THE APPROACH OF THE KENYAN CRIMINAL JUSTICE SYSTEM TO THE DETENTION OF PERSONS DECLARED NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISABILITY

Paul Ochieng Juma

19391502

Prepared under the supervision of Professor Frans Viljoen, Faculty of Law, University of Pretoria, South Africa

Mini-dissertation in partial fulfilment of the degree

LLM (Disability Rights in Africa)

Faculty of Law

University of Pretoria

2020

Declaration

I, Paul Ochieng Juma, hereby declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university,

Signed: .....

Paul Ochieng Juma

Dedication

This study is dedicated to all those who hope to awaken and strengthen an understanding of the human rights of persons with disabilities in Africa. You must win! Continue working, continue saving, continue sacrificing, continue enduring, continue fighting cheerfully and do your utmost as if the issue of the whole struggle depend on you alone.

Acknowledgements

I would like to express my heartfelt gratitude to Professor Frans Viljoen for your brilliant intellectual guidance during this study. It would be difficult to overstate the value of the assistance which you have rendered to me in the marshalling of information and presentation of this work. Your final opinions were always the models of brevity and accuracy as well as clarity and informative.

We don't have to turn to our history books for heroes. They're all around us.

Abstract

This mini-dissertation appraises how best Kenya's criminal justice system should deal with persons with mental disabilities (PwMD) who have committed offences. Specifically, it seeks to establish how the rights of PwMD who have committed offences can be best protected during and after the criminal process. It draws from Canadian law of criminal procedure related to PwMDs who have committed offences. The mini-dissertation concludes that certain provisions of Kenya's Criminal Procedure Code violate the rights of PwMDs who are found not criminally responsible by reason of mental disability (NCRMD) under both the Kenyan Constitution and the UN Convention on the Rights of Persons with Disabilities (CRPD), to which Kenya is a state party. The bases of these violations are the indefinite nature of the detention of NCRMD-PwMDs, not allowing for periodic review, and the disregard for any alternative forms of accommodation, which result in the infringement of NCRMD-PwMDs' rights to dignity, liberty, freedom from inhuman and degrading treatment and independent living. This mini-dissertation also makes recommendations for legal reform in Kenya, drawing from Canadian law and the CRPD. The recommendations include the amendment of the current legislation to replace derogatory phrases, amendment of the law to reflect a true acquittal of NCRMD-PwMDs in the criminal justice system, removal of the Executive's control of NCRMD-PwMDs in Kenya's criminal justice system, improvements to mental health conditions in psychiatric institutions and prison facilities, periodic re-evaluation, and the introduction of alternatives to detention as appropriate forms of accommodation.

LIST OF ABBREVIATIONS AND ACRONYMS

ACHR	American Convention on Human Rights
CAT	United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	United Nations Convention on the Elimination of all forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CLA	Criminal Lunatics Act
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
HRC	UN Human Rights Committee
MI Principles	Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care
NCAJ	National Council on Administration of Justice
NCCJR	National Council on Administration of Justice Committee on Criminal Justice Reform
NCRMD	not criminally responsible on account of mental disability

NCRMD-PwMDs	person with mental disability who have been declared not criminally responsible on account of mental disability
NGRI	not guilty by reason of insanity
OHCHR	Office of the High Commissioner for Human Rights
PwD	person with disability
PwMD	person with mental disability
UN	United Nations

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CHAPTER 1: GENERAL INTRODUCTION AND BACKGROUND

This chapter introduces the study. It indicates the rationale for the study followed by the literature review. This leads to the third part, which discusses the research problem which the mini-dissertation seeks to address. The fourth part presents some demarcations to the study, while the research questions, which form the backbone of this research, are set out in the fifth part. The sixth and seventh parts deal with the methodology of the study and provide an outline of the chapters.

1.1 Rationale for the study

This study focuses on the detention of persons with mental disabilities (PwMDs) who are found not criminally responsible on account of mental disability (NCRMD). (Members of the affected group are thus referred to as 'NCRMD-PwMDs').

Kenyan law in sections 166 and 167 of Kenya's Criminal Procedure Code[1] deals with this matter. This study explores the need by the Kenyan Parliament to amend sections 166 and 167 in order to remove the phenomenon of indefinite detention of NCRMD-PwMDs, and put in place safeguards to protect their rights. PwMDs are detained at the President's pleasure after being declared guilty but insane, or unable to understand proceedings under section 166 and 167 of the Criminal Procedure Code, a fact that deprives them of their human rights.[2] Human rights dictate that persons must only be arrested and detained within legal bounds;[3] and that their detention must not be arbitrary.[4] The notion of arbitrary detention arises when the state unreasonably detains an individual or when the detention amounts to an excess of the State's powers.[5]

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1 Criminal Procedure Code, Cap. 75 of 1930 (Laws of Kenya).
2 United Nations (UN) Rules for the protection of juveniles deprived of their liberty adopted 14 December 1990 secs II rule 11(b).
3 Human Rights Commission 'Right to liberty and security of person (s. 18)' https://hrc.act.gov.au/wp-content/uploads/2015/03/Section-18-Right-to-liberty-and-security.pdf (accessed 3 December 2019)
4 As above.
5 A Butler & P Butler *The New Zealand Bill of Rights Act: A commentary* (2005) 19.

Mental disability has been defined differently depending on jurisdictions and professions. For the purposes of this mini-dissertation, I adopt the definition from the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) Committee, which provides that 'a person has a mental disability when he or she has a limited decision making capacity depending on several factors including environmental and social'.[6] It is important to note the difference between legal capacity and mental capacity. Legal capacity means the 'ability to hold rights and duties and to exercise those rights and duties', while mental capacity denotes the ability to make decisions.[7] Therefore, legal capacity relates to the ability of persons not only to have, but also to act on the basis of their legally recognised rights and duties on an equal basis with others, while mental capacity is simply a person's putative psychological ability which varies from one individual to another.[8]

Concern about the commitment of NCRMD-PwMDs in mental institutions and prisons is not new. Dr. Thomas Szasz, a famous American psychiatrists, spent most of his career attacking what he felt was the immoral practices of institutionalising NCRMD-PwMDs.[9] Dr. Szasz held the view that the institutionalisation of NCRMD-PwMDs is incompatible with the principles of a free society.[10]

Historically, NCRMD-PwMDs were housed together in mental institutions for scientific research and treatment because they were considered dangerous to the rest of the society[11]. Francis Galton, Darwin's cousin, asked for 'stern compulsion' to 'check the birth rate of the unfit'.[12] The young Winston Churchill in Britain privately advised Prime Minister Asquith that the high birth rate of the 'mentally deficient' is 'a very terrible danger to the race'.[13] In 1913, Britain passed a law allowing for the detention of 'mental

6 CRPD Committee General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014 par 13.
7 Art 1, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol), 29 January 2018.
8 W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 41.
9 JA Schaler *Szasz under fire: The psychiatric abolitionist faces his critics* (2004) 18.
10 T Szasz *The Szasz quotationary: The wit and wisdom of Thomas Szasz* (2011) 10.
11 MH Rioux 'New research directions and paradigms: Disability is not measles' in Bach, M & Rioux, MH (eds) (1994) *Disability is not measles: New research paradigms in disability* 15.
12 M Mazower *Dark continent: Europe's twentieth century* (1998) 96.
13 As above.

defectives' in special institutions so as to prevent them from having children.[14] Kenya was colonised by the British and it gained independence in 1963.[15] As a result, Kenya adopted the common law legal system and its sources of law include

> (a) the Constitution; (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule; (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date. (2)…African customary law.[16]

With regards to international law, article 2(5) of the Constitution of Kenya 2010 (2010 Constitution) provides that the 'general rules of international law shall form part of the law of Kenya'.[17] It means that Kenya has adopted the monist approach to international law. The monist approach regards international law and national law as part of a single legal order where international law is directly applicable in the national legal order without the need for any act of domestic incorporation.[18]

The principle of discrimination runs through the 2010 Constitution of Kenya. Discrimination on grounds of disability, whether directly or indirectly, is prohibited.[19] Article 54 of the Constitution, which provides explicit protection for persons with disabilities (PWDs), affirms their rights in certain specific regards but does not make specific provision for their right to liberty. However, PWDs' right to liberty is extensively covered by article 29 of the 2010 Constitution, which is applicable to all Kenyans.

The Persons with Disabilities Act[20] aims to provide for the rights and rehabilitation of PWDs, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Council for Persons with Disabilities. Among the rights which it deals with are

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14 As above.
15 Mental Disability Advocacy Center (MDAC), The right to legal capacity in Kenya, MDAC, 2014 11.
16 Secs 3 Judicature Act 14 of 1977.
17 Art 2(5) Constitution of the Republic of Kenya, 2010.
18 TP Van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' (2011) 8 *International Journal on Human Rights* 145.
19 Art 27(5) 2010 Constitution.
20 14 of 2003.

> [c]ivic rights, equal rights of access to opportunities for suitable employment, to special and non-formal education, appropriate health care, participation in sporting and recreational activities and to a barrier free and disability friendly environment.[21]

However, the government is tasked with the progressive realisation of those rights. In fact, non-criminally responsible mental disability detentions are still firmly embedded in our laws and NCRMD-PwMDs continue to be discriminated against, and detained against their own will in prisons and mental institutions.[22] The Mental Health Act[23] makes provision for the involuntary treatment of NCRMD-PwMDs. The main reason for this unfortunate state of affairs is the gap in research that exists between human rights and the 'insanity defence'. The study tries to integrate the two doctrines in order to ensure that the rights of NCRMD-PwMDs accused of crimes are realised and protected.

1.2 Literature review

The rights of PwMDs are enshrined in various international human rights instruments. Generally, the first globally acknowledged is the Universal Declaration of Human Rights (Universal Declaration).[24] Article 3 of the Universal Declaration makes provision for the right to life, liberty, and security of the person.[25] Arbitrary arrests, detentions, and exile of persons are forbidden in article 9. Interrelated provisions to those of the Universal Declaration are contained in the International Covenant on Civil and Political Rights (ICCPR),[26] the Convention on the Rights of the Child[27] (CRC), the United Nations Convention on the Elimination of all forms of Discrimination against Women[28] (CEDAW), the United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment[29] (CAT), and the Convention on the Elimination of

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21 E Kamundia 'Choice, support and inclusion: Implementing article 19 of the CRPD in Kenya' (2013) 1 *Africa Disability Rights Yearbook* 65.

22 Secs 12 Penal Code, Cap. 63 of 1963, Laws of Kenya.

23 Mental Health Act, Cap 248, Laws of Kenya.

24 Universal Declaration on Human Rights (Universal Declaration), 10 December 1948, UN.G.A Res. 217 A (III), UN.GAOR, 3d Sess, UN. Doc. A/810 (1948)

25 Art 3 Universal Declaration.

26 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN. Doc A/6316 (1966) 999 UNTS 171 (entered into force on 23 March 1976).

27 Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

28 18 December 1979 UN Doc resolution 34/180 (entered into force on 3 September 1981).

29 United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment, 10 December 1984, UN resolution 39/46 (entered into force 26 June 1987).

all forms of Racial Discrimination (CERD).[30] Article 4 and 9 of the Declaration of the Rights of Mentally Retarded Persons[31] focuses on the rights of PwMDs to live and remain with their families except in cases of special health requirements.[32] Similarly, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care[33] (MI Principles) establishes substantive and procedural guidelines for the protection of PwMDs against unlawful and arbitrary detentions in psychiatric facilities.[34] Regionally, article 6 of the African Charter on Human and Peoples' Rights[35] (African Charter), article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[36] and article 7 of the American Convention on Human Rights (ACHR)[37] all provides for the right to liberty for all persons. However, article 6 of the African Charter limits the right to liberty and security of the person in accordance with the 'conditions previously laid down by law'.[38] These are very pertinent provisions for PWDs. Governments across the world are required to guard against unlawful and arbitrary detentions. These are not instruments to be perverted and circumvented at will by States.

