



PROPOSED AMENDMENTS IN THE CRIMINAL JUSTICE SYSTEM

A POLICY BRIEF



ISBN: 978-9966-1881-0-6

Published by

Kenya Human Rights Commission

P.O Box 41079-00100, Nairobi, Kenya. Email: admin@khrc.or.ke

Twitter: [@thekhrc](https://twitter.com/thekhrc)

Facebook: Kenya Human Rights Commission

Website: www.khrc.or.ke

©2020 Kenya Human Rights Commission

PROPOSED AMENDMENTS
IN THE CRIMINAL JUSTICE SYSTEMS:
A POLICY BRIEF

BY

KENYA HUMAN RIGHTS COMMISSION
1ST MAY 2020

Table of Contents

ACKNOWLEDGEMENT	4
FOREWORD	5
EXECUTIVE SUMMARY	7
CHAPTER ONE	8
1. BACKGROUND	8
1.1 A Brief on the Colonial Origins of the Police in Kenya	8
1.2 A Brief on the Colonial Origins of the Penal and Criminal Procedure Code	9
1.3 The NCAJ Criminal Justice Audit Report	11
CHAPTER TWO	14
2. Objectives of this Policy Brief	14
2.1 General Scope	14
CHAPTER THREE	15
3. Offences Requiring Review	15
3.1 Drunkness	15
3.2 Legal Provisions in Issue	15
3.3 Observation and Justification	15
3.4 Policy Proposal	16
CHAPTER FOUR	17
4. Nuisances Offences	17
4.2 Observation and Justification	17
4.3 Policy Proposal	18
CHAPTER FIVE	19
5. Sexual Offences And Special Groups- Intersex Persons	19
5.1 Legal Provisions in Issue	19
5.2 Policy Proposal	20
CHAPTER SIX	22
6. Gross Breaches of Rights and Freedoms arising from Police and Policing Agencies Conduct	22
6.1 Torture, Unlawful use of force, Unlawful Lethal use of firearms, Enforced Disappearance and Death in Police Custody	22
6.2 Observation and Justification	22

6.3 Policy Proposal	23
6.4 Unlawful arrests and Detention resulting in false imprisonment	24
6.5 Observation and Justification	25
6.6 Policy Proposals	28
6.7 Violations During Deployment And Policing Operations	29
6.7.1 Observation and Justification	30
6.7.2 Policy Proposals	31
CHAPTER SEVEN	33
7. Breaches of the fundamental Freedom of Assembly	33
7.1 Legal Provisions In Issue	33
7.2 Observation and Justification	33
7.3 Policy Proposals	34
CHAPTER EIGHT	36
8. Wilful disobedience of court order and the contempt of court act by police and policing agencies	36
8.1 Legal Provision	36
8.2 Observation and Justification	37
CHAPTER NINE	41
9. Police Officers	41
9.1 Police Welfare	41
9.1.1 Policy Provisions in Issue	41
9.1.2 Observation and Justification	41
9.1.3 Policy Proposals	41
9.2 Police Vetting - Review and Continuation	41
9.2.1 Legal Provision in Question	41
9.2.2 Observation and Justification	42
9.2.3 Legal and Policy Proposals	44

ACKNOWLEDGEMENT

The Kenya Human Rights Commission (KHRC), wishes to express much gratitude to Chris Gitari, an Advocate of the High Court of Kenya and Transitional Justice expert for researching and putting together this report titled: “Proposed Amendments in the Criminal Justice System: A Policy Brief”.

Second, we salute Mrs. Sandra Oyombe, the Programme Advisor, Legal Affairs for the phenomenal technical leadership in the development of this brief and Martin Mavunjina, Programme Advisor-Transitional Justice for the amazing technical support in the same process. Moreover, we appreciate Florence Otieno, a Fellow at the Centre for Strategic Litigation and Intern at the KHRC for the judicious administrative support and technical inputs.

Moreover, Mr. Medika Medi; Programme Advisor- Communication and Faith Kirui, IT and Procurement Officer are appreciated for their impressive role in the designing the layout, printing and dissemination of this report.

The KHRC also wish to acknowledge Mr. George Kegoro; Executive Director, Mr. Davis Malombe; Deputy Executive Director, for providing technical support and policy direction in the conception and development of this policy brief.

We extend our appreciation to Justice Grace Ng’enyne, a judge of the High Court (Criminal Division) and the chairperson of the National Committee on Criminal Justice Reforms (NCCJR); all members of the National Council on Administration of Justice (NCAJ), the Policing and Police Powers Subcommittee of NCCJR and the civil society’s Police Reforms Working Group (PRWG) for their valuable and insightful inputs.

Indeed this document is a product of many consultations which involved many stakeholders. We therefore appreciate both state and non-state actors who participated in the various workshops for their timely and treasured input and feedback which shaped this brief.

Finally, we deeply thank our development partners; DIAKONIA/ Swedish embassy, Ford Foundation and Norwegian Embassy for their financial and political support that made the development of this policy brief possible. However, the report does not in any way reflect their views.

FOREWORD

On 15th May 2015, the NCAJ commissioned an Audit on the criminal justice system in Kenya. In 2016 the National Council on the Administration of Justice (NCAJ) issued its report titled *The Criminal Justice System in Kenya: An Audit (Understanding Pre-trial Detention in Respect to Case flow Management and Conditions of Detention)*. The Audit revealed that the criminal justice system in Kenya did not serve the anticipated needs of Kenyans with respect to dealing with serious offences such as murder, rape, robbery with violence. The report posited that the success rate of attaining convictions against the serious offences was low and thereby exacerbating the low effectiveness of the criminal justice system in the eyes of many Kenyans. On the other hand, the Audit posited that the criminal justice system was largely skewed against the poor who often interacted with the justice system for having committed petty offences. A lot of resources allocated to the justice system was being directed to lesser offences such as nuisance, drug and disorderliness, loitering with intent to commit crime just to mention but a few. The policies and legislation in place exacerbated the situation because many of the provisions in the Penal and Criminal Procedure Code focused on petty offences as opposed to serious offences like murder, rape, robbery with violence et cetera. The report recommended structural, administrative, institutional and legislative reforms in order to align the criminal justice system with the Constitution. The main recommendations were to review and amend policy and legislation to decriminalise and reclassify petty offences in Kenya.

¹ *The Criminal Justice System in Kenya: An Audit (Understanding Pre-trial Detention in Respect to Case flow Management and Conditions of Detention)* (2016) National Council on the Administration of Justice, Legal Resources Foundation Trust and Resources Oriented Development Initiatives (RODI)

The Audit initiated discussions with respect to reforms within the criminal justice system given its far reaching findings and recommendations which culminated in the establishment of a committee to oversee the implementation of the report. The NCAJ Committee on Criminal Justice Reforms (NCCJR) was constituted and appointed in 2017 by the Chief Justice and Chair of the National Council on the Administration of Justice (NCAJ), Hon. CJ David K. Maraga to oversee the implementation of the findings and recommendations of the Audit. KHRC being a member of the NCAJ Committee on Criminal Justice Reforms (NCCJR) convened meetings with the Police Reforms Working Group, the Taskforce on Alternative Dispute Resolution Mechanism and referred to a number of judicial decisions. KHRC also conducted institutional visits and held a 4 days workshop with the Policing and Police Powers subcommittee and came up with this policy and legislative proposals.

This policy brief therefore examines the issues raised in the Audit with a view of proposing a number of policy measures and legislative intervention that would enable a more efficient and effective criminal justice system that secures the rights of the most vulnerable. The policy brief identifies legal provisions that establish petty offences like drunkenness, idle and disorderly, loitering with the intent of committing a breach of peace etc which are likely offences used to target the most vulnerable and by extension a breach of their rights. Other more serious violations of concern in this policy brief are the crimes committed generally against all Kenyans which result in a fundamental breach of their rights. These are violations on the right to life or personal integrity as a result of the unlawful use of force, unlawful use of fire arms, torture, enforced disappearance etc. Other violations committed against these vulnerable groups include false imprisonment and denial of the right to assemble. It therefore proposes a range of measures to meet the challenges brought about by the criminal justice system that is now.

George Kegoro
Executive Director
Kenya Human Rights Commission

EXECUTIVE SUMMARY

The broad purpose of this policy brief is to examine the issues raised in the NCAJ The Criminal Justice System in Kenya: An Audit (Understanding Pre-trial Detention in Respect to Case flow Management and Conditions of Detention) thereafter, analyse the laws, policies and practices within the criminal justice system that lend themselves to human rights violations despite the new constitutional order i.e. the promulgation of the Constitution of Kenya 2010.

