence, the pilot diversion project has had some success in aiding the process of removing children who may be caught in the formal justice system but have not committed any crimes.

## COURTS AND JUVENILES

The emphasis on separate courts and procedures for children is central to the provisions of the CRC, the African Children's Charter, and Kenya's Children's Act. Kenya's previous children's law (section 3(1) of the Children and Young Persons Act in 1969) provided for the jurisdiction of "juvenile courts" to try children accused of crimes (with the exception of when they were tried with adults) in addition to civil jurisdiction over care and protection, adoption, maintenance, and other issues. Under the Children's Act of 2001, the provision requiring specialized courts and procedures has not only been maintained but also enhanced. Part VI of the act provides for the establishment of children's courts. In relation to criminal matters concerning children, these courts are exclusively vested with jurisdiction to try children for all and any criminal offenses—serious or otherwise—except where children are charged with murder and where they are jointly accused of committing crimes with adult(s). Under section 76, the act requires that any court order or decision regarding children should take into account "the ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding."

Because of inadequate public allocation and spending in the criminal justice system in general and the juvenile justice system in particular, the law's requirement for separate courts and procedures remains elusive in practice. Officials and courts have often defaulted to conducting and hearing cases involving children in open regular courts (Human Rights Watch 1997). In its 2007 review, the UN Committee expressed its concern regarding the continuing lack of separate courts and procedures:

...in certain instances children are treated as adults and... only limited progress has been achieved in establishing a functioning juvenile justice system outside the capital....

When reporting to the UN Committee in 2006, the government stated that the number of children tried and sentenced as adults has gradually been decreasing (from 626 in 2003 to 180 in 2006). It attributed this decrease to the implementation of the Children's Act and increased awareness of children's rights.

On the one hand, the failure to establish full-fledged children's courts and separate procedures may be attributed to a question of availability and/or the

allocation of public resources to support the operationalization of the Children's Act. On the other hand, this failure reveals a tension inherent in the attempt of Kenya's legal framework to live up to the ideals of a purely rights-based oriented juvenile justice system that is subject to competing goals or ideals.

### **DUE PROCESS SAFEGUARDS AND AN EMPHASIS ON PROMPTNESS (SUBSECTION OF "COURTS AND JUVENILES")**

Part XIII of the Children's Act details provisions guaranteeing the application of fair trial and due process rights for children accused of committing crimes. These provisions straddle a balance of "protection" on the one hand and "autonomy of the child" on the other. The children's courts are required to consider a child's welfare in a manner that a regular court may not be required to do for adults; there is reference to the "best interests of the child." In addition, the court is obligated to have a setting that is friendly to the child offender. Children accused of crimes are guaranteed a number of rights, including the right to prompt notification of the charges and the right to have the matter determined without undue delay.

Subsidiary rules and regulations made under the Children's Act provide specific limits within which Kenyan courts should consider criminal cases involving children. Under Kenyan law, there are no corollary rules applicable to adults. According to the UN Committee, the CRC's provisions restricting the use of detention of children (Article 37) and emphasizing promptness when dealing with alleged child offenders (Article 40(2)) are meant to guard against the practice of keeping children for long periods of time in the justice system—thereby limiting the pedagogical impact of the system and potentially increasing the chances of stigma for the child. Viewed in this light, the time limits made under Kenyan law may be considered to be premised on the understanding that both a prolonged interaction with the formal justice system and detention are harmful for the welfare of children. Hence, detention and delays must be limited.

According to Rule 12 of the Child Offender Rules under Kenya's Children's Act:

1. *Every case involving a child shall be handled expeditiously and without unnecessary delay.*
2. *Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.*
3. *Where, owing to its seriousness, a case is heard by a court superior to the Children's Court the maximum period of remand for a child shall be 6 months, after which the child shall be released on bail.*
4. *Where a case to which paragraph (3) of this rule applies is not completed within 12 months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.*

Rule 10 deals with situations where a child is refused bail. It provides that in instances of pretrial detention, children should be held in specialized or child-specific remand homes. Any pretrial custody shall not exceed 6 months in the case of capital offenses or 3 months in the case of other offenses.