1.3 Problem statement

The problem this research aims to address relates to the way in which Kenya's Criminal Procedure Code deals with NCRMD-PwMDs who have committed crimes. In light of the UNCRPD,[39] to which Kenya is a state party and the 2010 Constitution, the institutionalisation of NCRMD-PwMDs in non-criminally responsible mental disability detentions under section 166 and 167 of the Criminal Procedure Code is unlawful and

30 21 December 1965, UN Doc resolution 2106 (XX) (entered into force 4 January 1969).
31 Declaration of the Rights of Mentally Retarded Persons, 20 December 1971, resolution 2856 (XXVI).
32 Art 4 & 9 Declaration of the Rights of Mentally Retarded Persons.
33 G.A. Res. 2856, 26 UN GAOR Sup. (No. 29), in 99, UN Doc. A/8429 (1971)
34 Department of Mental Health and Substance Dependence, World Health Organization 'The role of international human rights in national mental health legislation' https://www.who.int/mental_health/policy/international_hr_in_national_mhlegislation.pdf (accessed 3 November 2019) at 62.
35 27 June 1981, OAU Doc CAB/LEG/67/3/Rev.5 (1981) (entered into force on 21 October 1986).
36 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS (entered into force 3/09/1953).
37 22 November 1969, OAS TS No. 36, 1144 UNTS 123.
38 Art 6 African Charter.
39 Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006, UN Doc A/61/611 (entered into force on 3 May 2008).

arbitrary. Kenya's non-criminally responsible mental disability detentions do not take into account the disability-specific needs of NCRMD-PwMDs such as access to justice, health-care needs, and protection from sexual abuse, stigmatisation, and victimisation. Despite these atrocities, Kenya's Parliament has failed to amend sections 166 and 167 of the Criminal Procedure Code in order to remove the phenomenon of indefinite detention of NCRMD-PwMDs and put in place safeguards to protect the liberty of NCRMD-PwMDs, thus creating a conflict between non-criminally responsible mental disability detentions and human rights in Kenya.

1.4 Demarcation

The study will focus only on non-criminally responsible mental disability detentions in Kenya. The study is not about the threshold question of criminal capacity based on mental illness, and is also not about mental illness as a ground for mitigation after conviction.

1.5 Research question

1.5.2 Primary research question

In light of it becoming a state party to the CRPD in 2008, and its 2010 Constitution, how should Kenya deal with PwMDs who have committed crimes?

1.5.3. Secondary research questions:

a) What has the traditional position been under Kenyan law in respect of the detention of NCRMD-PwMDs and how did this position come to be established in Kenyan law?

b) To what extent and on what legal basis have Kenyan courts addressed the violations of the rights of NCRMD-PwMDs who have committed crimes?

c) How can the fact that Kenya is a party to the CRPD be leveraged to advance the rights of NCRMD-PwMDs who have committed crimes?

d) Drawing from Canada as comparator, what are the human rights-based solutions and alternative accommodation for NCRMD-PwMDs who have committed crimes?

e) What right-based protective legal provision should the Parliament of Kenya enact in order to enhance the rights of NCRMD-PwMDs who have committed crimes?

1.6. Proposed methodology

The methodology used in this study is both doctrinal and multidisciplinary. In the latter method of analysis, the study will focus mainly on the examination of legal, sociological, political, and psychological texts, scholarly articles, and investigative reports pertaining to the CRPD and non-criminally responsible mental disability detentions.

A comparative study will also be made between the Kenyan and Canadian criminal procedures on the disposition of PwMDs who are declared guilty but mentally ill. The choice of Canada is based on the similarities it shares with Kenya, including the influence of common law values, traditions and jurisprudence, constitutional supremacy and the application of the CRPD.

The research explores how the judiciary in Canada has balanced the demands of justice, public protection, and individual rights to liberty for those declared guilty but mentally ill. Relevant international treaties and national legislation will be examined against the backdrop of the CRPD's provisions. The core thematic areas in this study focus on theories underpinning human rights and the deprivation of liberty in accordance with article 14 of the CRPD. Generally, three main subjects have been critically considered: (1) The foundations of non-criminally responsible mental disability detentions, (2) models of disability with an emphasis on the human rights principles of liberty,[40] and (3) alternative reform approaches to the non-criminally responsible mental disability detentions. The study focuses on the detention of NCRMD-PwMDs in Kenya and Canada. However, this study relates to the ongoing global debate about the relevance or otherwise of non-criminally responsible mental disability detentions.

40 Kenya National Commission on Human Rights & the Open Society Initiative for Eastern Africa, How to implement article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper, KNHCR, 2012 15.

1.7. Chapter outline

In chapter 1, this paper gives the introduction, background, objectives of the research, and its methodology. Chapter 2 traces the evolution of the detention of NCRMD-PwMDs through the English common law system and discusses its legal underpinnings within the Kenyan legal framework. Chapter 3 examines the right to liberty under article 14 of the CRPD. The CRPD is discussed *vis-a-vis* non-criminally responsible mental disability detentions in Kenya. Chapter 4 is a comparative study between Kenya's disposition procedures of PwMDs who have committed crimes in Kenya and the equivalent process in Canada. Lastly, chapter 5 gives the conclusions and recommendations.

CHAPTER 2: THE EVOLUTION OF THE DETENTION OF NCRMD-PWMDS WITHIN THE KENYAN LEGAL FRAMEWORK

2.1. Introduction

The preceding chapter dealt with the introduction of the research. This chapter examines the origins of the detention of NCRMD-PwMDs in Kenya. To this end, it provides a brief historical account of the detention of NCRMD-PwMDs in Kenya. Following from the backdrop provided by the context of Kenya's historical development of the detention of NCRMD-PwMDs, this chapter proceeds to examine the provisions and the implementation of the Criminal Procedure Code. It also traces the paradigm shift towards the protection of NCRMD-PwMDs against arbitrary detention in Kenya's criminal justice system through case law. The relevance of this chapter is to trace the evolution of mental disability based detention in the common law system and its place in the Kenyan criminal justice system and the paradigm shift towards addressing human rights violations of NCRMD-PwMDs in the law.

2.2. Colonial origins of non-criminally responsible mental disability detentions in Kenya

The history of Kenya's Criminal Procedure Code including non-criminally responsible mental disability detentions dates back to the time when the country was still part of British East Africa.[41] It was preceded by the Indian Criminal Procedure Code, which was made applicable in the country by Order in Council in 1902.[42] After Kenya became a Crown colony in 1920, the Indian Criminal Procedure Code ceased to exist due to opposition from European settlers who did not want to be governed by 'laws intended for a coloured populace'.[43] They claimed their 'right to have the English common law which every Englishman carries from 'England into every new country settled by him or her over

41 Morris HF 'A history of the adoption of codes of criminal law and procedure in British colonial Africa, 1876-1935' (1974) 18 *Journal of African Law* 13.
42 As above.
43 As above.

which the King has proclaimed sovereignty'.[44] Therefore, in order to trace the origins of non-criminally responsible mental disability detentions in Kenya, one has to look at the English common law. In the 17th century, the English common law recognised the institutionalisation of PwMDs if found to be mentally ill during plea-taking until recovery, and without any further trial.[45] The law stipulated as follows:

> If a man in his sound memory commits a capital offense and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment .[46]

It means that no conceptual distinction was drawn between 'insanity at trial', during arraignment, and the 'insanity plea', which is a defence related to the commission of an offence.[47] In both instances, the offender was imprisoned until the end of the offender's 'incapacity'.[48]

In the 18th and 19th century one of the first pieces of legislation to deal with the detention of persons found unfit to plead and guilty but mentally ill was the 1800 Criminal Lunatics Act (CLA).[49] Under the CLA, findings of unfitness to plead against PwMD who committed an offence placed them in legal limbo as they were confined with neither a trial nor a guilty verdict.[50] The CLA was passed due to public demand following the acquittal and release of James Hadfield on grounds of 'insanity' after attempting to assassinate King George III.[51] The CLA stated as follows:

> [I]n all cases . . . of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody, in

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44 Morris (n 41 above) 14.

45 D Collins 'Re-evaluating competence to stand trial' https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1002&context=mjs (accessed 24 February 2020) 16.

46 M Hale *History of the pleas of the crown* (1736) 34.

47 A Loughnan *Manifest madness: Mental incapacity in the criminal law* (2012) 72.

48 As above.

49 Criminal Lunatics Act 1800 (CLA).

50 P Bartlett 'Legal madness in the nineteenth century' http://eprints.nottingham.ac.uk/1667/2/SOURCES3.SHM.pdf (accessed 10 February 2020) 1.

51 P Brown 'Unfitness to plead in England and Wales: Historical development and contemporary dilemmas' (2019) 59 *Medicine, Science and the Law* 190.

> such place and in such manner as to the court shall seem fit, until his Majesty's pleasure shall be known.[52]

Further, section 2 of the CLA stipulated that,

> [i]f any person indicted for any offence shall be insane, and shall on arraignment be found so to be, by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the Court to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known.[53]

The above sections of the CLA also did not differentiate between 'insanity' at trial and 'insanity' during the commission of an offence.[54] It was primarily concerned with the disposal of accused PwMDs who committed offences in a more systematic manner.[55] This meant that accused NCRMD-PwMDs could be detained indefinitely 'within a voluntarist legal system', in whatever manner 'the Crown saw fit', which almost always meant prison.[56] The Trial of Lunatics Act of 1883[57] also provided for the detention of a person who were found 'guilty but insane' until a further order was made by the Crown.[58] That form of indefinite detention was meant to offer a compromise between humanity and security, without either convicting or punishing the 'innocent' while devising new legal means of incarcerating offenders who posed a danger either to themselves or to others.[59]

The detention of convicted NCRMD-PwMDs used to take place in Victorian prisons or asylums where they would be restrained and sedated.[60] However, detention under these circumstances was not a mode of punishment as was held by Justice Tracy in *R v Edward Arnold,*[61] in 1724, when he said as follows:

> When a man is guilty of a great offence, it must be very plain and clear before a man is allowed such an exemption . . . it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast [in order to avoid punishment].[62]

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52 Secs 1, CLA.
53 Secs 2, CLA.
54 Loughnan (n 47 above) 76.
55 As above.
56 As above.
57 Trial of Lunatics Act, 1883.
58 *PIM v Republic* [1982] eKLR 4.
59 Loughnan (n 47 above) 110.
60 Brown (n 51 above) 191.
61 *R v Edward Arnold* (1724) 16 St Tr 695.
62 Loughnan (n 47 above) 106.

Also, there were strict disposal procedures and detention applied only to the poor or those 'who seemed to constitute a continuing danger' to themselves or to the public.[63] The rest 'were discharged into the care of relatives, or private asylums'.[64]

In 1830, one of the earliest cases to conclude with the indefinite detention of an accused PwMD was the matter of *Rex v Dyson,*[65] involving Esther Dyson who had been charged with the murder of her child. At the time she was deaf and mute. For this reason she was declared to be 'insane' and as a result was detained indefinitely under the CLA until further orders from the Crown.[66] That case was followed by that of *Rex v Pritchard,*[67] where the accused was facing a charge of bestiality which was considered a capital offence at the time.[68] Pritchard was also found 'not capable of taking his trial' and was confined indefinitely in prison, without the option of making his defence after recovery.[69] Here again, the conceptual interdependency between 'insanity' at trial and 'insanity' during the commission of the offence resulted in the indefinite detention of an accused to the exclusion of any further trial.[70] Lastly, in 1843 the famous legal case on the 'insanity' defence was decided after Daniel M'Naughton mistakenly shot and killed civil servant Edward Drummond thinking that he was Prime Minister, Sir Robert Peel, whom he believed was conspiring against him.[71] After the trial, M'Naughton was acquitted 'by reason of insanity' and was detained in a mental institution for the rest of his life.[72]

2.3. Colonial and post-colonial position on non-criminally responsible mental disability detentions in Kenya

63 Loughnan (n 47 above) 105.
64 As above.
65 (1831) 7 C & P 305.
66 Brown (n 51 above) 189.
67 (1836) 7 C & P 303.
68 A Shah 'Making fitness to plead fit for purpose' (2012) 1 *International Journal of Criminology and Sociology* 179.
69 Loughnan (n 47 above) 77.
70 As above.
71 C Berry-Dee *Emissaries of Satan: Serial killers under the microscope* 2015 116.
72 Berry-Dee (n 71 above) 116.