The most urgent attention is drawn to violations that touch on basic guarantees of rights to citizens as per the Bill of Rights. These are the right to life, equality and freedom from discrimination and unequal treatment, the right to dignity of the person, freedom and security of the person, access to information, right of an arrested person, right to fair hearing, rights of persons detained or held in custody etc. Given the length, breadth and complexity of the criminal justice system, it is important to consider reform measures that prioritize the rights and freedoms of the most vulnerable in society.

Further the policy briefs seeks to also prioritize reform measures that can assist the criminal justice system attain focus on its core mandate – which should be tackling the more serious criminal offences of concern to citizens and that have the most deleterious effect on the nation.

The KHRC is therefore focused on putting forward these range of legislative and policy proposals within the criminal justice system with these objectives in mind. The range of proposals seek to decongest the criminal justice system, secure fundamental rights and freedoms of the most vulnerable and indigent and acknowledge rights of intersex persons who live among us and have suffered historical discrimination and push for attention to the most serious crime of highest concern.

CHAPTER ONE

1. BACKGROUND

1.1 A BRIEF ON THE COLONIAL ORIGINS OF THE POLICE IN KENYA

Kenya Police traces its origins to the period between 1887-1902, when the East Africa Trading Company, later the Imperial British East Africa Company (IBEAC), operated in the region as a vehicle to expand British interests. The company established an administration with an armed security force in 1896. Fortified stations were established to protect its trading routes, trading centres, stocks and staff. The security personnel were largely recruited from the Indian police and were governed by Indian police statutes, giving the security force a quasi-police status.

Before the Kenya Police establishment, and during this early colonial period, a two tiered system of policing Africans had emerged – one focused on policing Africans and their movement in municipal and urban areas and another for policing Africans in rural areas. The policing of Africans in rural areas was usually undertaken by fellow Africans who usually were predatory in their policing approach. Too often these traditional authorities appointed by colonial officials would seize livestock, impose taxes and exploit labour for personal gain. Their actions usually fomented rebellions against the colonial state. The colonial authorities responded by forming ‘tribal or native’ police.

The completion of the Kenya-Uganda Railway was a game changer in 1901 and added momentum to the establishment of a proper police force in Kenya. The Colonial Government, in sight of the rail line, decided to adopt a more robust approach to policing – in particular given that the rail line came with a five-million-pound tag cost. Linked to this was the need to recoup the investment through supporting goods (mostly extractive) from hinterland. Therefore, two police units emerged- those to guard the railway line and those to police administrative centres set up along the railway line route. The consistency between these two police units was their lack of training and equipping. For examples guns used and/or rejected by the King’s African Rifles were usually given to these police units.

² Report of the National Taskforce on Police Reforms (The Hon. Mr. Justice (Rtd) Phillip Ransley Taskforce Report or the Ransley Taskforce Report) pg 13

³ The Village Headman Ordinance of 1902. The ordinance mandated the establishment of the Tribal and then (later) Administration Police.

Given these challenges, the Police Ordinance of 1906 was enacted which saw the creation of the Kenya Police Force. This law borrowed heavily from India⁴. The settlers also got their own police force called the European Police Force which only stationed in Nairobi District. As such early policing approaches had strong racial undertones given the demand by settlers not to be policed by natives but by other Europeans. Moreover, unlike settler areas, native areas were ‘thinly’ policed. Intense policing activities usually coincided with areas the colonial governments had an interest in such as policing in the protecting European settlers’ lives, property, economic interests and infrastructure. ***Lack of personnel and the demands of the territory gave rise to very unconventional and sometimes alarming forms of law enforcement***⁵.

From the analysis at hand and facts on the ground, it is likely that this approach is still one considered applicable in modern Kenya. The National Police Service leadership not only acknowledge this but are brazenly putting in place measures to usher the NPS into the new constitutional order.

1.2 A BRIEF ON THE COLONIAL ORIGINS OF THE PENAL AND CRIMINAL PROCEDURE CODE

In Kenya, the Indian Penal and Criminal Procedure Code were introduced by the East Africa Protectorate Order In Council 1897. The application of the Indian Codes of Criminal law and Procedure was far from popular with the European settlers in the East Africa Protectorate. In a petition to the Secretary of State in 1905 the Colonialists Association of British East Africa objected strongly to the position of placing ‘white men under laws intended for a coloured population despotically governed’. Their demand that English law apply could not be met as it would require employment of English trained magistrates in the colonies resulting in increased salaries which the colonial government could ill afford. In 1914 local ordinances replaced the Indian Criminal Procedure Code. The replacement was not by substantive new laws. Only the title changed with the deletion of the word ‘Indian’. The content of the law remained substantively the same. The Indian Penal Code remained. In 1930 Kenya enacted its own criminal procedure code and penal code based which still tried not to depart too dramatically from the Indian model.

⁴ The Truth Justice and Reconciliation Commission Report Volume 2A pg 49

⁵ Ibid

⁶ Morris H.F. *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935*. *Journal of African Law* Vol. 18, No. 1, Criminal Law and Criminology (Spring, 1974), pp. 6-23

The Indian Police Act along with the Penal Code, Criminal Procedure Code and the Evidence Code were all drafted in by the British to provide the foundation for law and law enforcement in Kenya. No alterations were made to the codes to cater for a context and a setting that was African and not Indian⁷.

The arrival of a formal and codified legal system should not be confused with the rule of law. If anything, the opposite applied. The primary preoccupation of the legal system was not the rule of law but the maintenance of colonial authority over frequently rebellious and recalcitrant Africans. And so it was that the laws imposed in much of Africa were designed to underpin the colonial presence and little else. Colonial rule went on to create many new crimes that were mostly crimes against, as it were, the colonial edifice itself rather than serious transgressions. Essential features of colonial law and policing became enforcing colonial rules and punishing those who breached them as opposed, for instance, to curbing and punishing disputes and crimes committed by one person against another.

In other words, the penal and criminal procedure code and by extension the criminal justice system was viewed as an imposition of foreign laws by the natives who preferred to apply their own local laws in settling disputes which were sometimes supposed to be governed by criminal law. The personnel employed as police had little training in the criminal justice system and in policing and around the laws in force. Lastly, and most importantly the culture of around poor policing practices and the embrace of the rule of law has its root in colonialism. Effort must be undertaken within policing agencies to promoting ‘an addiction’ to the rule of law and constitutionalism which will positively impact on the effectiveness of the criminal justice system.

⁷ Supra Note 3 TJRC Vol 2A pg 43

⁸ The Ransley Taskforce Report

1.3 THE NCAJ CRIMINAL JUSTICE AUDIT REPORT

In 2016 the National Council on the Administration of Justice (NCAJ) issued its report titled *The Criminal Justice System in Kenya: An Audit (Understanding Pre-trial Detention in Respect to Case flow Management and Conditions of Detention)* which we simply refer to the NCAJ CJS Audit Report. This report broke new ground in the discourse of criminal justice reform given its far reaching findings and recommendations on what exactly ails the sector. Its findings have informed the work of the criminal justice reform committee and this sub-committee. The report in essence notes that our courts are no longer in the business of serving Kenyans anticipated needs i.e. dealing with serious offences. Offences such as theft, murder, rape, robbery with violence etc are not being sufficiently dealt with in the criminal justice system. The resources the country allocates to the justice system are focused on lesser offences such as nuisance offences, state regulation offences (mostly dealing with control of alcohol abuse). The committee further notes that the success rate of attaining convictions against the serious offences is low and thereby exacerbating the low effectiveness of the criminal justice system in the eyes of many Kenyans.

The role of the police in attaining an effective criminal justice system cannot be overemphasised. Given the above report, the Policing and Police Powers subcommittee's own analysis, proposals from partners notably the Police Reforms Working Group and a number of judicial decisions, the subcommittee hereby makes a range of policy and legislative proposals in this policy brief.