An examination of court practices reveals that Kenyan courts have yet to fully embrace the time limits and the UN Committee's explanation of the desired pedagogic value of limiting pretrial detention and delayed hearing of cases involving children. In a number of court cases decided in the immediate aftermath of the Children's Act and decided between 2003 and 2006, the High Court seemed intent to uphold the time limits. A second subsequent set of decisions by the High Court, however, held that the act and the rules should not have the effect of imposing time limits within which to "complete trials" per se but provide a basis for encouraging an expeditious handling of criminal cases involving children. In 2006 the Court of Appeal of Kenya (Kenya's highest court at the time, and now second highest court) decided in the case *Kazungu Mkunzo and another versus Republic* to declare that the imposition of time limits for cases involving children was unlawful. The court held that Rules 10(4) and 12 were unconstitutional. It reasoned that the rules purported to set time limits within which to complete the criminal trial of alleged child offenders in a context where Kenya's Constitution (applicable at the time) and the Children's Act did not make corresponding express provisions setting time limits for the completion of trials involving children or adults. The Court of Appeal further examined the provision regarding bail (section 72) under the provisions of the old constitution and noted that any person, child or adult, charged with a capital offense was not entitled to a right to bail.

This decision was not surprising in light of the absence of the corresponding provisions under Kenya's Constitution applicable at the time or the failure by parliament to include the Child Offender Rules as a part of the main body of the Children's Act (rather than their status as subsidiary legislation promulgated by the minister in charge). However, the court's failure to engage with Kenya's obligation to put into effect provisions in compliance with the CRC, which would give effect to the restriction on detention and ensure promptness of criminal procedures involving children, is surprising albeit attributable to a historical reluctance by Kenyan courts in general to engage with international legal norms.

Following the Court of Appeal decision, the status of the rules remains unclear because the government (e.g., minister in charge or the attorney general) has not moved to clarify the status of the Child Offender Rules. Courts have continued to apply the rules, albeit with differing interpretations as to whether they are legally binding or subject to interpretation. Moreover, in many instances where this issue has recently come up (e.g., *C.J.W Guardian ad litem for D.W v Republic*), the Kenyan High Court did not reference the child rights clause under Kenya's Constitution, Article 53, which restricts the use of detention for children (as a last resort and for the shortest period of time) in keeping with the provisions of Article 37 of the CRC. In this case, a 16-year-old boy charged with

defilement whose case had been pending before the trial court for over 12 months had petitioned the High Court to consider whether the 12-month lapse from the time of plea was in violation of Rule 12(2) of the Child Offender Rules (which requires criminal trials of non-capital offenses to be disposed of within 3 months from the date of the child taking a plea). The Court dismissed the child's request for a dismissal of the case on the basis of the delay, asserting that the rule in question was instructive rather than mandatory. It discussed that case delays are usually caused by various reasons, including heavy court schedules and requests for adjournments by lawyers defending accused children. Ultimately, a judicial or administrative review is required to harmonize the Children's Act and the Child Offender Rules made under it in light of the implications of the child rights clause under Kenya's Constitution which expressly limit detention, including pretrial detention, as last resort and for the shortest period of time.

### **CUSTODIAL RULES, SENTENCING, AND ALTERNATIVE SENTENCING REGIME**

Part XIII (sections 189–193) of the Children's Act provides courts with an array of alternative sentences for a trial court to impose for children found to have committed a crime. These include orders committing children to the care of parents, families, or charitable institutions; a discharge with or without sureties; a term served in rehabilitation schools (for children between the ages of 10 and 15 years); specialized children's institutions, termed “borstal” institutions (for children over 16 years); educational and vocational schools; probation; community service; and the payment of monetary fines. In keeping with the prohibition under the CRC and the African Children's Charter, the Children's Act prohibits the use of the death penalty for children; Kenyan law also prohibits the use of corporal punishment. The act outlaws any form of detention in a prison or “detention camp.” The prohibition of any form of imprisonment goes further than the provisions of the CRC (Article 37) and the African Children's Charter (Article 17), both of which restrict the use of imprisonment while providing for the absolute prohibition of the most extreme form of imprisonment—life imprisonment without parole.