Colonial Kenya's 1930 Criminal Procedure Code is based on the English common law.[73] This law has remained on the statute book of independent Kenya, and is still the law in place in Kenya today. The Criminal Procedure Code provides for the dual concept of 'insanity' at trial and 'insanity' during the commission of an offence. The institutionalisation of NCRMD-PwMDs usually occurs in the context of mental health care for those considered dangerous to themselves and to the society. Section 166 of the Criminal Procedure Code is the often cited provision by courts when dealing with the issue of detention for discharged NCRMD-PwMDs. It provides that where, at the time of the commission of an offence, the court finds that the offender was not responsible for his or her acts, it must make a special finding of guilt against the accused but hold that they were mentally ill when they did the act or made the omission.[74] After the finding is made, the court must make a report to the President and in the meantime detain the accused in manner that the court will deem proper.[75] After receiving the report, the President may make an order for the person to be detained in a mental hospital, prison or other suitable place of safe custody.[76] However, during the detention of NCRMD-PwMDs, the President may at any time order that the person detained be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.[77]

After three years of the detention, the officer in charge of a mental hospital, prison or other place where a PwMD is detained by an order of the President must make a report in writing to the Minister (today Cabinet Secretary) for the time being responsible for prisons for the consideration of the President in respect of the condition, history and circumstances of the person so detained.[78] Thereafter, after the expiration of a period of two years from the date of the last report, the officer in charge of the mental hospital or prison must submit a report on the antecedents of the detainee.[79] After consideration of

73 National Council on Administration of Justice (NCAJ) Criminal justice system in Kenya: An audit http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf (accessed 16 March 2020) 55.
74 Sec 166(1), Criminal Procedure Code.
75 Sec 166(2), Criminal Procedure Code.
76 Sec 166(3), Criminal Procedure Code.
77 Sec 166(7), Criminal Procedure Code.
78 Sec 166(4), Criminal Procedure Code.
79 As above.

the report, the President may make an order that the relevant detained PwMD be discharged or depending on their conditions remain under supervision in any place or under any person in order to ensure the safety and welfare of the person in respect of whom the order is made and of the public.[80]

Further, the law allows for any person or persons empowered by the President at any time after a person has been detained to make a special report to the Minister for transmission to the President.[81] The report should detail the condition, history and circumstances of the detained PwMD.[82] The President will then consider the report and may order that the detained PwMD be discharged or conditionally remain under supervision in any place or under any person for ensuring their safety and welfare of the person in respect of whom the order is made and of the public.[83]

2.4. Post-2010 Constitution: Paradigm shift towards addressing human rights violations of NCRMD-PwMDs through Kenyan case law

The 2010 Constitution was adopted in 2010 after replacing the independence Constitution of Kenya, 1963. Courts in Kenya have employed the human rights approach when interpreting the rights of PwMDs under the 2010 Constitution resulting into the paradigm shift towards addressing human rights violations of NCRMD-PwMDs through Kenyan case law.

2.4.1. The cases, issues and findings

2.4.1.1. Hassan Hussein Yusuf v Republic[84]

This was an appeal from the Magistrate Court, whereby the appellant, who was charged with breaking into a building and committing a felony contrary to section 306(a) of the Penal Code was ordered to be detained in prison at the pleasure of the President under section 167 of the Criminal Procedure Code after being found to be of unsound mind

80 Sec 166(5), Criminal Procedure Code.
81 *Leonard Mwangemi Munyasia v Republic* [2015] eKLR.
82 Sec 166(7), Criminal Procedure Code.
83 Sec 166(8), Criminal Procedure Code.
84 *Hussan Hussein Yusuf v Republic* [2016] eKLR.

during sentencing. The High Court held that the detention of the appellant under section 167 of the Criminal Procedure Code discriminated against NCRMD-PwMDs because the detention was indeterminate, and detention was in a prison instead of in a health facility. The High Court found section 167 to be in contravention of NCRMD-PwMDs' rights to freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom and security of the person under the 2010 Constitution.

2.4.1.4. Joseph Melikino Katuta v Republic[85]

This was an appeal from the Magistrate Court, whereby the appellant who was charged and convicted of the offence of defilement of a girl contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act was sentenced to serve 20 years imprisonment. On appeal, the High Court found the appellant to be mentally disabled but held that it could not detain him under section 167 of the Criminal Procedure Code as that would violate his right to freedom and security of the person. The appellant was released.

2.4.1.5. Republic v SOM[86]

The accused was convicted of murder contrary to section 203 as read with section 204 of the Penal Code. The High Court further made a special finding under section 166(1) of the Criminal Procedure Code to the effect that the accused committed the act of killing but was insane at the time. The High Court, after finding that NCRMD-PwMDs have a right to be treated with dignity, held that the detention of NCRMD-PwMDs under the provisions of section 166 of the Criminal Procedure Code was unconstitutional to the extent that it took away the judicial function to determine the nature of the sentence or consequence of the special finding and vested it in the executive.[87] The Court went further to amend section 166 of the Criminal Procedure Code by wrestling back from the executive the judicial functions of determining the guilt and sentences of PwMDs.[88] As a result, the accused was committed to Mathare Mental Hospital for a term of 15 years subject to

85 *Joseph Melikino Katuta v Republic* [2016] eKLR.
86 *Republic v SOM* [2018] eKLR.
87 *Republic v SOM* (n 86 above) 3.
88 As above.

periodic review by the Court in accordance with section 166 of the Criminal Procedure Code.

2.4.1.6. Republic v ENW[89]

The accused was convicted of murder contrary to section 203 as read with section 204 of the Penal Code. The High Court further made a special finding under section 166(1) of the Criminal Procedure Code to the effect that the accused was guilty but insane. However, the High Court departed from the findings in *Republic v SOM* and held that the executives' powers under section 166 of the Criminal Procedure Code are pegged to the President's power of mercy under article 133 of the 2010 Constitution.[90] The High Court did not find article 166 of the Criminal Procedure Code to be unconstitutional because the President was exercising his legitimate power of mercy as provided for under the 2010 Constitution, and as such section 166 had not taken away the judicial function to sentence accused persons.[91] The Court in this case held that the accused had voluntarily induced his psychosis and was sentenced to serve 13 years imprisonment.

2.4.2. Significance of the cases

These High Court decisions are significant because they are based on the 2010 Constitution which is a higher validating norm rather than the common law position on which the Criminal Procedure Code is based. Indeed, the detention of NCRMD-PwMDs at the President's pleasure for an indefinite length of time under section 166 and 167 of the Criminal Procedure Code is in violation of the rights to freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom and security of the person under the 2010 Constitution because the length of such detention depends on the inmate's conduct and imprisonment terminates only after the President decides that there has been a significant change in the NCRMD-PwMDs' attitude and behaviour.[92] Therefore, section 166 and 167 of the Criminal Procedure Code denotes that the detention

89 *Republic v ENW* [2019] eKLR.
90 *Republic v ENW* (n 89 above) 3.
91 *Republic v ENW* (n 89 above) 4.
92 N Nyambane 'Imprisonment at the President's pleasure' 12 February https://nairobilawmonthly.com/index.php/2019/02/12/imprisonment-at-the-presidents-pleasure/ (accessed 1 May 2020).

of NCRMD-PwMDs 'at the President's pleasure' can be very short, or it can be a life sentence if no decision is made to end the detention.[93] The High Court's assertion that the power of sentencing accused NCRMD-PwMDs is a judicial prerogative and not an executive function is also key to protecting the rights of NCRMD-PwMDs accused of crimes.

2.4.3. Unintended consequences and missed opportunities

The decisions by the High Court unintentionally establishes a dictatorship of the Judiciary. The decisions still imposes non-criminally responsible mental disability detentions on NCRMD-PwMDs without even considering whether they pose any significant threat to their own safety or to that of the public. It means that the High Court decisions have failed to apply appropriate substantive component of the right to freedom of the security of the person, which requires that the deprivation of liberty should not be arbitrary and that there must be a just cause for any deprivation.[94] According to the High Court, the objective of treatment alone justifies the institutionalisation of NCRMD-PwMDs. That approach fails to appreciate that mental illness is complex and that there are varying types and degrees of mental disability which do not always call for the institutionalisation and treatment of PwMDs.[95] In the case of *De Vos NO v Minister of Justice and Constitutional Development*,[96] the Constitutional Court of South Africa gave the example of down syndrome as one type of intellectual disability that must not necessarily be treated, thus depriving of a rational basis the institutionalisation or treatment of PwMDs on that ground.[97]

Moreover, the High Court's dominating attitude towards NCRMD-PwMDs is fueled by the medical model of disability which views disability as an antiphony of everyday life which must be pensioned off and relegated to medical institutions.[98] For

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93 As above.
94 *De Vos NO v Minister of Justice and Constitutional Development* (CCT 150/14) [2015a] ZACC paras 27.
95 *De Vos NO* (n 94 above) paras 55.
96 As above.
97 As above.
98 P Juma 'Right to self-representation for people with mental disabilities in Kenya's courts' (2019) 7 *African Disability Rights Yearbook* 86

example, in *Republic v SOM,* the court after finding the accused guilty but insane recommended that he be committed to a mental institution for a term of 15 years subject to periodic reviews by the Court in accordance with section 166 of the Criminal Procedure Code and in any case before the expiry of every two years.[99] The High Court's reasoning in *Republic v SOM* is based on the medical model of disability which the CRPD eschews and instead, adopts the human-rights model which focuses on mainstreaming disability and removing 'attitudinal and environmental barriers' which causes the marginalisation and stigmatisation of PWDs.[100]

The other challenge with the High Court's decisions, relates to the conflict in the interpretation of the function of the President and the Judiciary in section 166 and 167 of the Criminal Procedure Code. The decision in *Republic v ENW* infers that section 166 and 167 is linked to the President's power of mercy under article 133 of the 2010 Constitution. That provisions provides as follows:

> 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.[101]

Section 166 and 167 of the Criminal Procedure Code which provide for the detention of NCRMD-PwMDs at the President's pleasure must not be confused with the President's exercise of the power of mercy under the 2010 Constitution.[102] The President's power of mercy entails the grant of pardon, respite, substituting a less severe form of punishment and remission which is not the case with the detention of NCRMD-PwMDs whose purpose is to treat and rehabilitate NCRMD-PwMDs.[103] Moreover, the President's power of mercy is exercised with the advice of the advisory committee established under article 133(2) of the 2010 Constitution and not unilaterally, as is the case with the powers conferred to the President under section 166 and 167 of the Criminal Procedure Code.[104]

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99 *Republic v SOM* (n 86 above) 4.
100 Communication 22/2014, *X v United Republic of Tanzania*, CRPD Committee (31 August 2017) UN Doc CRPD/C/18/D/22/2014 para 7.6.
101 Art 133, 2010 Constitution.
102 Nyambane (n 92 above).
103 As above.
104 As above.

2.5 Criticism of the judgments

There is no doubt that sections 166 and 167 of Kenya's Criminal Procedure Code are not in tandem with the 2010 Constitution. The position is exacerbated by a lack of uniformity in the High Court's interpretation on the role of the executive in imposing detention orders on NCRMD-PwMDs who have been accused of crimes. This leaves the current status of mental disability detentions in Kenya uncertain. Apart from the Judges' contradictory positions, the High Court decisions have not articulated all the ways in which non-criminally responsible mental disability detentions under sections 166 and 167 of the Criminal Procedure Code constitutes a violation of NCRMD-PwMDs right to liberty under the 2010 Constitution.

2.5.1. The Criminal Procedure Code and how it violates NCRMD-PwMDs' right to liberty

The Criminal Procedure Code raises major issues on NCRMD-PwMDs' right to liberty during and after criminal proceedings. Section 166 and 167 of the Criminal Procedure Code detail the procedure for disposing NCRMD-PwMDs who have been declared guilty but insane and NCRMD-PwMDs who are unable to understand criminal proceedings.

2.5.1.1. Violation of NCRMD-PwMDs' right to liberty during criminal proceedings

NCRMD-PwMDs have the same fair hearing right as all other accused persons. Section 167 of the Criminal Procedure Code allows for the detention, at the President's pleasure, of NCRMD-PwMDs who cannot be made to understand the proceedings but there is evidence which has been heard and the court has ruled that it would justify their conviction.[105] The President is not an independent and impartial tribunal or court. Imposition of a suitable sentence to a convicted accused person forms part of a hearing.[106] Therefore, the function of sentencing a convicted accused person should be imposed by

105 Criminal Procedure Code secs 167(1).
106 *AOO and 6 others v Attorney General and Another* [2017] eKLR 4.

an independent and impartial tribunal.[107] The indefinite detentions of NCRMD-PwMDs who cannot understand proceedings without providing them with any procedural and age-appropriate accommodation in order to enable them to understand the proceedings during the trial violates their right to liberty. Detention at the pleasure of the President is also arbitrary because of its mandatory nature and because it is imposed against the will of NCRMD-PwMDs on the pretext of treatment.[108] The detention is also indefinite until further orders from the President; and furthermore, the Criminal Procedure Code provides no periodic review or considerations of alternative forms of accommodations to NCRMD-PwMDs detentions.