An NCAJ CJS Audit Report on the criminal justice system was which was undertaken in 18 counties in Kenya (including Nairobi, Mombasa and Kisumu) gives us insight into the current policing experiences and by extension use of penal provisions in the Penal and Criminal Procedure Code. It also highlights to application of penal provisions under other statutes within the criminal justice system. A number of key findings emerge from the audit. The table below highlights some of the committee's observations:

⁹ *The Criminal Justice System in Kenya: An Audit (Understanding Pre-trial Detention in Respect to Case flow Management and Conditions of Detention)* (2016) National Council on the Administration of Justice, Legal Resources Foundation Trust and Resources Oriented Development Initiatives (RODI)

Offence	Percentage	Observation
Nuisance offence	15%	Drunk and disorderly constitute 96% of reasons for arrest under this category.
State Offence	10%	No Alcohol License, Alcohol Dealing, Alcohol Possession, gambling offences constitute a majority of offences under state offences.
Remand pending hearing or on an arrest warrant	14%	About one third of those held under this section were for petty offences punishable with less than 6 months imprisonment
Property offence	13%	Theft, theft by servant and stock theft offence constitutes a vast majority of reasons for arrest and detention
Traffic	9%	
Immigration	9%	
Loitering	4%	
Disturbance and Nuisance	4%	
TOTAL	78%	

This policy brief therefore examines the issues raised in this report with a view of proposing a number of policy measures and legislative intervention that would enable a more efficient and effective criminal justice system that secure the rights of the most vulnerable. It is important to quickly note that the report identifies persons who we agree as being the disadvantaged majority of whom exhibit the following characteristics i.e. indigent, least educated (below 8 years of schooling), unemployed, youth and not financially stable. This category which is quite large in Kenya are the majority of the affected by retrogressive criminal laws and practices that pervade our legal system. This report identifies legal provisions that establish offences like drunkenness, idle and disorderly, loitering with the intent, committing a breach of peace etc are likely offences used to target the most vulnerable and by extension a breach of their rights. Other more serious violations of concern to the committee are the crimes committed against this category and generally against all Kenyans which result in a fundamental breach of their rights. These are violations on the right to life or personal integrity as a result of the unlawful use of force, unlawful use of fire arms, torture, enforced disappearance etc. Other violations committed against these vulnerable groups include false imprisonment and denial of the right to assemble. Police and other policing agencies in security operations and deployment is also of interest to the sub-committee. It therefore proposes a range of measures to meet the challenges brought about by the criminal justice system that is now undergoing various reform measures.

CHAPTER TWO

2. OBJECTIVES OF THIS POLICY BRIEF

2.1 GENERAL SCOPE

The broad purpose of this policy brief is to analyse laws, policies and practices within the police and policing sector that lend themselves to human rights violations despite the new constitutional order i.e. the promulgation of the Constitution of Kenya 2010. The most urgent attention is drawn to violations that touch on basic guarantees of rights to citizens as per the Bill of Rights. These are the right to life, equality and freedom from discrimination and unequal treatment, the right to dignity of the person, freedom and security of the person, access to information, right of an arrested person, right to fair hearing, rights of persons detained or held in custody etc.

Given the length, breadth and complexity of the criminal justice system, it may be most important to consider reform measures that prioritize the rights and freedoms of the most vulnerable of society.

Further the policy briefs seeks to also prioritize reform measures that can assist the criminal justice system attain focus on its core mandate – which should be tackling the more serious criminal offences of concern to citizens and that have the most deleterious effect on the nation.

The Sub-Committee on Policing and Police Powers is therefore focused on putting forward this range of legislative and policy proposals touching on police powers and policing with these objectives in mind. The range of proposals seek to decongest the criminal justice system, secure fundamental rights and freedoms of the most vulnerable and indigent and acknowledge rights of intersex persons who live among us and have suffered historical discrimination and push for attention to the most serious crime of highest concern. The Sub-committee's focus is on institutions that are engaged in policing are mainly targeted at the National Police Service, Kenya Prisons Service and county government inspectorate/enforcement units etc.

CHAPTER THREE

3. OFFENCES REQUIRING REVIEW

3.1 DRUNKNESS

From the report one observes that most offences Kenyans are arrested for relate with the offences of drunk and disorderly, theft by servant, state offences as relates to trade in alcohol¹⁰. Up to 95% of offences under nuisance and state offences relate to the Alcoholic Drinks Control Act. Key provisions of concern are:

3.2 LEGAL PROVISIONS IN ISSUE

Offence	Statutory Provision	Baseline Study
Drunkenness	Section 27 of the Alcoholic Drinks Control Act	This section is on licenses and punishes non-conformity with licensing requirements as relates to the manufacture of alcohol.
	Section 33 of the Alcoholic Drinks Control Act	This section deals with arrest without a warrant for any drunk and disorderly conduct in public places.
	Section 34 of the Alcoholic Drinks Control Act	This section punishes a seller who is in breach of the license requirements.
	Section 37 of the Alcoholic Drinks Control Act	This section punishes the sale of alcohol without a license.
	Section 38 of the Alcoholic Drinks Control Act	This section deals with the sale of adulterated alcoholic drinks

3.3 OBSERVATION AND JUSTIFICATION

As the CJ Audit report found¹¹ The largest category of charges to court was that involving offences against the state i.e. non-compliance with statutory legislation around Alcohol, business licencing and the like. This comprised more than one fifth of charges to court. In many countries such regulatory offences would be dealt with administratively.

The next largest category was that relating to “drunk and disorderly” which also comprised more than one fifth of charges to court. If one adds to the drunk and disorderly category “disturbance” and “nuisance” it ends up comprising 30% of all charges to court. Again, as these are essentially anti-social behaviour charges, this brings into questions what other interventions other than criminal proceedings in court could be brought to bear in reducing or controlling this behaviour.

¹⁰These are offences defined in legislation outside of the Penal Code. These offences typically do not have a complainant and typically relate to the regulation of formal or informal economic activity, where a particular state interest is being protected, such as regulation of alcohol use and protection of the environment. See CJA Report pg xxxi

¹¹NCAJ CJS Audit Report Pg 70

From the analysis the committee is convinced that the Alcohol Drinks Control Act is responsible for about 25% of the offences charged in our courts. As such a review of the manner in which this Act penalizes the offences is important if we are to make the justice system less overloaded with these kinds of offences, more focused on serious crime, and therefore more effective.

3.4 POLICY PROPOSAL

The committee proposes a general review the Alcoholic Drinks Control Act and the role of the police in dealing with the national challenge of alcohol consumption and alcoholism in Kenya. The CJR notes on the use of the criminal justice system to fight the scourge of alcoholism¹²

...a national conversation needs to be undertaken to fully understand the implications of using criminal justice processes to further the very real public health and other interests of the state. This conversation must acknowledge that using the machinery of the police and courts to deal with these interests threatens livelihoods and may bring the criminal justice system into disrepute amongst a public over-policed in entrepreneurial activity and under-policed in terms of serious crime.

In particular, the vexed question of alcohol control emerges again in this dataset, as a subset of the category of state-control, as well as in the large number of offences apparently emerging from the consumption of alcohol. Periodic deaths as a result of deadly brews lead the Kenyan state to further “clamp-down” on informal alcohol production and sales recently. Yet 4 million Kenyans are said to consume such products, usually without serious incident and providing an entrepreneurial income stream for many. The criminal justice system is unlikely to be able to succeed in controlling this sector, yet at the same time where it does attempt to do so it may threaten livelihoods.

¹²NCAJ CJS Audit Report pg 95

CHAPTER FOUR

4. OFFENCES REQUIRING REVIEW

4.1 NUISANCES OFFENCES

A number of provisions in the Penal Code are commonly used to deprive vulnerable Kenyans of their liberty. These provisions have had the effect of criminalizing poverty and depriving Kenyans of an effective criminal justice system that targets serious crime which is of high concern to them.

4.2 LEGAL PROVISION IN ISSUE

Offence	Statutory Provision	Baseline Study
Nuisance	Section 175 of the Penal Code	This section punishes a person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury or harm or a nuisance
	Section 181 of the Penal Code	This section criminalizes the production and possession of obscene items including films.
	Section 182 of the Penal Code	This section is on punishment of idle and disorderly persons including prostitutes, beggars, hawkers, street vendors, vagabonds and sex workers
	Section 193 of the Penal Code	This section criminalizes the making of loud noises and offensive smells in public

4.3 OBSERVATION AND JUSTIFICATION

Police concentration on petty offences rather than serious criminal offences goes to the root of this proposal. The Criminal Justice Audit Report noted that *information was obtained from registers within 26 police stations, and 84% of petty offences or state regulated offences go without complaints to the ODPP meaning none of them undergoes prosecution.*

Innovative ways of dealing with petty offences should be formulated. The 4th Schedule of the Constitution distributes the functions between the National and County Governments. Part 2 provides for the functions and powers of the County Government. Health services (sub part 2), and control of air pollution, noise pollution and other public nuisances and outdoor advertisement (sub part3), trade development and regulation (sub part 7) and control of drugs and pornography are matters that fall under the County Government.

There are also concerns over the offence of idle and disorderly-

- i. there are four distinct offences under one section;
- ii. the provisions are vague e.g. the terms indecent, common prostitute, immoral purposes, disorderly conduct,
- iii. the provisions are subjective and capable of different intentions.
- iv. section 182 (c) is covered under section 93 and 94.

4.4 POLICY PROPOSAL

Clear guidelines to be developed to define parameters under which hawkers and street vendors can operate.

4.4.1 County Law Compliance and Enforcement Bill 2018 by Senate

The counties should regulate public nuisances. As such there needs to be an Act of Parliament passed by Senate creates offences against public nuisances and appropriate punishment. These laws would then be applicable throughout the counties and enforced by enforcement units with the assistance of the NPS. The law would also establish the enforcement Unit, a Code of Conduct, give the units power to arrest, Production in a Police Station of accused and Assist the police in investigations.