Yet in practice, Kenyan courts have tended to lean in favor of imposing the death penalty and prison sentences on child offenders for capital and other offenses (Ongoya 2007). Relatively high numbers of children can be found among the country's prison population: the number of prison inmates below 18 years of age (with a majority aged 16–17 years) increased from 2570 in 2013 to 3455 (about 1.3% of the total inmate population) in 2014 (Kenya National Bureau of Statistics 2015). In part, the use of imprisonment for children in cases deemed as serious offending (and which are punishable by terms in prison for adults), despite the prohibition in law, reflects a crime control attitude and a retributive goal of the penal system. The tendency by courts to resort to prison custodial

sentences also owes to the lack of alternative child-friendly facilities. Even in the wake of the new legal regime, which allows for the imposition of custodial sentences to be served by children in rehabilitation and other facilities (such as “borstal” institutions), the country’s facilities for these purposes remain few and far between. There are 11 rehabilitation schools (hosting an average of 70 children each) and four probation hostels in the country—all of which predate the new legislation. The full extent to which the conditions and programs that children undergo within these institutions comply with their legal rights is not clear due to the absence of dedicated research on this issue.

### **DIFFERENCES IN THE TREATMENT OF BOYS AND GIRLS**

The Kenyan criminal justice system mainly focuses on male offenders largely because of the disproportionate representation of males in arrest, trial, and post-trial procedures. According to official data from 2010 to 2014, 79.4% of cases reported to the police in 2014 concerned male offenders (Kenya National Bureau of Statistics 2015). Female offenders constituted only 6.4% (2085) of the total number (32,686) of persons convicted of crimes in 2014. Most police and prison facilities in the country are designed to accommodate male offenders. More specifically related to juvenile justice, only two of 11 rehabilitation schools and only one of the four probation hostels in the country are dedicated to house or cater to girls in the juvenile justice system. Although there are gender desks, which are staffed by specially trained officers at a limited number of police stations in the country, there are no special provisions for female offenders. The only relevant provision is included in the Constitution Article 53(1) (f) (ii) to the effect that in the event of children’s detention they should be separated from adults and that such detention should be with regard to their age and sex. This would require the separate detention of girls from boys or males.

In 2013 about 13% (4852) of police officers were female (of the total number of 37,293) (Kenya National Bureau of Statistics 2015). With the limited number and capacity of female-specific facilities, there is a real risk of female offenders being mixed with adults, including males, when deprived of their liberty. This enhances the risk of girls being victims of sexual or gender-based violations and abuses during arrest and detention.

### **CONCLUSION**

Children’s rights norms encapsulated in the CRC and the African Children’s Charter have had a significant effect on the domestic laws and practices of many African States that are parties to these treaties. In keeping with its treaty obligations to review and reform laws relating to children’s issues, Kenya enacted the Children’s Act in 2001. This law includes provisions pertaining to juvenile justice.

The child rights-oriented philosophy of the law is very different compared to the previously inherited legal framework. The resulting situation is a legal framework motivated by children's rights norms. The legal framework that anchors the juvenile justice system in Kenya will have to be the subject of further reform if the country wishes to usher in some of the discrete aspects of a rights-based system, envisaged in treaties such as the CRC. Beyond such law reform, the Kenyan example proves that the achievement of a truly separate and rights-based system will also require considerable practical administrative changes, investment in new facilities and an improvement of the capacity and knowledge of judges, the police, and other players within the criminal justice system.

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