2.5.1.2. Violation of NCRMD-PwMDs' right to liberty after criminal proceedings

Detention at the President's pleasure after trial denotes the confinement of an accused 'until the President issues an order releasing him either unconditionally or to' the care of his family.[109] These detentions are for an indefinite period of time since there are no clear and proper guidelines for the duration of the institutionalisation of NCRMD-PwMDs. Furthermore, there is no procedure for the release of NCRMD-PwMDs in case the President fails to make any orders as to where or when they should be taken for mental treatment or otherwise be dealt with.

2.5.2. Violations in terms of punishment

Detention at the order of the President is not a form of punishment as was held in the case of *PIM v Republic*[110] but a preventive measure aimed at ensuring the safe custody of an accused for an indefinite period, and 'not imprisonment for a fixed term'.[111] Further, in the case of *KCK v Republic,*[112] another case decided by the Court of Appeal, the Court said that the detention at the pleasure of the president is neither a sentence nor a conviction

107 As above.
108 J Breeding 'Practicing Szasz: A psychologist reports on Thomas Szasz's influence on his work' (2014) *Sage Open Journals* 2
109 EL Lubulellah 'Mandatory' death penalty in Kenya: An examination of its legality in light of the Constitution of Kenya 2010 and the "right to freedom from inhuman or degrading treatment or punishment" LLM dissertation, University of Nairobi, 2014 148.
110 *PIM v Republic* [1982] eKLR.
111 *PIM v Republic* (n 110 above) 4.
112 *KCK v Republic* [2016] eKLR.

but an acquittal to which NCRMD-PwMDs have no right of appeal.[113] For that reason, discharged NCRMD-PwMDs are considered patients and not prisoners.[114]

The High Court judgments in *Republic v ENW* and *Republic v SOM* contradicts the positions as laid out in the two Court of Appeal cases in *PMI v Republic* and *KCK v Republic* which stipulated that the special finding of 'guilty but insane' is neither a sentence nor a punishment. In the Kenyan judicial hierarchy, the Court of Appeal is superior to the High Court which means that 'decisions of the Court of Appeal are binding on the High Court.'[115] Therefore, the decisions by the High Court can be faulted for holding that the 'detention at the pleasure of the President' constitutes a sentence in Kenya. Such a holding cannot stand and is in itself a violation of NCRMD-PwMDs' right to liberty because the 'not guilty but insane verdicts' in Kenya amounts to acquittals and not convictions which results in sentences. Moreover, the 'sentence' will be unlawful because it will not be serving its purpose which are punishing the offender, reducing crime, reforming the offender, protecting the public, and making reparations by offenders to persons affected by their offences which are the legitimate purposes of sentencing.

2.6. Conclusion

Although the High Court in Kenya has declared the detention under section 166 and 167 of the Criminal Procedure Code unconstitutional, Parliament is yet to amend the law. Therefore, the detention of discharged NCRMD-PwMDs is still under the control of the executive. The major drawback of these non-criminally responsible mental disability detentions in Kenya is the lack of investigation as to the necessity of the institutionalisation of NCRMD-PwMDs with regards to their individual circumstances. The law does not make any provision for their treatment. Moreover, there are no provisions for alternative forms of accommodation to detention, such as diversion, probation, community-based or alternative social-care services, treatment orders, or even an absolute discharge. In short, the detention does not reflect the special needs such as

113 *KCK v Republic* (n 112 above) 5.
114 As above.
115 Juma (n 98 above) 90.

the rehabilitation of NCRMD-PwMDs. This chapter has discussed the evolution of the detention of NCRMD-PWMDS within the Kenyan legal framework. The next chapter will analyse the the CRPD and non-criminally responsible mental disability detentions.

CHAPTER 3: THE CRPD AND NON-CRIMINALLY RESPONSIBLE MENTAL DISABILITY DETENTIONS

3.1. Introduction

The preceding chapter discussed the evolution of the detention of NCRMD-PWMDS within the Kenyan legal framework. This chapter attempts, from a legal point of view, to provide insights obtained from a legal approach to the understanding of the key aspects of the right to liberty under article 14 of the CRPD. It endeavours to explore the general principles in relation to the right to liberty and sets out the established legal standards. The chapter is divided into four parts. Part one is the introduction to the chapter. Part two discusses the relationship between the CRPD and the violations of PwMDs' right to liberty in Kenya's non-criminally responsible mental disability detentions. Part three analyses violations of article 14 of the CRPD in Kenya followed by an analysis of the merits of the CRPD Committee's finding in *Noble v Australia* (*Noble*).[116] Part four gives the conclusion of the chapter.

3.2. Application of the CRPD in Kenya and the violations of PwMDs' rights through non-criminally responsible mental disability detentions

On 19 May 2008, Kenya ratified the CRPD, which encompasses the international standards of regulating the deprivation of liberty for PwMDs. Article 14 states as follows:

> States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. (2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.[117]

Article 14 is the most comprehensive and authoritative provision that explicitly guarantees the rights of liberty and security of the person for all PWDs on equal

116 Communication No 7/2012 *Noble v Australia* (*Noble*), views adopted at its sixteenth session (2 September 2016), UN Doc CRPD/C/16/D/7/2012 (10 October 2016).
117 Art 14, CRPD.

conditions with others.[118] Liberty denotes 'freedom from confinement of the body', while security of the person concerns 'freedom from injury to the body and the mind'.[119] The main reason behind the CRPD's inclusion of article 14 is to ensure that any deprivation of PwMDs' liberty is in conformity with the law.[120] The right to liberty is not an absolute right and may be restricted only 'in accordance with the law, for example, in the enforcement of criminal laws'.[121] Most importantly, the right to liberty prohibits all unlawful or arbitrary deprivations of liberty and imprisonment on ground of disability.[122] Moreover, any deprivation of PWDs' liberty should be on an equal basis with others. Article 14 of the CRPD should be interpreted in light of the UN Human Rights Committee's (HRC) General Comment 35 (General Comment 35) which details the core elements of the right to liberty as including the prohibition of arbitrary and and unlawful detention, judicial control of PwMDs' institutionalisation in criminal justice systems, and the right to take proceedings for release from unlawful or arbitrary detention.[123]

3.2.1. Arbitrary and unlawful detention

The right to liberty applies to all detentions including those 'in connection with criminal proceedings'.[124] It also acts as a substantive guarantee against the unlawful or arbitrary deprivation of PwMDs' liberty.[125] A detention is arbitrary when it is characterised by aspects of 'inappropriateness, injustice, lack of predictability and due process of law, as well as the absence of elements such as 'reasonableness, necessity, and proportionality'.[126] According to the Guidelines to Protect Stateless Persons from Arbitrary Detention (the Guidelines to Protect Stateless Persons), confinement is considered to be arbitrary and unlawful when it is not

118 PC Gómez et al 'Psychosocial disability and deprivation of liberty: Reviewing the case of Qatar in the light of the Convention on the Rights of Persons with Disabilities' (2018) 24 *International Journal of Mental Health and Capacity Law* 57.
119 CD Aguilar, Ending the deprivation of liberty on the basis of disability, A/HRC/40/54 9.
120 A Arstein-Kerslake *Disability human rights clinic* (2018) 87.
121 Aguilar (n 119 above) 9.
122 Arstein-Kerslake (n 120 above) 87.
123 UN Human Rights Committee (HRC) General Comment 35: Article 9: Liberty and security of person (2016) CCPR/C/GC/35 dated 16 December 2014.
124 General Comment 35 (n 123 above) par 40.
125 Aguilar (n 119 above) 9.
126 General Comment 35 (n 123 above) par 12.

> (i) [p]rovided for by national law; (ii) Carried out in pursuit of a legitimate objective; (iii) Non-discriminatory; (iv) Necessary; (v) Proportionate and reasonable; and (vi) Carried out in accordance with the procedural and substantive safeguards of international law.[127]

Similarly, in the case of *Purohit and Another v The Gambia,*[128] the African Commission on Human and Peoples' Rights (African Commission) held the following:

> Article 6 of the African Charter guarantees every individual, be they disabled or not, the right to liberty and security of the person. Deprivation of such liberty is only acceptable if it is authorized by law and is compatible with the obligations of States Parties under the Charter… Article 6 of the African Charter further states that no one may be arbitrarily arrested or detained. Prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it.[129]

Therefore, deprivation of liberty on grounds of disability is not justifiable.[130] Deprivation of PwMDs' right to liberty on grounds of disability means that the legal grounds upon which restriction of liberty is determined is linked to the impairment of the person involved instead of being neutrally defined so as to apply to all persons on an equal basis.[131] Article 1 of the CRPD describes PWDs as including people with 'long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others'.[132] In this instance, disability occurs when persons with impairments are detained and thus 'prevented from fully and effectively participating in the society on an equal basis with others due to attitudinal and environmental barriers'.[133] In fact, according to the CRPDs Guidelines on article 14,[134] which were approved by the CRPD Committee, the 'provision implies an absolute prohibition of detention on the basis of disability and does not permit any exceptions'.[135] However, according to the Office of the High Commissioner for Human Rights (OHCHR), deprivation of liberty 'should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention'.[136]

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127 The Equal Rights Trust (ERT), ERT guidelines to protect stateless persons from arbitrary detention, ERT, 2012 16.
128 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).
129 *Purohit & Another v The Gambia* (n 128 above) par 64-65.
130 General Comment 35 (n 123 above) par 19.
131 J Beqiraj, L McNamara & V Wicks, Access to justice for persons with disabilities: From international principles to practice, International Bar Association, October 2017 39.
132 Art 1 CRPD.
133 CRPD preamble par (e).
134 Guidelines on the right to liberty and security of persons with disabilities, adopted September 2015.
135 Gómez (n 118 above) 59.
136 Beqiraj et al (n 131 above) 39.

Therefore, detention for the purpose of protecting PwMDs from serious harm or preventing injury to others is considered a legitimate aim.[137] Proportionality in terms of detention means that it must be applied as a measure of last resort and for the shortest appropriate period of time, otherwise state parties are obligated to provide for adequate community-based or alternative social-care services for NCRMD-PwMDs as alternatives to their institutionalisation.[138]

3.2.2. Judicial control of detention in connection with criminal charges and the right to take proceedings for release from unlawful or arbitrary detention

The other major element of a legally acceptable preventive institutionalisation is that court control of the detention must be a prerequisite.[139] For a long time NCRMD-PwMDs detained at the order of the President have not been able to access 'adequate redress and reparations, and the restitution of their liberty' in the relevant judicial systems.[140] According to General Comment 35, persons who have been deprived of their liberty are entitled to take proceedings against the deprivation and to receive a decision without delay.[141] Regrettably, NCRMD-PwMDs who are diverted from the criminal justice system following the special verdict of 'guilty but insane' 'have less access to procedural guarantees than others in the criminal justice system'.[142]

3.3. Violations of article 14 of the CRPD in Kenya

In Kenya, the detention of NCRMD-PwMDs at the order of the President is a major national concern. The detention of NCRMD-PwMDs at the order of the President has been criticised for violating various NCRMD-PwMDs' rights, including the right to liberty and security of the person under Kenya's 2010 Constitution. These violations will be discussed below in light of article 14 of the CRPD and will also be buttressed by

137 General Comment 35 (n 123 above) par 19.
138 General Comment 35 (n 123 above) par 19.
139 A Zayas 'Human rights and indefinite detention' (2005) 87 *International Review of the Red Cross* 15.
140 Aguilar (n 119 above) 4.
141 General Comment 35 (n 123 above) par 47.
142 Aguilar (n 119 above) 6.

comparative foreign cases which are applicable and persuasive in Kenya's legal system in so far as they are consistent with the 2010 Constitution.[143]

A first violation of article 14 of the CRPD is related to the phenomenon of *indefinite detention* of NCRMD-PwMDs in Kenya'.[144] Section 166 of the Criminal Procedure Code provides that when a trial court makes a special finding that a PwMD is 'guilty but insane', it is mandatory for it to impose a detention order at the President's pleasure on the PwMD who has been acquitted.[145] It means that they will be detained indefinitely until further orders from the President.[146] That is the law regardless of whether the accused poses any risk to himself or to the society.[147] The lack of clear and proper guidelines before the institutionalisation of NCRMD-PwMDs in the criminal justice system also constitutes a violation of NCRMD-PwMDs' right to liberty.[148] The right to freedom and security of the person requires that no one should be deprived of their physical freedom unless a fair and lawful procedure has been followed.[149] Therefore, the institutionalisation of NCRMD-PwMDs without proper guidelines in Kenya's criminal justice system is procedurally unfair and unlawful.