4.4.2 Repeal select provisions of the Penal Code

Pursuant to recommendation (a) above, Sections 175, 181, 182 and 193 of the Penal Code be repealed. When legislating repealed above the County Governments must ensure that the pertinent terms are defined; that the ingredient of the offences are clear and that the legislative intent is valid/ legitimate.

CHAPTER FIVE

5. SEXUAL OFFENCES AND SPECIAL GROUPS - INTERSEX PERSONS

Despite the numerous advancements that have been made in the protection of rights of vulnerable persons and special interest groups various provisions of law continue to contravene the constitution and the rights of these groups.

Further despite the courts having defined intersex, the law remains silent. Most Acts of Parliament do not provide for intersex persons, there is need to have legislative provisions sensitive to intersex persons. Lack of definition has led to the exclusion of the intersex persons hence a challenge to public officers on how to handle such persons.

5.1 LEGAL PROVISION AND PRACTICES IN ISSUE

Offence	Statutory Provision	Baseline Study
Sexual Offences	Section 146 of the Penal Code	This section is on defilement of idiots and imbeciles. This section demeaning and discriminatory, it also provides for a maximum sentence on conviction for the offence which is less than the minimum sentence for a similar sexual offence in the Sexual Offences Act and is therefore discriminatory. Further the section creates a standard of proof higher than the similar offence against a child in the Sexual Offences Act.
Special Interest Groups	Sexual Offences Act	Genital organs are defined strictly male or female organs hence excluding intersex organs. Genital organs exclude intersex organs.
	The Persons Deprived of Liberty Act	This Act does not include sex in registration particulars hence a challenge in confining intersex persons in the right cells. Public officers group intersex in cells based on assumptions.
	The Criminal Procedure Code	This Act does not provide for ways of effecting a search on intersex persons; there is need for intersex persons to have the right to choose (sex of the officer) whom to do the search.
	The Prison Act	This Act does not provide for ways of effecting a search on intersex persons, there is need to have the intersex persons decide whom (sex of the officer) to do the search. The Act does not include sex in registration particulars hence a challenge in confining intersex persons in the right cells. The Prison Act also does not provide for ways of effecting a search on intersex children, there is need to have the intersex children decide whom (sex of the officer) to do the search

5.2 POLICY PROPOSAL

- 5.2.1 The committee proposes a review of Section 146 of the penal Code to repeal the section and reclassify the offence. This section ought to be repealed from the Penal Code and brought under the ambit of the Sexual Offenses Act and reviewed on the basis of language, standard of proof and the sentence provided to ensure that they are compliant with the constitution and international human rights standards.
- 5.2.2 Amend Persons Deprived of Liberty Act, definition section 2. The definition provided by the Act is narrow and does not use the term organ as opposed to system which is more inclusive. It should be defined as follows intersex means ‘a person who is born with a biological sex characteristic that cannot be exclusively categorised in the common binary as female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns which are apparent at birth or puberty or adulthood.’
- 5.2.3 Amend Section 27 Criminal Procedure Code Act to read ‘whenever it is necessary to cause an intersex person to be searched, the intersex person shall choose the sex of the officer conducting the search strict regard to decency’.

CHAPTER SIX

6. GROSS BREACHES OF RIGHTS AND FREEDOMS ARISING FROM POLICE AND POLICING AGENCIES CONDUCT

6.1 TORTURE, UNLAWFUL USE OF FORCE, UNLAWFUL LETHAL USE OF FIREARMS, ENFORCED DISAPPEARANCE AND DEATH IN POLICE CUSTODY

Torture, the unlawful use of force, unlawful use of firearms, enforced disappearance including death in police custody are some of the most heinous crimes known to have been committed by police in Kenya as per a myriad of reports including the Truth Justice and Reconciliation Report, the Commission of Inquiry into the 2007 Post-election Violence and various KNCHR Reports. Legal provisions in issue are:

Offence	Statutory Provision	Baseline Study
Torture, unlawful use of force and unlawful lethal use of Firearms	Section 61 of the National Police Service Act	This section is on the performance of functions by police officers by use nonviolent means and the use of force and firearms in accordance with the Sixth Schedule
	Section 95 of the National Police Service Act	Prohibits torture, cruel, inhuman or degrading treatment by Police Officers
	Section 25 and 26 of the IPOA Act	Provides for investigation of serious injuries or death that occurs during police custody
	Section 385-386 of the Criminal Procedure Code	This section governs the process of inquests whenever death occurs in police custody.

6.2 OBSERVATION AND JUSTIFICATION

The TJRC Report notes that in the history of policing in Kenya, there has existed a certain readiness to abandon and ignore the law under the guise operating in a difficult policing environment. This was best exemplified whenever a native area was described as ‘disturbed or dangerous’.

Such an area and by extension such communities residing in those areas would also be labelled dangerous and overall a threat to national security. Special operations under the Collective Punishment Ordinance were mounted; this ordinance allowed the entire community to be punished for the transgressions of a few. The police would, in the course of the operation, extract payment from communities for the cost of the operation launched to pacify them. The police would thereby simply raid property from the communities under the guise of policing.

Undergirding almost all operations was the sense that people had to be punished, harshly treated and—if necessary—forcefully be made to understand that they had to comply with colonial rules and regulations. The futility of using such punitive methods to enforce respect for the law was entirely lost on authorities.

There is an urgent need for the police to adopt modern day policing methods and most importantly comply with constitutional and legal provisions. Given what is at stake are breaches of Kenyans fundamental right to life, the committee stresses that NPS immediately complies with section 61 and the Sixth Schedule despite the current lack of regulations. The committee also observes the need to fully operationalize the Sixth Schedule through the passage of regulations. Secondly, the main concern is in regard to inquests which enable investigation of death in police custody. It is firstly noted that the Coroners Services Act is yet to be operationalized. Secondly this Act would be crucial because the Police are usually the alleged perpetrators who are then also involved in conduct of the inquests. There is conflict between CPC and the NPS, under 385 CPC the OCS is supposed to report to the magistrate. Under the NPS the OCS is supposed to report to IPOA.

6.3 POLICY PROPOSAL

- a) Full implementation and adherence to the Persons Deprived of Liberty Act.
- b) Full implementation and adherence to Prevention of Torture Act.
- c) Full implementation and adherence to Victim Protection Act.
- d) Operationalize Persons Deprived of Liberty Committee.
- e) The KNCHR and IPOA should issue the public regular report on the compliance with the Persons Deprived of Liberty Act and the Prevention of Torture Act.
- f) Operationalize the National Coroner Service Act.
- g) Review the Inquests process and provision. Section 385-386 of the Criminal Procedure Code should be reviewed to make it responsive to the new realities of other agencies having power to undertake policing other than NPS, the existence of IPOA and a National Coroner Service. The new provisions can provide for establishment of regulations which can work out more detail \ around a modern process of inquests especially where the death is suspected to be as a result of police action.
- h) Operationalize Victim Protection Fund.
- i) Enforce the National Police Service Commission (Discipline) Regulations 2014.
- j) Review the draft the National Police Service (Promotion of Human Rights) Guidelines, 2014 before enactment and operationalization.
- k) Review the draft the National Police Service (Use of Firearms) Regulations, 2014 before enactment and operationalization.
- l) Review the draft the National Police Service (Use of Force) Regulations, 2014 before operationalization.
- m) Ratification of the International Convention For the Protection of all Persons From Enforced Disappearance.

6.4 UNLAWFUL ARRESTS AND DETENTION RESULTING IN FALSE IMPRISONMENT

The committee took note of the Criminal Justice Audit Report finding that about 14 to 15% of reasons for detention under the so-called ground of ‘remand pending hearing or on an arrest warrant’. The wanton detention and false imprisonment of vulnerable groups is of great concern to the committee especially where they relate to offences where punishment is not more than 6 months in prison.

Offence	Statutory Provision	Baseline Study
Unlawful arrests and detention resulting in false imprisonment	Criminal Procedure Code, section 29.	This section provides for the arrests of persons without a warrant of arrest
	Section 24(h) of the National Police Service(NPS) Act	It provides one of the functions of the Police is the apprehension of offenders.
	Section 51 of the NPS Act	It gives wide powers to the police to maintain law and order including detecting crimes and undertaking arrests.
	Section 52 of the NPS Act	This section gives power to the police to compel attendance of witnesses; failure to which the person commits an offence.
	Section 53(1) of the NPS Act	Gives the police powers to bond people as a way of compelling them to attend court.
	Section 56 of the NPS Act	This section gives further powers of stoppage and detention.
	Section 58 of the NPS Act	It gives the police wide powers to arrest persons without a warrant.
	Section 59 of the NPS Act	This section governs police power of arrests and detentions. It states that an arrest by a police officer, whether with or without a warrant, shall be subject to the rules contained in the Fifth Schedule with respect to arrest and detention.
	Section 60 of the NPS Act	This section gives the police powers to search without warrant in special circumstances.
	Section 66 of the NPS Act	This section gives general protection to police from personal liability as long as the actions are undertaken in good faith. A person who seeks to take action following abuse of the police powers outlined here would have to do so against the Inspector General of Police.
	Section 123 of the NPS Act	This section provides for police stations to be places of detention

6.5 OBSERVATION AND JUSTIFICATION

In practice the police have been accused of serious violations of false imprisonment for example, numerous breaches of these laws were witnessed in the *Operation Usalama Watch* that was launched by the State in April 2014 as part of efforts by the government to address the insecurity in the country in particular terror attacks. KNCHR established that serious human rights violations and breaches of the law were committed by security agencies against innocent civilians. The violations included the human rights to security of the person, human dignity, food, education, security of the home, and freedom from torture, cruel, inhuman and degrading treatment all of which are guaranteed and protected under Chapter Four of the Kenya Constitution and international human rights instruments which Kenya has ratified. Police officers were also accused of profiling and harassing residents of Somali extract. The report alleges that police would randomly stop Somalis walking on the streets strip search them while demanding identification. Many would thereafter be arrested and detained in police stations and other detention facilities without being booked in cell registers and incidents of arrest being recorded in police station occurrence books. Somali victims of these wanton profiling reported having to pay bribes to the police in order to win their freedom. Bribes that ranged from Kshs. 1000 to Kshs. 50,000 depending on whether you were in possession of some form of identification or not at the time of arrest or a refugee. Many spent days and even weeks in detention facilities in Nairobi and thereafter never charged with any offence.¹⁴

The CPC has in-built safeguards against this abuse of power by the police. It envisages Judicial and accountability safeguards in the use of the power of arrest without a warrant by requiring the arresting officer to take the arrested person before a Magistrate or before an Officer Commanding Station (OCS).¹⁵ It further gives powers to the Officer Commanding Station to release a person arrested without a warrant if a Police inquiry reveals insufficient evidence to proceed with a charge.¹⁶ A further safeguard in the use of the Police arresting powers are contained in the National Police Service Act which provides that the Police must execute all their functions, including the arresting duties, in accordance with Article 244 of the Constitution as well as the Bill of Rights.¹⁷ The Persons Deprived of Liberty Act 2014 gives extensive protection to persons detained by police or other types of policing agencies. The Prevention of Torture Act also provides for full protection of detainees against torture and ill treatment.

¹⁴ Return of the Gulag; Report of KNCHR investigations on Operation Usalama Watch Jul 2014 pg 4-6

¹⁵ *Criminal Procedure Code, section 33.*

¹⁶ *Criminal Procedure Code, section 36*

¹⁷ *National Police Service Act, No. 11 A of 2011, revised edition 2012, section 49*

Despite these safe guards, the abuse of police power so far as arrest and detention is concerned is a great concern for the committee. The instances of false imprisonment of young people from poor backgrounds, wantonly arrested, extorted and released without charge has alarmed the committee. The courts too have shown great concern about abuse of police power and set out to punish police officers who abuse their office and flagrantly breach the rights of the vulnerable members of society.

In the case of *Fesial et al vs. Kandie* and others the court found for 20 petitioners. 19 of whom were arrested, temporarily detained and prevented from receiving legal representation. Their advocate was also arrested and detained when he sort to have the 19 released. The court found that the 20 detainees were not informed of their reasons for arrest and eventually only the advocate was charged in court. The court sighting case law¹⁹ had this to say

The law demands that whenever an arrest is made, the accused person has a right to be informed not only that he is being arrested but also of the reasons or grounds for the arrest. Thus, the police officer must be able to justify the arrest apart from his power to do so. He does that by communicating to the arrested person the full particulars of the offence for which he is arrested or other grounds for such arrest at the time of the arrest. Thus it is incumbent upon those who deprive other persons of liberty in the discharge of what they conceive to be their duty to strictly and scrupulously observe the forms and rules of law. I'm also tempted to mention that no arrest should be made by Police Officer without a reasonable satisfaction reached after some investigation as to the geniuses and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest.

The Report concludes:

The evidence here suggests that if the state were to confine itself to holding on remand only those accused of violent offences, the number of men on remand would reduce by two-thirds and the number of women by one-half.

¹⁸ Constitutional Petition No. 14 of 2017 Feisal et al vs. Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another

¹⁹ In *O'hara v Chief Constable of The Royal Ulster Constabulary (1997) A.C. 286* Lord Hope of Craighead stated that: "The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5(1) (c) [section 5(1) (e)]. The court agrees with the Commission and the Government that having a 'reasonable suspicion' presupposes the existence of facts or information which would justify an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances.". In the case of *Hicks v Faulkner, (1878), 8 Q.B.D. 167 at para 171* Hawkins J. defined probable and reasonable cause as follows: "Reasonable and probable cause is an honest belief in the guilt of the Accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

The Criminal Justice Audit Report observes;

The profile of remand detainees suggests a range of ordinary Kenyans who are at the prime of income-earning potential. The holding of so many possibly productive persons who may never be found guilty on remand is counter-developmental and costly for the Kenyan state. At the same time, educational levels suggest such persons will need legal representation in order adequately to defend themselves in court. Legal representation ought to be a priority in order to realise gains envisioned by Constitution of Kenya 2010 Article 50(2) (h) “Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Lesser offences should not result in remand and legal aid should be immediately available to detainees – many of who do not know their rights.

Further the rules in the Fifth Schedule are not observed as per numerous state and non-state actor reports. The CJ Audit Report agreed with Independent Policing Oversight Authority (IPOA), monitoring report on operation ‘*Usalama Watch*’ in July 2014 that the detention facilities were in very deplorable conditions, they were also overcrowded and children and adults were confined in the same cells.²⁰

6.6 POLICY PROPOSALS

- a) The Cabinet Secretary Interior in conjunction with the Inspector General of Police and other stakeholders should immediately embark on finalizing the National Security Policy and National Policing Policy. The National Taskforce on Police Reform (The Ransley Taskforce) advised as follows with regard to crafting the National Policing Policy. The Policy should, amongst other things, set the broad values, principles, standards and objectives for the police services.²¹
- b) Immediate implementation of the ODPP Diversion Policy²²
- c) Continued implementation and monitoring of The Bail and Bond Policy
- d) Full operationalization of the Legal Aid Act and in particular the Attorney General issues regulations in this regard and which particularly provide for the procedures for the provision of legal aid to persons detained at police stations, or in remand, prison or other places of lawful custody;²³
- e) Enforcement of the Persons Deprived of Liberty Act 2014.
- f) Enforce the Fifth Schedule Rules of the NPS Act.
- g) Enforcement of the Prevention of Torture Act 2017.
- n) Enforce the National Police Service Commission (Discipline) Regulations 2014.
- o) Review the draft the National Police Service (Promotion of Human Rights) Guidelines, 2014 before enactment and operationalization.
- p) Review the draft the National Police Service (Use of Firearms) Regulations, 2014 before enactment and operationalization.
- q) Review the draft the National Police Service (Use of Force) Regulations, 2014 before operationalization.

r) Ratification of the International Convention For the Protection of all Persons From Enforced Disappearance.

²⁰ CJ Report pg 20

²¹ In should also specifically set out:

- i. The constitutional national values, principles, standards and objectives that police in the country should adhere to. Some of the key values and principles that the policing agencies must respect and adhere to include recognition and respect of the value and integrity of every Kenyan, courtesy, commitment to use of reasonable force, and use of lethal force only when a police officer or another person is in imminent danger of death or physical injury, guarantee to all persons (regardless of race, ethnicity, religion, gender, or disability) of equal protection under the law and sensitivity to citizen's complaints;
- ii. Mainstream the respect for human rights, children's rights and gender diversity;
- iii. Commitment to zero-tolerance to corruption within the police services;
- iv. Respecting and protecting the right level of police discretion as opposed to micromanaging them;
- v. Commitment to political neutrality of the police;
- vi. Commitment to police services that are representative and reflect the face of Kenya;
- vii. Optimal use of civilian staff and deployment of police officers to core functions
- viii. Development and maintenance of efficient forensic science services
- ix. Adequacy and proper use of firearms;
- x. Community policing with optimal public input and participation;
- xi. Modalities of promoting positive image including mechanisms for public information and feedback, and of effectively dealing with the media;
- xii. Victim support policy'

²² Diversion has been defined in the said policy as a means a process for resolving criminal cases without resort to full judicial proceedings. Diversion can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion programme, restorative justice process or similar scheme. This enables Offenders to be dealt with by non-judicial bodies and thereby avoiding the negative effects of formal judicial proceedings, a criminal conviction and a criminal record.