Further, there is no procedure to apply for their release in case the President fails to make any orders as to where they should be taken for mental treatment or otherwise be dealt with. According to the Kenya's judiciary situational analysis, NCRMD-PwMDs who are unable to understand the proceedings are detained indefinitely with no remedy.[150] Detention in such circumstances is usually for inordinately long periods without any safeguards apart from the protection of their dignity thus violating their right to liberty.[151]

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143 Art 2(4) of the 2010 Constitution.
144 *Centre for Health, Human Rights and Development (CEHURD) v Attorney General* Constitutional Petition 64 of 2011 16.
145 Judiciary of Kenya *Sentencing policy guidelines* (Judiciary of Kenya) 41.
146 As above.
147 *Centre for Health, Human Rights and Development (CEHURD) v Attorney General* (n 144 above) 20.
148 *Centre for Health, Human Rights and Development (CEHURD) v Attorney General* (n 144 above) 23.
149 See also *De Vos NO* (n 94 above) para 24.
150 The Judiciary of Kenya (n 145 above) 18.
151 Secs 23(3) Person Deprived of Liberty Act 23 of 2014 and secs 38 Mental Health Act, Chapter 248 Laws of Kenya.

A second violation of NCRMD-PwMDs' rights under article 14 occurs when those who are found 'guilty by reason of insanity' are confined under *appalling conditions* either in hospital, prison, or other places of custody.[152] Under the CRPDs' Guidelines on article 14, the CRPD Committee has confirmed that PwMDs' right to liberty will be violated if they are detained under poor living conditions, whether in prisons, hospitals or other places of custody'.[153] Regrettably, prisons facilities in Kenya are not adequately equipped to offer the highest attainable standard of health to institutionalised PwMDs, an issue that was addressed by the High Court of Kenya in the case of *Republic v CMW*.[154] In that matter, the Court after finding the accused 'guilty but insane' recommended that the country should build 'a mental asylum where persons with mental disabilities facing trial for various offences may be held, and consequently properly medically treated'.[155] The continued deprivation of liberty of NCRMD-PwMDs in prisons rather than in medical institutions after being found not criminally responsible on account of their mental illness violates their right to liberty and security.[156] There has also been criticisms that the conditions in Mathare Hospital where most NCRMD-PwMDs are confined are appalling.[157] Most NCRMD-PwMDs live under the constant threat of exploitation, violence, neglect and abuse.[158] Imprisonment of NCRMD-PwMDs in hospitals with inadequate conditions violates their rights.[159] Therefore, there is a need to offer 'training mechanisms for justice and prison officials in accordance with the' CRPD's 'legal paradigm' in article 14.[160]

Third, the *lack of periodic re-evaluation* for NCRMD-PwMDs detained at the order of the President contravenes the right to liberty and security of NCRMD-PwMDs under the CRPD.[161] The decisions to detain 'should be open to review periodically so that the grounds justifying the detention can be assessed'.[162] In Kenya, judicial power resides

152 Secs 166(3) Criminal Procedure Code.
153 Guidelines (n 134 above) par 17.
154 *Republic v CMW* [2018] eKLR.
155 *Republic v CMW* (n 154 above) para 48.
156 European Court of Human Rights *Detention and mental health* (2020) 9.
157 Kamundia (n 21 above) 55.
158 As above.
159 European Court of Human Rights (n 32 above) 9.
160 Guidelines (n 134 above) par 17.
161 General Comment 35 (n 123 above) par 12.
162 *A v Australia* [1997] Communication No 560/1993 (HRC) UN Doc CCPR/C/59/D/560/1993, para 9(4).

in the judiciary. Therefore, the judiciary is the proper organ for conducting periodic re-evaluation for NCRMD-PwMDs detained at the order of the President and not the executive. In *AOO and 6 others v Attorney General and Another*,[163] the High Court of Kenya held as follows:

> The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. In so far as section 25(2) & (3) of the Penal Code allows a person aged below 18 years to be detained at the presidents pleasure, thereby granting the president powers to determine sentence or when to release the person and requires a judicial officer to forward notes to the president, in my view it offends the principle of separation of powers and Article 160 (1) of the constitution of Kenya 2010.[164]

Therefore, a lawful detention automatically becomes arbitrary and unlawful if it is not subject to any periodic review in order to ensure that NCRMD-PwMDs are not detained indefinitely.[165] Section 166 and 167 of the Criminal Procedure Code does not have any review mechanism for NCRMD-PwMDs who have been detained at the order of the President.[166] However, according to section 167(4) of the Code, the court may make suitable recommendations for interventions.[167] General Comment 35 requires that detentions must be 'necessary in all the circumstances'.[168] It means that NCRMD-PwMDs should be released once the legitimate aim of the detention, which is treatment and rehabilitation of NCRMD-PwMDs, ceases to exist.

A fourth violation of article 14 of the CRPD may occur because of the *lack of special alternative accommodation* to detentions for NCRMD-PwMDs under section 166 and 167 of the Criminal Procedure Code and active considerations for possible alternative forms of accommodations to their institutionalisation by judicial officers. Sufficient considerations must be given to the fact that not all NCRMD-PwMDs pose a danger to themselves or to the public to warrant their incarceration or institutionalisation for purposes of care and treatment.[169] For example, children with mental disabilities or adults with serious brain damage, given the nature of their disability and the inability to

163 *AOO and 6 others v Attorney General and Another* [2017] eKLR.
164 *AOO and 6 others v Attorney General and Another* (n 106 above) 9.
165 Zayas (n 139 above) 15.
166 The Judiciary of Kenya (n 145 above) 41.
167 As above.
168 General Comment 35 (n 123 above) par 12.
169 F Khan '*De Vos NO v Minister of Justice and Constitutional Development*: The constitutionality of detaining persons unfit to stand trial' (2017) 59 *SA Crime Quarterly* 44.

understand court proceedings, cannot reasonably be expected to acknowledge responsibility.[170]

Regrettably, the dominating attitude of lawmakers, judges, and magistrates in Kenya is driven by the medical model of disability that centralises the impairment of the person and views disability as a defect which must be cured through medical intervention.[171] The lack of rights-based alternative forms of accommodations to institutionalisation such as 'diversion programmes, including restorative justice' also violates the principles of article 14 of the CRPD.[172] According to the CRPD Committee, such provisions divests NCRMD-PwMDs of a clear determination of their responsibility and relegates them 'to further segregation and marginalization; as well as to indefinite detention in psychiatric institutions under the harshest conditions and often for extremely long duration'.[173]

The fifth and last violation of article 14 of the CRPD occurs because the *institutionalisation* of NCRMD-PwMDs under section 166 of the Criminal Procedure Code is usually made in the context of mental health care for those considered dangerous to themselves and to the society. The CRPD Committee rejects this 'outcome approach', which is based on the assumption that NCRMD-PwMDs decisions have negative consequences.[174] The outcome approach 'strengthens the arguments against the 'dangerousness criteria', rejecting predictions of future harm or risk 'as valid grounds for denying' their right to liberty thus enforcing their 'hospitalization or institutionalization'.[175] Moreover, the use of phrases such as 'idiots', 'lunatic'. 'insane' and 'dangerous' 'are derogatory and detract from the dignity that should be accorded to all' NCRMD-PwMDs in accordance with the CRPD.[176]

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170 Khan (n 169 above) 45.
171 W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights* 316.
172 Guidelines (n 134 above) par 21.
173 Gómez (n 118 above) 62.
174 General Comment 1 (n 6 above) Par 15.
175 Gómez (n 118 above) 64.
176 *Centre for Health, Human Rights and Development (CEHURD) v Attorney General* (n 144 above) 27.

3.4. Protection of PwMDs' rights during and after criminal proceedings through the reasoning of the CRPD Committee in *Noble*

In 2016, the CRPD Committee issued a groundbreaking decision on non-criminally responsible mental disability detentions and verdicts in *Noble*, where it held that the indefinite detentions of NCRMD-PwMDs violated their rights under articles 14(1) (liberty) and 15 (freedom from torture) of the CRPD.[177]

In *Noble*, the accused was charged with various counts of sexual penetration against minors between the ages of 13 and 16 which carried a maximum penalty of 20 years.[178] Before entering a plea, Noble was between 2002 and 2003 taken for various mental assessments, all of which concluded that he was unfit to plead.[179] Ultimately, the matter was referred to the Mentally Impaired Review Board, which ordered that the accused be detained in custody at Greenough Regional Prison where he remained until 2012.[180] In his complaint to the CRPD Committee, Noble argued that the unfit to plead declarations amounted to discrimination, violated his rights to legal capacity, access to justice, and liberty. The State of Australia denied all these allegations and the CRPD Committee had to decide on the legality of both mental disability based verdicts and non-criminally responsible mental disability detentions.

The CRPD Committee found that, first, non-criminally responsible mental disability detentions are discriminatory and should be replaced by reasonable accommodation provisions in order to ensure the rights of NCRMD-PwMDs in the criminal justice system.[181] Secondly, that the detention of accused NCRMD-PwMDs based solely on the nature of their disability without considering any available alternatives and support mechanisms amounts to a violation of their right to liberty under the CRPD.[182] Lastly, that the detention of NCRMD-PwMDs indefinitely in violent conditions amounts to psychological torture thus infringing on their various rights under the CRPD.[183]

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177 *Noble v Australia* (n 116 above) paras 4.3.
178 *Noble v Australia* (n 116 above) paras 2.1.
179 *Noble v Australia* (n 116 above) paras 2.4.
180 As above.
181 *Noble v Australia* (n 116 above) paras 8.4.
182 *Noble v Australia* (n 116 above) paras 8.7.
183 *Noble v Australia* (n 116 above) paras 8.9.

Section 166, and 167 of Kenya's Criminal Procedure Code allows for the detention of NCRMD-PwMDs who have been declared guilty but insane and NCRMD-PwMDs who do not understand criminal proceedings at the President's pleasure.[184] However, after the presidential order for detention is given, a report on the antecedents of the detainee shall be prepared under section 166(4).[185] Detention under section 167 of the Criminal Procedure Code does not make any provision for periodic reports to the President. From the foregoing it is clear that non-criminally responsible mental disability detentions in Kenya tilts the scales heavily against NCRMD-PwMDs who are not viewed as right bearers but as material beings with lesser rights who should be protected against themselves and against the society through incarceration. Therefore, non-criminally responsible mental disability detentions under sections 166(1), and 167 are in contravention of NCRMD-PwMDs right to liberty.

3.5. Conclusion

Although article 14 of the CRPD forms part of Kenya's legal framework, it has not resulted into any amendments of laws that allow for the detention of NCRMD-PwMDs. Instead, it has led to the enactment of the Person Deprived of Liberty Act,[186] which together with the Mental Health Act[187] sets out the criteria for the detention of NCRMD-PwMDs without the necessary procedural safeguards.[188] The CRPD Committee has maintained as follows:

> [D]eclarations of unfitness to stand trial or non-responsibility in criminal justice systems and the detention of persons based on those declarations is contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.[189]

Therefore, detentions of the nature of section 166 and 167 of the Criminal Procedure Code, which results in the detention of NCRMD-PwMDs considered exempt from criminal liability, are unlawful because they contradict the norms of the CRPD.[190] The result of the analysis is that Kenya's criminal justice system does not promote the dignity, respect, autonomy, and nondiscrimination of NCRMD-PwMDs or incorporate any procedural

184 Criminal Procedure Code, secs 166(1) & 167(1).
185 Criminal Procedure Code, secs 166(4).
186 Person Deprived of Liberty Act 23 of 2014.
187 Chapter 248, Laws of Kenya.
188 Secs 23(3) Person Deprived of Liberty Act.
189 Guidelines (n 134 above) par 16.
190 Aguilar (n 119 above) 9.

safeguards for their protection against arbitrary detention thus violating their rights to liberty. This chapter has analysed the CRPD and non-criminally responsible mental disability detentions. The next chapter discusses Canada's disposition procedures of NCRMD-PwMDs who have committed offences and how they are protected from mental disability detentions.