²³ Section 86 of the Legal Aid Act

²⁴ See Gitari C. (2019) **Situating Security Sector Reforms in Kenya's Inclusion Discourse and National Dialogue Process** <https://www.ictj.org/publication/situating-security-sector-reforms-kenya%E2%80%99s-discourse-inclusion-and-national-dialogue>

6.7 VIOLATIONS DURING DEPLOYMENT AND POLICING OPERATIONS²⁴

According to the TJRC report, the history of security operations conducted by the police, military, or both in areas inhabited by excluded ethnic groups has been dominated by accounts of the use of brutal force, unlawful killings (sometimes in large scale), rape and sexual violence, and burning and looting of property. These security operations viewed as modes of collective punishment. According to the Commission of Inquiry into the Post-Election Violence (CIPEV), most contingents of the security sector threw away all pretence at professionalism during the 2007-2008 election crisis.²⁵ While some allowed themselves to be actively used for partisan political purposes, others rendered services to citizens in distress based on their political affiliation and ethnic identity. Still others became complicit in criminal acts and committed murder, rape, arson, and theft.²⁶

A KNCHR report concerning the 2017 presidential election, for example, found that the police were biased against supporters of opposition party candidates and used lethal force against them when they held anti-government rallies. The police failed to arrest and charge government supporters, who often donned military regalia during pro-government rallies.²⁷

Thus, since independence, Kenyans fear the police especially during security operations given their past conduct of being violators of human rights rather than protectors.²⁸ For example in the Northern Eastern Kenya and in the Coast regions, the Kenya security agencies are accused of conducting abusive operations against individuals and groups suspected of terrorism.²⁹ These violations are said to occur during policing and security operations.

Decision on who to deploy and where are not usually based on sound policy frames. Deployment is often made, not according to the officer's function or specialized skills, but rather based on an officer's links with decision makers, making these decisions and the deployments themselves prone to abuse.³⁰

²⁵Former President Mwai Kibaki established the CIPEV on May 23, 2008, to investigate the post-election violence and make recommendations on the punishment of the perpetrators of atrocities and the prevention of potential outbreaks of violence in the future. The Kenya Gazette Notice No. 4473 Vol. CX No. 4 of 23 May 2008. For information on the decline of professionalism within the NPS, see Waki report, Chapter 11.

²⁶Waki report, 396-398.

²⁷Kenya National Commission on Human Rights, "Still a Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Poll" (2018).

²⁸Truth, Justice and Reconciliation Commission of Kenya, "Report of the Truth, Justice and Reconciliation Commission, Volume I," (2013), 34.

²⁹Kenya National Commission on Human Rights, "Error of Fighting Terror with Terror: Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown Against Terrorism" (2015), 6.

³⁰Ransley Report

6.7.1 OBSERVATION AND JUSTIFICATION³¹

Security and policing operations that result in human rights violations does not augur well for Kenya's national and social cohesion. Current strategies to combat threats to national security are sadly fueling feelings of exclusion, discrimination, marginalization, and hostility.³² By deploying police officers with requisite knowledge, training, and skills, the NPS could help prevent the profiling of communities and eventual human rights violations.

Police oversight bodies should therefore take more deliberate measures to hold to account police officers and their commanders who use police powers to suppress groups that are exercising constitutional and internationally guaranteed human rights. It has been shown that the lack of accountability for gross violations committed by security sector actors has an even greater negative impact on national cohesion, compared with when perpetrators of such violations are brought to justice.

It is not only rare but almost unheard of for the state to undertake genuine investigations into atrocities committed during politically motivated security operations. Accountability measures could range from compensation for victims to lustration, disciplinary action, and prosecution for perpetrators.

The security sector should therefore adopt a range of reform measures particularly a gender-sensitive approach at all stages of security operations, including planning, implementation, and monitoring and evaluation. It should also prioritize the welfare of victims and cooperate and coordinate with other sectors to provide essential services to victims of sexual or gender-based violence. The security sector should put in place operational protocols and procedures to enable victims of sexual or gender-based violence to report these violations for purposes of accountability. It should also develop special measures for child and male survivors of sexual violence to ensure their safety and access to justice while avoiding stigma. Security sector personnel should receive gender-sensitivity training, and a zero-tolerance code of conduct should be put in place—both critical measures.³³

³¹Gitari C. (2019) *Situating Security Sector Reforms in Kenya’s Inclusion Discourse and National Dialogue Process* <https://www.ictj.org/publication/situating-security-sector-reforms-kenya%E2%80%99s-discourse-inclusion-and-national-dialogue>

³²Kenya National Commission on Human Rights, “A Country Under Siege: The State of Security in Kenya: An Occasional Report (2010–2014)” (2014), 13.

³³Megan Bastick, Karin Grimm, and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2007).

6.7.2 POLICY PROPOSALS

6.7.2.1 NPSC Audit Report on Police Deployment

As per IPOA’s recommendations, an audit of the police service should be urgently undertaken to identify irregular and unregulated deployment of officers and to reduce abuses committed by them, particularly in politically excluded communities. The audit should assess who is assigned where and when and the reasons for the assignment in order to identify irregular or unjustified deployment of officers and any other relevant issue.

6.7.2.2 Draft Policy on Transfer and Deployment

As per IPOA’s recommendations NPSC should enact a policy on transfer and deployment that curbs abuse and enables proper monitoring of the effectiveness of such deployments. The policy should ensure the end the use of deployment as a means to punish and intimidate targeted communities and regions.

Deployment should also be used to provide opportunities to historically excluded groups including women to gain the vital experience required to serve in more senior ranks.

6.7.2.3 NPSC Regulations on Transfer and Deployment

NPSC should immediately implement Regulations on Transfer and Deployment.

6.7.2.4 Operational protocols and procedures to govern security operations

The NPS should put in place operational protocols and procedures to govern security operations in order to enhance accountability in the event of gross human rights violations and procedures that enable victims of sexual violence to report their violations for purposes of accountability. These measures should also include special procedures and provision of essential services for vulnerable groups harmed during such operations.

- Enforce the National Police Service Commission (Discipline Regulations 2014
- Review the draft the National Police Service (Promotion of Human Rights) Guidelines, 2014 before enactment and operationalization
- Review the draft the National Police Service (Use of Firearms) Regulations, 2014 before enactment and operationalization
- Review the draft the National Police Service (Use of Force) Regulations, 2014 before operationalization.

CHAPTER SEVEN

7. BREACHES OF THE FUNDAMENTAL FREEDOM OF ASSEMBLY

7.1 LEGAL PROVISION IN ISSUE

Article 37 of the Constitution, recognizes demonstrations to be a fundamental right. It states that: “Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.” This right can be limited under Article 24 (1) and (3).

This right is also governed under the Public Order Act. Under the Public Order Act, an assembly may be stopped or prevented when there is clear, present or imminent danger of a breach of the peace or public order. Under international law, restrictions may only be placed “in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Any person who takes part in any public meeting or public procession deemed to be an unlawful assembly or holds, convenes or organises or is concerned in the holding, convening or organising of any such meeting or procession shall be guilty of the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year. The act further prohibits the use of offensive weapons at public meetings and processions otherwise than in pursuance of lawful authority, shall be guilty of an offence.

³⁴ICCPR Art 21. See also The Right to Freedom of Peaceful Assembly: A checklist for the Kenya Police and Public by Article 19, OHCHR, IPOA and KNCHR

7.2 OBSERVATION AND JUSTIFICATION

Kenyan law states that a regulating officer³⁵ has to be notified of an intended public assembly³⁶ at least 3 and at most 14 days before it is due to take place. A regulating officer can deny the assembly only if notice of another assembly at the same venue, time and date has already been received.³⁷ The notification of denial shall be in writing and shall be delivered to the organizer at the physical address specified.³⁸ Under international law, standards and best practices, the purpose of system of prior notification is to allow State authorities an opportunity to facilitate the exercise of assembly rights, to take measures to protect public safety and/or public order and to protect the rights and freedoms of others.³⁹ The proper management of peaceful assemblies calls for the protection of a broad range of rights by everyone involved. This includes freedom of opinion and expression; freedom of association; freedom of thought, conscience, religion or belief; the right to life, bodily integrity (which includes the right to security), the right to be free from torture and cruel, inhumane and degrading treatment or punishment, and the rights to due process, fair trial, and effective remedy for human rights violations.⁴⁰

In February 2017 three United Nations human rights experts called on the Government of Kenya to cease its systematic crackdown on civil society groups, which has intensified in the lead-up to national elections scheduled in August. Maina Kiai; on freedom of opinion and expression, David Kaye; and on the situation of human rights defenders, Michel Forst issued a statement urging Kenya to protect this fundamental right after several civil society actors had the protests disrupted by police and a number of them arrested and charged in court.⁴¹

7.3 POLICY PROPOSALS

7.3.1 Draft a Public Order Management Policy and Act⁴²

A policy on public order management, where management of right to assembly, demonstration, picketing, or presentation of petitions to public authorities' falls, should be developed. Currently, police officers rely on the Public Order Act and the Public Order Management as laid out under Chapter 58 of the Service Standing Orders to manage the public, almost repetitive of the NPS Act, Sixth Schedule.

The National Police Service together with KNCHR should spearhead the development of Public Order Management Policy with a view of informing repeal of Public Order Act (Cap. 56). With this policy in place, fulfilment of Article 37 and professionalization of policing of assemblies, demonstrations, picketing, protests and presentation of petitions would be realised. The disorderliness, disorganisation and chaotic nature that was observed on police while policing elections should be discouraged. Further the consistent refusal of regulating officers to receive notifications from the public to undertake protests should also be discouraged.

The Public Order Management Policy should encourage the adoption of intelligence led policing of assemblies. The National Police Service should ensure intelligence gathering leads their policing around public order management to map out the criminal elements who might infringe on freedom of assembly, demonstrations and picketing. This should be done with the conveners / organizers of the public protests having their field marshals as well, and with adequate security arrangements being put in place, to promote and protect security of all actors.

7.3.2 Training of Police on Public Order Management.

After the development of the policy, training on public order management should be taken as a serious course in the Service, and especially against use of lethal force including crime scenes preservation and management.

The Public too should be trained on appropriate conduct when exercising this right so as not to breach the rights of other Kenyans.

7.3.3 Kitting.

This should be coupled with equipping the police with the appropriate kind of police kitting used during public protests including use of less lethal equipment such as rubber bullets.

³⁵ Section 2 Public Order Act: Regulating officer is the officer in charge of the police station in the area where the assembly is to take place or where it is to end.

³⁶ Section 5 (2) Public Order Act

³⁷ Section 5 (4) Public Order Act

³⁸ Section 5 (5) public Order Act

³⁹ The Right to Freedom of Peaceful Assembly: A checklist for the Kenya Police and Public by Article 19, OHCHR, IPOA and KNCHR pg 6

⁴⁰ The Right to Freedom of Peaceful Assembly: A checklist for the Kenya Police and Public by Article 19, OHCHR, IPOA and KNCHR

⁴¹ <http://freeassembly.net/news/kenya-crackdown-rights-groups/>

⁴² See IPOA Exit Report pg 136

⁴³ IPOA Exit report pg 129

⁴⁴ IPOA Exit Report pg 136

CHAPTER EIGHT

8. WILFUL DISOBEDIENCE OF COURT ORDER AND THE CONTEMPT OF COURT ACT BY POLICE AND POLICING AGENCIES

8.1 LEGAL PROVISION

On non-adherence to court orders such as the inability of police officers to honour orders to arrest influential persons or non-adherence by police officers was deemed as an issue affecting the criminal justice process. Non-adherence of court orders recast as wilful disobedience of court orders can be considered being under the ambit of contempt of court. Contempt of Court is a legal doctrine that simultaneously celebrates the authority of courts while at the same time punishes those who dare defy it.⁴⁵ Contempt is the Proteas of the Legal World, assuming an almost infinite number of forms.⁴⁶

Kenya enacted the Contempt of Court Act on 23rd December 2016. This Act was later on declared unconstitutional. The Act sought to define or limit the powers of the court in punishing for contempt of court and for connected purposes. The Act had five objectives being:

- a) to uphold the dignity and authority of the court
- b) ensure compliance with the directions of the court
- c) ensure observance and due respect of the due process of the law
- d) preserve an effective impartial system of justice; and
- e) Maintain public confidence in the administration of justice as administered by court.

The Act classified contempt into two types of contempt civil⁴⁸ and criminal⁴⁹ contempt. The biggest challenge it sort to tackle as per the Kenyan context was the wilful disobedience of court orders. Section 4 of the impugned Contempt of Court Act⁵⁰ goes further and creates a third category of contempt of law. It states that in cases not relating to criminal or civil proceedings, an action that interferes with due process of administration of justice in relation to any court or that lowers or tends to lower the authority of the court, or to scandalize a judge in relation to any proceedings before a court constitutes contempt of court.

⁴⁵Scheneebaum G. and Lavi S. *The Riddle of Sub-judice and the Modern Law of Contempt* **Critical Analysis of Law 2:1 (2015)**

⁴⁶Moskovitz, *Contempt of Injunctions, Criminal and Civil (1943)* COLUMN.L. REV VOL. 43 780

⁴⁷See **Kenya Human Rights Commission v Attorney General & another Constitutional Petition No 87 of 2017**

8.2 OBSERVATION AND JUSTIFICATION

Wilful disobedience of court orders continues to be a major challenge in Kenya in connection with contempt of court. Some of the orders being ignored include money decrees which remain outstanding for years after judgement. Some of the more known cases where there has been wilful disobedience of court orders are listed below. Many of these cases involve abuse of power by police officers. They also constitute the compensation for the use of torture. They include:

a. MISCELLANEOUS CRIMINAL APPLICATION NO. 57 OF 2018, *Miguna Miguna versus Director of Public Prosecutions, Director of Criminal Investigations and the Inspector General.* There was a Miscellaneous Criminal Application 2 of 2018 filed at the court of appeal seeking stay of the contempt orders filed by the Inspector General and Director of Criminal Investigations. On 5th February, 2018, Miguna Miguna a politician affiliated to the National Super Alliance (NASA) was arrested on the 1st of February 2018 at his residence in Runda. He was taken to Githunguri police Station. He was arraigned in court and granted a bail of Kshs. 50,000. However, he was retained in police custody for the next three days, in an undisclosed location(s) necessitating the filing of the application for habeas corpus. Upon hearing of the Application, an order was issued on 5th February 2018 directing the Inspector-General of Police, the Director of Criminal Investigations to produce the Applicant before court or show cause why they should not be held in contempt. The order was not complied with. Subsequent to this, the public was informed that the Applicant had been deported to Canada, for having failed to reinstate his Citizenship status.

b. PETITION 51 OF 2018, *Miguna Miguna Versus Dr. Fred Matiang'i And Others; KNCHR.* Justice Chacha granted orders suspending the declaration by the first Respondent Dr. Fred Matiangí under section 43 (1) declaring Miguna Miguna not a citizen. He also suspended the declaration by the Respondent revoking Miguna's passport and directed the Respondents to facilitate the Petitioner's re-entry into Kenya. The order was not complied with. In this case, the Petitioner sought orders suspending the declarations made through gazette notice VOI CXX No. 15 of 30th January 2018 declaring the National Resistance Movement illegal. He also sought orders for reinstatement of the Petitioner's passport and facilitation of the Petitioner's re-entry into the country. Justice Chacha granted orders suspending the declaration by the first Respondent Dr. Fred Matiangí under section 43 (1) declaring Miguna Miguna not a citizen. He also suspended the declaration by the Respondent revoking Miguna's passport and directed the Respondents to facilitate the Petitioner's re-entry into Kenya. The order was not complied with.

c. PETITION NO. 822 OF 2008. *Salim Awadh Salim & 10 others V Commissioner of Police & 3 others.* The events that give rise to this petition took place some 6 years ago when the petitioners allege that they were arrested by Kenyan security forces, held in custody unlawfully, sent to Somalia and Ethiopia without due process being followed, and tortured while in the custody of Kenyan Somali and Ethiopian Forces. In their petition dated 22nd December 2008, the petitioners sought the following orders:

i) A declaration that the arrests of the Petitioners was in the circumstances arbitrary, unlawful illegal, unconstitutional and in violation of the Petitioners fundamental right against arbitrary arrest guaranteed by sections 70 and 72 of the Constitution of Kenya. Judge Mumbi made global awards to each of the petitioners as follows; i. Salim Awadh Salim- Kshs 4,000,000.00 ii. Saidi Hamisi Mohamed-3,500,000.00 iv. Hassan Shabani Mwazume-3,500,000.00 v. Swaleh Ali Tunza-3,500,000.00 vi. Abdallah Halfan Tondwe-3,500,000.00 vii. Kasim Musa Mwarusi-3,500,000.00 viii. Ali Musa Mwarusi-3,500,000.00 ix. Fatma Ahmed Chande-Kshs 2,000,000.00 x. Mohamed Abushir Salim-2,000,000.00 xi. Muhabitabo Clement Ibrahim-2,000,000.00. The Principal Secretary has neglected, failed or refused to comply notwithstanding persistent entreaties and pleas from the Applicant.