CHAPTER 4: SPECIFIC SAFEGUARDS AND HOW NCRMD-PWMDs ARE PROTECTED FROM NON-CRIMINALLY RESPONSIBLE MENTAL DISABILITY DETENTIONS IN CANADA

4.1. Introduction

The preceding chapter analysed the CRPD and non-criminally responsible mental disability detentions. This chapter discusses Canada's disposition procedures of NCRMD-PwMDs who have committed offences and how they are protected from mental disability detentions. The study focuses on Canada as a comparator through the analysis of the country's criminal procedure laws and examines how they protect NCRMD-PwMDs' rights against violations arising from non-criminally responsible mental disability detentions with a view of identifying the best solutions and alternative accommodations for addressing the violations of NCRMD-PwMDs' rights in Kenya's non-criminally responsible mental disability detentions.

4.2 Developments of protection of NCRMD-PwMDs from Canada's non-criminally responsible mental disability detentions

Prior to Canada becoming a confederation, its insanity law, like that of Kenya, mirrored English law.[191] Several decades after becoming a confederation, up until the enactment of the first Criminal Code in 1892,[192] there was no legislation governing PwMDs who committed criminal acts and so English law remained in effect.[193] The first legislation to codify the 'not guilty by reason of insanity' (NGRI) verdict in Canada was the 1892 Criminal Code (Criminal Code).[194] The detention of accused PwMDs who were found to be NGRI was addressed in section 736 of the Criminal Code as follows:

> Whenever it is given in evidence upon the trial of any person charged with any indictable offence, that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence, the

191 KA McCleery 'The paramount consideration: Decision-making by the British Columbia review board in initial disposition decisions' LLM dissertation, The University of British Columbia, 2019 26.
192 Criminal Code, SC 1892, c 29.
193 McCleery (n 191 above) 26.
194 McCleery (n 191 above) 27.

> court before which such trial is heard, shall order such a person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known.[195]

The above provision was largely similar to that of the 1800 English Criminal Lunatics Act,[196] which had been passed in England 92 years ago. The only substantive difference related to the reference of the lieutenant-governor in the Canadian provision instead of the King in the English version,[197] meaning that in Canada the various lieutenant-governors had the final authority.[198] The lieutenant-governor represents the monarch in Canada and is the legal head of state at the provincial level.[199]

In 1969, the Canadian Parliament amended the Criminal Code to allow the lieutenant-governor of each Province to create mental health review boards which would provide non-binding advice regarding PwMDs found NGRI, thus enhancing their procedural protections.[200] However, appointment of the mental health review boards was not mandatory and the final authority on the detention of acquitted PwMDs still rested with the lieutenant-governor.[201] In fact, it was a must for the lieutenant-governor to impose detention on acquitted NCRMD-PwMDs under the Criminal Code.[202] However, where a mental health review board had been established, it was required to review each case within six months of the verdict and annually after that thus ensuring a measure of procedural certainty in the form of regular reviews to accused persons.[203]

In 1976, the Canadian Law Reform Commission (Commission) prepared a report titled 'Mental Disorder in the Criminal Process',[204] which was highly critical of the NGRI system. The Commission argued that the NGRI system was based on myths and misunderstandings about 'the character and nature of the problems created by mentally

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195 Secs 736, 1892 Criminal Code.
196 Criminal Lunatics Act 1800 (CLA).
197 McCleery (n 191 above) 27.
198 McCleery (n 191 above) 29.
199 What is Canada's political system? https://settlement.org/ontario/immigration-citizenship/canadian-government/canadian-political-system/what-is-canada-s-political-system/ (accessed 21 April 2020).
200 McCleery (n 191 above) 29.
201 As above.
202 SN Verdun-Jones 'Tightening the reins: Recent trend in the application of the insanity defence in Canada' (1991) 10:3 *Medicine and Law* 298.
203 Verdun-Jones (n 202 above) 298.
204 Law Reform Commission of Canada, *A report to Parliament on mental disorder in the criminal process* (Ottawa: Law Reform Commission of Canada, 1976).

ill offenders'.[205] The Commission further argued that the NGRI system and the Canadian authorities assumed that 'all mentally ill persons' were 'prone to violence'.[206] It called for a true acquittal of NGRI-PwMDs, which should result in their release 'subject only to a post-acquittal hearing to determine whether the individual should be civilly detained on the basis of his psychiatric dangerousness'.[207] The report also criticised the lieutenant-governor's role in reviewing the detention of NGRI-PwMDs and advocated for its elimination.[208] Further, it called for 'the expansion of procedural rights for those found NGRI and a requirement that any disposition following the verdict be of a determinate length'.[209]

The Commission's report resulted in the 1982 'Mental Disorder Project' (Project) within the Canadian Department of Justice. The Project's aim was to oversee research, engage in consultations, and suggest reforms to the NGRI verdict.[210] The Project culminated in a report[211] recommending the replacement of the lieutenant-governor's role in the disposition of NGRI- PwMDs with that of the courts and the mental health review boards; and placing time limits for their detention following the verdict.[212] These recommendations were forwarded to the Canadian Parliament but not considered at the time due to the 1988 Federal elections.

Expansion of procedural protections for acquitted NCRMD-PwMDs continued all through 1980. Mental health review boards were required to act fairly and to disclose factual information before it to the parties involved.[213] In *McCann v Duffy*,[214] the Court of Appeal in Canada declared that acquitted NCRMD-PwMDs had a right to be heard before mental health review boards.[215] In *Re Jollimore and the Queen*,[216] the Supreme Court of Canada held that the lieutenant-governors were under an obligation to take into

205 EA Tollefson & B Starkman *Mental disorder in criminal proceedings* (1993) 2.
206 Tollefson & Starkman (n 205 above) 2.
207 Law Reform Commission of Canada (n 204 above) 22.
208 As above.
209 Law Reform Commission of Canada (n 204 above) 38.
210 McCleery (n 191 above) 32.
211 Mental Disorder Project, Criminal Law Review *Final report* (1985).
212 Final Report (n 211 above) 40-49.
213 *Re Abel et al and Advisory Review Board* (1980) 31 OR (2d) 520.
214 *McCann v Duffy* (1982), 35 BCLR 133.
215 As above.
216 *Re Jollimore and the Queen* (1986) 72 NSR (2d).

consideration the advice of the mental health review boards, even though its recommendations were not binding.[217] At the start of the 1990s, every Province in Canada had a mental health review board in place and it was rare for the various lieutenant-governors to fail to act on the advice received from the mental health review boards.[218]

In 1991, the Supreme Court of Canada forced the NGRI system back onto the legislative agenda, in *R v Swain* after it found and declared the automatic and indefinite detention of NGRI-PwMDs unconstitutional for violating their right to life, liberty and security of the person; and the right not to be deprived thereof except in accordance with the principles of fundamental justice and the right to be free from arbitrary detention.[219] In that case, Swain was found NGRI after he assaulted his spouse and two young children on the mistaken belief that they were being attacked by devils and that his actions would protect them.[220] The Supreme Court held that anyone acquitted based on NGRI who does not necessarily pose a threat to the public should not automatically be detained beyond what is required to assess their present mental condition and dangerousness.[221]

The Canadian Parliament responded to the Supreme Court's decision in *R v Swain* by enacting Bill C-30,[222] which amended the Criminal Code. It replaced the NGRI verdict with that of 'not criminally responsible on account of mental disorder' (NCRMD) to signify that that the verdict was not an acquittal as may be implied by the use of the phrase 'not guilty'.[223] Most importantly, Bill C-30 abolished the automatic and mandatory indefinite detention of NCRMD-PwMDs.[224] It also introduced alternatives to detentions such as absolute discharges and conditional releases.[225]

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217 *Re Jollimore and the Queen* (n 216 above) 347.
218 Verdun-Jones (n 202 above) 298.
219 *R v Swain* [1991] 1 SCR 1009-1019.
220 *R v Swain* (n 219 above) 955.
221 *R v Swain* (n 219 above) 1009-1019.
222 Bill C-30 An Act to amend the Criminal Code (Mental Disorder) and to amend the National Defense Act and the Young Offenders Act, S.C. 1991, c.43.
223 C Snell, 'The Criminal Code amendments: The legal background' in D Eaves, RP Ogloff & R Roesch (eds) *Mental disorders and the Criminal Code: Legal background and contemporary perspectives* (2000) 23.
224 S Penney, A Morgan & AIF Simpson 'Motivational influences in persons found not criminally responsible on account of mental disorder: A review of legislation and research' (2013) 31 *Behavioural Sciences and the Law* 495.
225 I Grant 'Canada's new mental disorder disposition provisions: A case study of the British Columbia Criminal Code Review Board' (1997) 20:4 *International Journal of Law and Psychiatry* 424.

In 2014, Bill C-54: The NCRMD Reform Act[226] was enacted. It made two major changes on Bill C-30 by directing that the paramount consideration when determining the disposition of NCRMD-PwMDs should be public safety and created a new category of high risk accused with special dispositional rules.[227] NCRMD-PwMDs who were so designated were to be detained in hospital for up to 36 months, when the mental health review board would conduct disposition hearings to determine whether the individual has improved.[228]

4.3 Specific procedural safeguards

4.3.1 Administrative control of NCRMD-PwMDs by mental health review boards

In Canada, when a PwMD commits an offence, a trial is conducted before the courts where either the prosecution or defence may raise the issue of criminal responsibility.[229] When that happens, a medical practitioner is appointed to advise the court on the mental state of the accused PwMD at the time of the commission of the offence. If the court accepts the NCRMD plea, it may determine the disposition of the NCRMD-PwMD on the advice of a medical practitioner or refer the matter to the mental health review boards, which must determine the matter within 45 and 90 days.[230]

Bill C-30 removed the lieutenant-governor's role in the NGRI system and replaced it with the provincial and territorial mental health review board system.[231] Mental health review boards are administrative tribunals with specialized expertise in mental health which act as the intersection between criminal justice and mental health.[232] Each Province and Territory must establish its own mental health review board, which should consist of at least five members among whom one must be a licensed psychiatrist and one licensed

226 The Not Criminally Responsible Reform Act SC 2014 C 6.
227 McCleery (n 191 above) 39.
228 L Grantham 'Bill C-14: A step backwards for the rights of mentally disordered offenders in the Canadian criminal justice system' (2014) 19 *Appeal: Review of Current Law and Law Reform* 74-75
229 Secs 672.12, Canadian Criminal Code.
230 Secs 672. 45, Canadian Criminal Code.
231 L Salem 'Housing trajectories of individuals found not criminally responsible on account of mental disorder' PhD thesis, Université de Montréal, 2015 14.
232 HWR Curtis 'Risk in review: A qualitative investigation of *Winko* criteria interpretation in British Columbia Review Board hearings' Master of Arts, University of Northern British Columbia, 2012 20.

to practice psychology or medicine in the relevant province or territory.[233] The lieutenant-governor is responsible for the appointment of members of the mental health review boards.[234] The designated chair must be a judge (sitting or retired) or a lawyer who has the qualifications to be appointed in the judiciary at the Federal Court, Superior Court, or District Court levels.[235] Hearings should be chaired by a panel of three members, including the chairperson, a psychiatrist, and one other member.[236] Mental health review boards have the power to draft their own rules governing procedure and practice, so long as they are approved by the lieutenant-governor of the relevant province or territory.[237] Decisions of the mental health review boards are made by a simple majority of the panel members.[238]

The main function of the mental health review boards is to make disposition decisions once an NCRMD verdict is reached by a court.[239] However, where the courts determines the disposition, the mental health review board must hold a hearing to review this disposition within 90 days.[240] Otherwise, the mental health review boards must conduct annual appraisals of all dispositions[241] unless the circumstances allow for an extensions of up to 24 months as stipulated by the law.[242]

4.3.2 No more indefinite detention without due process

Prior to 1992 in Canada, NCRMD-PwMDs were automatically held in strict custody and detained indefinitely at the pleasure of the lieutenant-governor regardless of whether the offence committed was minor in nature.[243] In 1992, the Supreme Court of Canada found that the automatic and indefinite detention of NCRMD-PwMDs was unconstitutional under the Canadian Charter as it violated their right to liberty.[244] Further, in *Corporation*

233 Secs 672.39, Canadian Criminal Code.
234 Secs 672.38, Canadian Criminal Code.
235 Secs 672.4(1), Canadian Criminal Code.
236 Secs 672.41(1), Canadian Criminal Code.
237 Secs 672.44(1), Canadian Criminal Code.
238 Secs 672.42, Canadian Criminal Code.
239 Curtis (n 224 above) 21.
240 Secs 672.47(3), Canadian Criminal Code.
241 Secs 672.81(1), Canadian Criminal Code.
242 As above.
243 Salem (n 231 above) 14.
244 As above.

of the Canadian Civil Liberties Association v Her Majesty the Queen[245] and *British Columbia Civil Liberties Association v Canada (British Columbia Civil Liberties),*[246] detentions which are indefinite and not subject to due process were held to be a violation of human rights.[247] In Canada, the Criminal Code as amended by Bill C-30 no longer allows for the indefinite detention of NCRMD-PwMDs without a release plan.