Civil society also has borne the wrath of disobedient of court order. For example, the Public Benefits Organization Act No. 13 of 2013 has never been operationalized despite numerous court orders yet it is a law that would entrench fundamental rights and freedoms in Kenya.

d. PETITION 351 OF 2015, *Trusted Human Rights Alliance Versus Cabinet Secretary (Devolution and also Interior) to date, the order has never been complied with and the Act is yet to be operationalized.* To date, the order has never been complied with and the Act (Public Benefits Organizations Act) is yet to be operationalized. The Petition filed on 18th November 2011 faulted the Respondents for having failed to trigger or cause the commencement of the provisions of the Public Benefits Organization Act No. 13 of 2013 for a period of over two and half years. Justice Onguto allowed the Petition and gave an order of mandamus compelling the Cabinet Secretary to gazette and operationalize the PBO Act 2013. The constitution of Cabinet is unconstitutional as shown the case below and yet the Executive continues to ignore this declaration by our court.

e. JR MISCELLANEOUS APPLICATION 617 OF 2016. *Republic Versus Cabinet Secretary Treasury And Others Peter Kariuki – Ex-Parte Applicant.* The Principal Secretary has neglected, failed or refused to comply notwithstanding persistent entreaties and pleas from the Applicant. The Petition was filed challenging the appointment of persons for the Cabinet Secretaries positions. Justice Onguto upon hearing the counsel for the Petitioners and respondents made an order that the cabinet as constituted was unconstitutional and therefore void.

The first impact of wilful disobedience of the court orders is that it undermines constitutionalism. Charles Howard McIlwain said *‘in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the anti-thesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.’*⁵¹ In the KHRC vs AG & another court stated that disobedience and disregard of the authority of the courts would violate national values and the Constitution. In that regard, courts punished for contempt in order to maintain their dignity, authority, the rule of law, democracy and administration of justice as foundational values in the Constitution.⁵²

In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*⁵³ Ibrahim J (as he then was) this was restated as follows:-

It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged.

8.3 POLICY PROPOSAL

A new Contempt of Court Act is urgently required to better define (not limit) the powers in punishing for wilful disobedience of court orders and general contempt. Broad stakeholder and public consultations should be undertaken in drafting of this law.

⁴⁸See section 4(1)(a) civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court;

⁴⁹See section 4(1)(b) criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —

i). scandalizes or tends to scandalize, or lowers or tends to lower the dignity of the judicial authority or dignity of the court
ii) prejudices, or interferes or tends to interfere with, with due course of any judicial proceeding; or
iii). Interferes or tends to interfere with, obstructs or tends to obstruct the administration of justice

⁵⁰Act No. 46 of 2016

⁵¹C H McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Great Seal Books, 1947) p. 21-22.

⁵²See **Kenya Human Rights Commission v Attorney General & another Constitutional Petition No 87 of 2017**

⁵³[2005] 1 KLR 828

CHAPTER NINE

9. POLICE OFFICERS

9.1 POLICE WELFARE

9.1.1 POLICY PROVISIONS IN ISSUE

Welfare is a key concern and central to achieving police reforms. Police continue to live in squalid conditions; families still struggle to receive compensation following demise of their loved ones, fail to get allowances following police operations, receive poor remuneration based on their terms of reference and also as compared public officers undertaking comparable duties, lack mechanisms to articulate their welfare concerns.

9.1.2 OBSERVATION AND JUSTIFICATION

Of considerable concern to the NCAJ CJA Report was the welfare of the police. It was found that working conditions of the police left a lot to be desired. There have to be better terms of service not only to attract the right people into the police, but to ensure that they will remain and act honestly in their police work. We set out in this Report, comprehensive proposals for the improvement in their salary and working conditions.⁵⁴

9.1.3 POLICY PROPOSALS

- a) Housing Policy,
- b) Establishment of Police Welfare Association, efficiency in issuing compensation,
- c) Health and Insurance Policy access to medical points of service under the medical insurance scheme,
- d) Efficiency in receipt of allowances during operations/deployment

9.2 POLICE VETTING - REVIEW AND CONTINUATION

9.2.1 LEGAL PROVISIONS IN ISSUE

In transitional justice contexts such as Kenya, vetting refers to the processes through which an individual's integrity and competence is assessed in order to decide whether he or she is suitable for public employment.⁵⁵ It usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from within the police, prison services, army, and judiciary.⁵⁶ Vetting processes are designed to screen current or potential public employees to determine "if their prior conduct - including, most importantly from a transitional justice perspective, their respect for human rights standards - warrants their exclusion from public institutions."⁵⁷

A vetting process is different from a purge; vetting must comply with procedural fairness drawn from international human rights standards, whereas a purge does not.⁵⁸ Thus in a vetting process, those subject to a complaint or investigation are notified of the allegations against them and given an opportunity to respond before the body that is administering the vetting process. They should receive reasonable notice of the case against them, have the right to contest the case, and the right to appeal an adverse decision to a court or other independent body.⁵⁹

National Police Service Act, Section 7 (1) and (2) and The National Police Service (Vetting) Regulations of 2013 (No. 11A of 2011), are legal provisions in issue. These are the laws that govern the police vetting process. The NPSC is mandated by these two laws to undertake police vetting.⁶⁰ The NPSC has the power to gather relevant information, interview relevant individuals or groups, hold inquiries, and undertake investigations to establish the veracity of information on police officers being vetted. The vetting panels only make recommendations to the full commission on the suitability or unsuitability of a police officer to continue holding office.

9.2.2 OBSERVATION AND JUSTIFICATION

In Kenya the vetting process covers all police officers and civilians who were employed in the Kenya Police Force and Administration Police Force at the time of the commencement of the National Police Service Act on 30 August 2011. The NPSC commenced the process on 17 December 2013 and intends to complete it before the August 2017 general elections. The total number of officers to be vetted is approximately 77,500. This includes about 5,150 gazetted officers in the ranks of Senior Deputy Commissioner (I and II), Deputy Commissioner, Senior Assistant Commissioner, Assistant Commissioner, Senior Superintendent, Superintendent, Chief Inspector, and Inspector of Police; and about 72,350 non-gazetted officers in the ranks of Senior Sergeant, Sergeant, Corporal, and Constable.

To date, the NPSC has vetted about 6000 police officers specifically in the ranks of Senior Deputy Commissioner (I and II), Deputy Commissioner, Senior Assistant Commissioner, Assistant Commissioner, Senior Superintendent, Superintendent, Assistant Superintendent of Police, and all police officers in the Internal Affairs Unit. The NPSC also claims to have vetted police officers from the Traffic Department.

Given the fact that the inaugural commission was only able to vet 6000 police officers in the period of 6 years of its existence, one may argue that it may take well over 50 years to complete the police vetting process. This is bearing in mind that the commission has other critical mandates beyond police vetting as laid out in the Constitution and the NPSC Act. This is an absurd situation caused by the current legal and constitutional interpretation of the commission's powers that the commissioners are the ones who must individually vet police officers. In essence that this function cannot be delegated.

The court has held that vetting through panels is a possibility as long as the minimum number of commissioners seat as a members of those panels. This still does not solve the current problem given that when the commission is fully constituted of 9 members only 6 panels can seat given the fact that three of the members (the Inspector General of Police and his tow deputies) would obviously be unable to seat given their other core mandates. The 6 panels would still not be able to deliver a timely and effective vetting process – say within a stipulated 2 to 3 years. This is also because these panels are decision making entities. In which period should allow the 6 other commissioners to prosecute their other mandates.

In *Evans Momany Gatembe vs R* the court had this to say

It was contended that the Respondent delegated its vetting functions to persons who are not legally empowered to conduct the vetting....therefore if the Respondent unlawfully delegated its statutory powers, its decision would be no decision at all and would not be permitted to stand....that **the incorporation of other persons other than the Commissioners by the Respondent during the process of vetting does did not amount to delegation of its powers as long as the minimum number of Commissioners were present during the vetting.** In other words the mere fact that the Respondent incorporates other persons who in its view possess knowledge and skills necessary for the functions of the Commission does not necessarily render the constitution of the vetting panel unlawful **as long as those incorporated though may participate in the deliberations do not vote thereat.**

9.2.3 LEGAL AND POLICY PROPOSALS

- a. Review of the NPSC Act section 7 to allow the commission to delegate the police vetting process.
- b. There should be established a clear criteria and process of constituting these committees to undertake vetting on behalf of the commission
- c. Serving police officers should not be allowed to serve in these delegated committees due to conflict of interest
- d. Police officers who were found unsuitable or with decisions undergoing appeals should not also be included in the vetting process
- e. Ex-officers of a certain seniority (possibly gazetted officers) who have served the police service with integrity should be considered to serve in these vetting processes.
- f. Other persons of high integrity who have served both in public and private sector should be considered in the constituted panels.
- g. Clear and well laid processes and procedures should be laid out to protect the integrity vetting process.



KENYA HUMAN RIGHTS COMMISSION

Gitanga Road, opp. Valley Arcade Shopping Centre

P.O. Box 41079-00100 Nairobi - Kenya

Phone: +254-20-2044545, +254-20-2106763

Cell: +254 722 264497, +254 733 629034

E-mail: admin@khrc.or.ke

www.khrc.or.ke