According to a 2013 report,[248] presented to the Department of Justice in Canada, out of 58 NCRMD-PwMDs facing homicide related charges and who were found to be NCRMD, 15 (25.9%) were released conditionally, 21 (41.4%) were absolutely discharged, and only 19 (32.8%) were detained.[249] Out of the 65 who were facing attempted murder charges, 11 (16.9%) were conditionally released, 32 (49.2%) were discharged absolutely, and only 22 (33.8%) were detained.[250] Out of the 42 who were facing sexual related offences, 4 (0.9%) were released conditionally, 25 (59.5%) were discharged absolutely, and 13 (30.9%) were detained.[251] That means that out of the total 165 NCRMD-PwMDs, 81 (49.1%) were discharged absolutely, 30 (18.1%) were released conditionally, and 54 (32.1%) were detained.[252] These statistics represent a conscious effort by the Canadian authorities to reintegrate NCRMD-PwMDs into the community and as such ensure their liberty as required by article 14 of the CRPD.

245 *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491 (CanLII).
246 *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 (CanLII).
247 D Cassandra 'Extending our promise: Providing help to mentally ill accused as soon as practicable' LLM dissertation, The University of Western Ontario, (2019) 82.
248 AG Crocker et al 'Description and processing of individuals found not criminally responsible on account of mental disorder accused of serious violent offences' Department of Justice, Canada, 2013.
249 Crocker (n 248 above) 22.
250 As above.
251 As above.
252 As above.

4.3.3 Periodic re-evaluation

Once a trial judge makes a verdict of NCRMD on a PWMD without any disposition orders, the mental health review boards are required to determine the manner of disposition within 45 days of the court's verdict.[253] Afterwards, periodic re-evaluation hearings of the detained NCRMD-PwMDs and the conditions attached thereto is usually conducted by the mental health review board at least once in every 12 months.[254] That period may be extended to 24 months in accordance with the 2005 amendment, to take into account certain circumstances where the PwMD is represented by an advocate and together with the prosecution have agreed to the extension.[255]

Other additional mandatory reviews may also be conducted. First, an additional mandatory review may be conducted in cases where a PWMD, who is in custody, is subject to increased restrictions lasting longer than seven days.[256] Second, an additional mandatory review may be conducted where detained NCRMD-PwMDs requests to have their dispositions reviewed before the scheduled time and in such circumstances the mental health review board must conduct the requested hearings.[257] Third, an additional mandatory review may be conducted in cases of dual disposition which occurs where an NCRMD-PwMD incurs a subsequent criminal conviction which is unrelated to the original offence and the trial judge has imposed a jail or prison sentence.[258] Fourth, an additional mandatory review may be conducted sooner where an NCRMD-PWMD who is not in custody asks for a discretionary review or where the mental health review board, on its own accord has given a short order, lasting six months and there is need for an evaluation so as to determine whether the NCRMD-PWMD is reintegrating and succeeding well in the community.[259] Fifth, an additional mandatory review may be conducted in cases of an enforcement hearing where the NCRMD-PWMD is in the community but has his or her liberty or privileges restrained.[260] Sixth, a mandatory

253 Secs 672.47(1), Canadian Criminal Code.
254 Secs 672.81(1), Canadian Criminal Code.
255 Secs 672.81(1.1), Canadian Criminal Code.
256 Secs 672.81(2)(a), Canadian Criminal Code.
257 Secs 672.81(2)(b), Canadian Criminal Code.
258 Secs 672.81(3), Canadian Criminal Code.
259 Secs 672.82(1), Canadian Criminal Code.
260 Secs 672.94, Canadian Criminal Code.

mental health board review may occur where an accused PWMD is arrested while in the community for a subsequent charge, and the trial judge is of the belief that he or she has failed to comply with his or her disposition orders.[261]

4.3.4 Active considerations for possible alternative forms of accommodations to detention

According to Bill C-30, once a PwMD is declared NCRMD, the court or mental health review board may either order that the accused be conditionally or unconditionally detained in hospital, released to the community conditionally, or discharged absolutely.[262] In particular the Criminal Code states as follows:

> Where a court or Review Board makes a disposition…it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.[263]

Where an NCRMD-PwMD is detained, it means that he or she will be placed in custody within a hospital.[264] Where he or she is discharged absolutely, the mental health review board loses its jurisdiction over him or her and cannot conduct any supervision or annual reviews on that person.[265] When an NCRMD is released conditionally, he or she may be subjected to one or more conditions including residing in a particular place, abstaining from illegal drugs and/or alcohol, submitting to urinalysis testing for prohibited substances, abiding by a specified treatment plan, reporting to a designated person (such as a psychiatrist) on a scheduled basis, and refraining from possessing weapons.[266]

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261 Secs 672.93 (2), Canadian Criminal Code.
262 Secs 672. 54, Canadian Criminal Code.
263 As above.
264 Department of Justice Canada 'The review board systems in Canada: An overview of results from the mentally disordered accused data collection study' Department of Justice, 2006 3.
265 Secs 672.81(1), Canadian Criminal Code.
266 Department of Justice Canada, (n 264 above) 3.

In *R v Myette*,[267] the Provincial Court of Alberta convicted of sexual assault an accused who was a person with visual impairment and needed the assistance of a guide dog.[268] He was supposed to be sentenced to an imprisonment term of between 18 and 24 months.[269] The issue before the Court was whether the accused could be incarcerated as part of his sentence despite his disability and reliance on an assistance animal.[270] The Crown urged for incarceration but the defence opposed it on the grounds that it would breach Canada's obligations under article 14 of the CRPD, which requires that PWDs deprived of their liberty should be offered special protection including reasonable accommodation of their disabilities.[271] The Court found that incarcerating the accused in a correctional facility would contravene both the provisions of the CRPD and section 718 of the Criminal Code which requires the use of 'less restrictive sanctions' in such circumstances.[272] Ultimately, the Court ruled against incarceration because it was unduly harsh and would amount to a 'deprivation of liberty out of all proportion to the deprivation suffered by other offenders in the corrections system'.[273] Instead, the accused was sentenced 'to house arrest under an 18 month probation order with conditions to accommodate his disability and reliance on a guide dog'.[274] Although that case was overturned by the Alberta Court of Appeal, it acknowledged that disability is a legitimate factor in determining the length of a custodial sentence.[275] Further, although the case did not involve a PwMD, it shows Canada's availability of community-based or alternative social-care services which are geared towards guaranteeing the liberty of PWDs including NCRMD-PwMDs.

4.3.5 Consideration of dangerousness to themselves and to the society

267 *R v Myette*, 2013 ABPC 89.
268 SJ Hoffman, L Sritharan & A Tejpar1 'Is the UN Convention on the Rights of Persons with Disabilities impacting mental health laws and policies in high-income countries? A case study of implementation in Canada' (2016) 16 *BMC International Health and Human Rights* 14.
269 As above.
270 As above.
271 As above.
272 As above.
273 As above.
274 As above.
275 As above.

The purpose of an NCRMD verdict is to remove accused PwMDs and divert them from the mainstream criminal justice system to special streams that provide individualised assessment and treatment for those found to be a significant danger to the public.[276] Danger implies a real risk of physical or psychological harm which must be serious and criminal in nature.[277] It does not include a minuscule risk of a grave harm or a high risk of trivial harm.[278]

Between 1892 and 1992, NCRMD-PwMDs were detained because of their 'potential dangerousness or risk to the public'.[279] The issue of whether considerations of dangerousness infringes on an NCRMD-PwMDs' right to liberty was determined in *Winko* where the Chief Justice of the Supreme Court of Canada held as follows:

> Parliament tended to set up an assessment-treatment system that would identify those NCR accused who pose a significant threat to public safety, and treat those accused appropriately while impinging on their liberty rights as minimally as possible, having regard to the particular circumstances of each case.[280]

Just like the deinstitutionalisation movement under the CRPD, the Canadian Criminal Code emphasises treatment and stabilization over incarceration and punishment.[281] In *Winko* it was held as follows:

> [I]t has been determined that the NCR offender is not morally responsible for his or her criminal act. Punishment is morally inappropriate and ineffective in such a case because the NCR accused was incapable of making meaningful choice upon which the punishment model is premised. Because the NCR accused's liberty is not restricted for the purpose of punishment, there is no corresponding reason for finitude. The purposes of restriction on his liberty are to protect society and to allow the NCR accused to seek treatment. This requires a flexible approach that treats the length of the restriction as a function of these dual aims and renders a mechanistic comparison of the duration of confinement inappropriate.[282]

It means that the disposition of NCRMD-PwMDs 'is not meant to be punitive' but intended to enhance their mental health.[283] Therefore, when

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276 S Yuen 'Unnecessary, counterproductive, unconstitutional. An examination of Bill C-54: The Not Criminally Responsible Reform Act' LLM dissertation, University of Toronto, 2013 13.

277 *Winko v British Columbia (Forensic Psychiatric Institute) [1999] 2 S.C.R.*para 57.

278 *Winko* (n 277 above) para 57.

279 Psychiatric Patient Advocate Office *Honoring the past, shaping the future 25 years of progress in mental health law* (2008) 197.

280 *Winko* (n 277 above) para 16.

281 Yuen (n 276 above) 13.

282 *Winko* (n 277 above) para 93.

283 LM Broderick 'The disposition of not criminally responsible accused persons in British Columbia: The impact of the W*inko* case on the decision-making process of the British Columbia Review Board' Masters of Arts, Simon Fraser University, 2006 22.

> [i]t becomes clear that absent a finding on the evidence that the NCR accused poses a significant threat to the safety of the public, the court or Review Board must order an absolute discharge. This interpretation is supported by the principle that a statute should be read in a manner that supports compliance with the Charter.[284]

It means that where an NCRMD-PwMD ceases to pose a 'significant threat to the safety of the public', the mental health review board is required to give an absolute discharge.[285] That was also the holding in the case of *R v Orlowski*.[286]

4.4 Conclusion

The above specific procedural safeguards is evidence of the consciousness of the Canadian criminal justice system to ensure the equality of PWDs. It is a clear evidence of the CRPD's impact on mental health laws and policies in Canada. Particularly, there is an attempt to ensure NCRMD-PwMDs' right to liberty through the provision of special protection including reasonable accommodation. Most of the courts' decisions and laws have demonstrated affinity for the integration of PWDs into the community as opposed to institutionalisation. The integration approach signifies a 'paradigm shift' from the medical model to the social model of disability in Canada, as also reflected by the CRPD. This chapter has discussed Canada's disposition procedures of NCRMD-PwMDs who have committed offences and how they are protected from mental disability detentions. The next chapter will conclude the research by setting out the lessons that may be learnt from the Canadian experience and it does this by drawing conclusions from the various strands of thought expressed in the preceding chapters.

284 *Winko* (n 277) para 48.
285 Secs 672.54(a), Canadian Criminal Code.
286 *R. v Orlowski* (1992).

CHAPTER 5: CONCLUSION

5.1 Introduction

Kenya's post-2010 Constitution ushered in a paradigm shift towards addressing human rights violations of NCRMD-PwMDs through the human rights approach. The preceding chapter discussed Canada's disposition procedures of NCRMD-PwMDs who have committed offences and how they are protected from mental disability detentions. This concluding chapter sets out the lessons that may be learnt from the Canadian experience and it does this by drawing conclusions from the various strands of thought expressed in the preceding chapters. The objective is to secure from the Canadian criminal law a blueprint for the protection of NCRMD-PwMDs in Kenya. This is all the more relevant in light of the fact that the Kenyan judiciary has in recent times embarked on reinforcing the protection of NCRMD-PwMDs in the criminal justice system, thereby suggesting that there is a 'window of opportunity'. In addition to the conclusions of this mini-dissertation, recommendations are made towards the introduction of procedural safeguards and alternative accommodation of PwMDs who commit crimes under the CRPD. The recommendations are undertaken to inform Kenyan best practice, based on the Canadian experience.

5.2 Conclusion

The mini-dissertation examined sections 166 and 167 of Kenya's Criminal Procedure Code and confirmed the need to remove the phenomenon of indefinite detention of NCRMD-PwMDs and put in place safeguards to protect the liberty of NCRMD-PwMDs. The study took an in-depth look at the historical foundations of non-criminally responsible mental disability detentions in Kenya. It also analysed the provisions of article 14 of the CRPD and found that the detention of PwMDs declared guilty but insane at the order of the President in Kenya's criminal justice system is both unlawful and arbitrary. NCRMD-PwMDs in Kenya are detained indefinitely without any periodic review and without any considerations of alternative forms of accommodation.

The study revealed that there are no policy guidelines regarding the place of detention for guilty NCRMD-PwMDs. In practice, guilty NCRMD-PwMDs are usually detained either in prison or in Mathare Hospital for care and protection. Prison facilities in Kenya are not adequately equipped to offer the highest attainable standard of health to institutionalised NCRMD-PwMDs. In Mathare Hospital, the conditions are appalling and most NCRMD-PwMDs live under the constant threat of exploitation, violence, neglect and abuse.[287] Further, Mathare Hospital houses NCRMD-PwMDs who have been committed through both the civil and criminal process without any distinction. Equal measures are taken in respect of all NCRMD-PwMDs and they all receive as much, or as little, treatment as any other, irrespective of their individual conditions. The failure of the law to differentiate between the circumstances of different PwMDs means that there will not be any special accommodations for the most vulnerable PwMDs.

Under Kenyan law, when a trial court makes a special finding that a PwMD is 'guilty but insane,' it is mandatory for it to impose a detention order 'at the President's pleasure' on the PwMD who has been acquitted.[288] It means that they will be detained indefinitely until further orders from the President.[289] The detention of NCRMD-PwMDs is indefinite and subject only to a report which is prepared after three years from the date of the detention order, and thereafter, every two years.[290] There is no release plan set by the law and there is no procedure to apply for the release of NCRMD-PwMDs in case the President fails to make any orders as to where they should be taken for mental treatment or otherwise be dealt with. That is the law regardless of whether the accused poses no risk to himself or to the society.[291]

Also, the vesting of such discretionary powers to the President is counter-productive since it could lead to abuse, not to mention the lack of the necessary qualifications in dealing with mental health issues. Further, there is no periodic re-evaluation for individual NCRMD-PwMDs detained at the order of the President. Similarly, section 166 of the Criminal Procedure Code offers no alternative forms of

287 Kamundia (n 21 above) 55.
288 The Judiciary of Kenya (n 145 above) 41.
289 As above.
290 Criminal Procedure Code, secs 166(4).
291 *Centre for Health, Human Rights and Development (CEHURD) v Attorney General* (n 144 above) 20.

accommodation to the institutionalisation of NCRMD-PwMDs. Therefore, NCRMD-PwMDs in Kenya's criminal justice system can only be detained in mental hospitals, prisons or other suitable places of safe custody as ordered by the President.

5.3 Recommendations

In *Republic v SOM,* the High Court of Kenya urged for the amendment of section 166 of the Criminal Procedure Code, which makes provision for the 'procedure in lunacy' that had been enacted in the 18th century. The National Council on Administration of Justice (NCAJ) Committee on Criminal Justice Reform (NCCJR) appointed by the Chief Justice Vide Gazette Notice No. 5857 of 19 June 2017 needs to review the provisions with regard to non-criminally responsible mental disability detentions.[292] In order to guarantee the rights of NCRMD-PwMDs as stipulated by the CRPD, all non-criminally responsible mental disability detentions must be abolished and replaced with rights-based accommodation geared towards ensuring the equality, participation, and inclusion of PwMDs accused of criminal offences in the Kenyan criminal justice system.[293] After analysing Canada's legal framework on non-criminally responsible mental disability detentions, the study suggests the most pertinent specific procedural safeguards that Kenya may borrow from Canada and incorporate in its own Criminal Procedure Code in order to give effect to the country's obligations under article 14 of the CRPD to ensure the liberty of NCRMD-PwMDs. Based on the analysis of the Kenyan law, and drawing from Canadian law and the CRPD, six recommendations are identified, and are discussed below.

5.3.1. Amendment of the law to replace derogatory phrases

Section 166 of the Criminal Procedure Code still maintains the use of phrases reminiscent of the colonial epoch, such as 'insane' and 'lunacy'. These terms are derogatory and detract from the dignity that should be accorded to all NCRMD-PwMDs in accordance with the CRPD. In *Purohit and Moore v The Gambia*, the African Commission on Human and Peoples' Rights held as follows:

292 *Republic v SOM* (n 86 above) 4.
293 General Comment 1 (n 6 above) para 9.

> [P]ersons with mental illness have been branded as 'lunatics' and 'idiots', terms, which without any doubt dehumanise and deny them any form of dignity in contravention of Article 5 of the African Charter.[294]

Clearly, the use of phrases such as 'idiots' and 'lunatics' in section 166 of the Criminal Procedure Code are dehumanising, discriminatory, and violates the dignity of PWDs. They should be removed from the Criminal Procedure Code.

5.3.2 Amendment of the law to reflect a true acquittal of NCRMD-PwMDs in the criminal justice system

Parliament should amend section 166 of the Criminal Procedure Code to allow for the acquittal of NCRMD-PwMDs in the criminal justice system to amount to an affirmative discharge except in cases where an acquittal is shown to pose a risk to themselves or to the society. The OHCHR has made recommendations for the abolition of all defenses that are based on the negation of criminal responsibility due to the existence of a mental or intellectual disability.[295] The CRPD Committee has also called for the abolition of unfitness to plead and non-responsibility declarations that are based on mental disability.[296] Instead, 'disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant'.[297] Parliament should also repeal declarations such as 'guilty but insane', which are based on mental and intellectual disability as recommended by the OHCHR and the CRPD Committee.

Furthermore, although the special finding of 'guilty but insane' in Kenya amounts to an acquittal, it is not an affirmative discharge but a fiction intended to incarcerate NCRMD-PwMDs, thus denying them of their right to liberty without their consent. In Canada, once the court accepts an NCRMD plea or finds a PwMD to be NCRMD, a post-acquittal hearing to determine whether the individual should be civilly detained on the basis of his psychiatric dangerousness is usually conducted. The Parliament of Kenya should make provision for disposition hearings of acquitted NCRMD-PwMDs on the

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294 *Purohit & Another v The Gambia* (n 128 above) par 59.

295 United Nations Human Rights Council 'Thematic study by the United Nation High Commission for Human Rights on enhancing awareness and understanding on the Convention on the Rights of Persons with Disabilities' https://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf (accessed 19 March 2020) para. 48.

296 General Comment 1 (n 6 above) para 9.

297 Beqiraj (n 126 above) 32.

advice of experts in order to determine whether they pose any risk to themselves or to the society to warrant their incarceration.

5.3.3 Removal of the Executive's control of NCRMD-PwMDs in Kenya's criminal justice system

Parliament should replace the Executive's control of the detention of NCRMD-PwMDs in the criminal justice system with a mixed system involving both the judiciary and other administrative tribunals created for that purpose and made up of various experts including mental health specialists. According to the HRC's General Comment 35, persons who have been deprived of their liberty are entitled to take proceedings against the deprivation and to receive a decision without delay.[298] In Canada, the role of the lieutenant-governors in the deprivation of NCRMD-PwMDs' right to liberty under the Canadian justice system was removed and replaced with the provincial and territorial mental health review board system.[299] Each Province and Territory is required to establish its own mental health review board which should consist of at least five members among whom one must be a licensed psychiatrist and one licensed to practice psychology or medicine in the relevant province or territory.[300] Deprivation of NCRMD-PwMDs' right to liberty in Kenya's criminal justice system should also be under the authority and supervision of persons procedurally and substantively competent to certify it and the President lacks the necessary qualifications required to deal with mental health issues.

5.3.4 Improvements to mental health conditions of NCRMD-PwMDs in psychiatric institutions and prison facilities

Mental health services in Kenya's psychiatric institutions and prison facilities are evidently inadequate. They lack disability specific amenities and most NCRMD-PwMDs do not receive the highest standard of health because of negative attitudes from health care and prison workers, shortage of health care staff, and constant threat of exploitation, violence, neglect, and abuse.[301] Under the CRPDs' Guidelines on article 14, the CRPD Committee has confirmed that NCRMD-PwMDs' right to liberty is violated if they are

298 General Comment 35 (n 123 above) par 47.
299 Salem (n 231 above) 14.
300 Secs 672.39, Canadian Criminal Code.
301 Kamundia (n 21 above) 55.

detained under poor living conditions, whether in prisons, hospitals or other places of custody.'[302] Also, the CRPDs' Guidelines on article 14 requires States Parties to offer 'training mechanisms for justice and prison officials in accordance with the' CRPD's 'legal paradigm' in article 14.[303] Similarly, in its Concluding Observations to Kenya, the CRPD Committee recommended that the State creates a deinstitutionalisation strategy, make available community-based services, and establish a budgetary allocation for the promotion of independent living of PWDs.[304] Therefore, the government of Kenya needs to establish community support services, initiate the deinstitutionalisation of NCRMD-PwMDs, and facilitate their inclusion into the society as one of the ways of ensuring their rights to liberty and health.

5.3.5 Institution of periodic re-evaluation

Parliament should amend the law to allow for reviews of detained NCRMD-PwMDs cases after a fixed period. The lack of periodic re-evaluation for NCRMD-PwMDs detained at the order of the President contravenes their right to liberty and security under the CRPD.[305] A lawful detention automatically 'becomes arbitrary and unlawful if it is not subject to any periodic review in order to ensure that NCRMD-PwMDs are not detained indefinitely'.[306] In Canada, the mental health review boards are required to determine the manner of disposition within 45 days of the court's verdict where no disposition order is made and afterwards at least once in every 12 months.[307] That period may be extended to 24 months to take into account certain circumstances for example where a PwMD is represented by an advocate and together with the prosecution have agreed to the extension.[308] Therefore, Parliament should put in place mechanisms for review in order to assess the progress of individual NCRMD-PwMDs.

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302 Guidelines (n 134 above) par 17.
303 As above.
304 CRPD Committee 'Concluding observations on the initial report of Kenya' UN Doc CRPD/C/KEN/CO/1 (30th September 2015) par 37.
305 General Comment 35 (n 123 above) par 12.
306 Zayas (n 139 above) 15.
307 Secs 672.81(1), Canadian Criminal Code.
308 Secs 672.81(1.1), Canadian Criminal Code.

5.3.6 Introduction of alternatives forms of accommodations to detention

NCRMD-PwMDs should be released once the legitimate aim of the detention, whether treatment and rehabilitation, ceases to exist. In *Noble,* the CRPD Committee stated that the indefinite detentions of NCRMD-PwMDs violated their rights under articles 14(1) (liberty) and 15 (freedom from torture) of the CRPD.[309] In Canada, the Criminal Code as amended by Bill C-30 no longer allows for the indefinite detention of NCRMD-PwMDs without a release plan. Instead, the mental health review board must take into account the reintegration of the accused into society and the other needs of the accused and when making a determination on the disposition of NCRMD-PwMDs, they must consider a method which is least onerous and least restrictive. In Kenya, Parliament should amend section 166 of the Criminal Procedure Code and remove the phenomenon of indefinite detention of NCRMD-PwMDs.

Moreover, Parliament should enact provisions for alternative forms of accommodation to detention such as diversion, probation, community-based or alternative social-care services, treatment orders, or even an absolute discharge. The CRPD Committee in *Noble* recommended that States Parties need to explore alternative and support measures under article 12(3) of the CRPD including provision of reasonable accommodation under article 14 in order to ensure the liberty of NCRMD-PwMDs and eliminate unnecessary detentions.[310] In Canada, once a PwMD is declared NCRMD the court or mental health review board may either order that the accused be conditionally or unconditionally detained in hospital, released to the community conditionally, or discharged absolutely.[311] Kenya also needs to enact rights-based alternative forms of accommodations to institutionalisation such as diversion programmes, including restorative justice, community-based or alternative social-care services, abolition of short imprisonment terms, abolition of the death sentence, the removal of minimum mandatory sentences, alternative dispute resolution mechanisms, and the abolition of the insanity defence.

309 *Noble v Australia* (n 116 above) para 4.3.
310 *Noble v Australia* (n 116 above) para 8.7.
311 Secs 672. 54, Canadian Criminal Code.

The recommendations given in this chapter are based on the human rights approach according to the 2010 Constitution and as interpreted by Kenyan courts. They reflect the paradigm shift towards addressing human rights violations and elimination of discrimination against NCRMD-PwMDs in Kenyan laws.

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