



ADDITIONAL REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ON THE IMPLEMENTATION OF THE PROVISIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

4TH PERIODIC REPORT

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KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

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Introduction

The Kenya National Commission on Human Rights (KNCHR) submits this additional report in update to the one submitted in September 2020 to the Human Rights Committee, so as to inform its review of the State's Fourth Periodic Report under the International Covenant on Civil and Political Rights (ICCPR).

The Kenya National Commission on Human Rights is established under Article 59 of the Constitution of Kenya, 2010 and operationalized under the Kenya National Commission on Human Rights Act 2011¹. It is the successor to the Kenya National Commission on Human Rights established in 2003 under the Kenya National Commission on Human Rights Act 2002². The Commission is constitutionally mandated as the principal organ of the State in ensuring compliance with obligations under international and regional human rights treaties and conventions. KNCHR is the national monitoring agency under Article 33 (2) of the Convention on the Rights of Persons with Disabilities³ and has additional functions to oversight implementation of the Prevention of Torture Act⁴. The KNCHR has since 2004 enjoyed an Affiliate Status with the African Commission on Human and Peoples' Rights⁵. The Commission is also a member of the Network of African National Human Rights Institutions (NANHRI), the regional umbrella body that brings together National Human Rights Institutions in Africa. The Commission is accredited as an 'A' status National Human Rights Institution on its compliance with the Paris Principles, by the Global Alliance of National Human Rights Institutions (GANHRI).

KNCHR presents this **additional** report to the Human Rights Committee in fulfilment of its constitutional and statutory obligations, and in line with its regional and international obligations as a national human rights institution; in order to assist and apprise the Committee on efforts made towards implementation of the provisions of ICCPR at the domestic level and highlights the key achievements, concerns and challenges in implementing ICCPR in Kenya. This report covers subsequent period up to January 2021 and addresses three thematic areas- COVID-19 Pandemic, the Building Bridges Initiative (BBI) and the insecurity in Turkana County (Kapedo town).

¹ Act No 14 of 2011 available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2014%20of%202011>.

² Act No 9 of 2002 (repealed). The History of the institution however dates further back in 1996 when the then His Excellency President Moi set up a Standing Committee on Human Rights (SCHR) vide a gazette notice of June 1996.

³ Letter from the Hon Attorney General to the Secretariat of the Committee on the Rights of Persons with Disabilities referenced DOJ/COM/8/21/TY (97) dated 9th June 2017 nominating the Kenya National Commission on Human Rights as the Monitoring Agency under the United Nations Convention on the Rights of Persons with Disabilities.

⁴ Act No 12 of 2017 available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2012%20of%202017>.

⁵ Status granted during the [36th Ordinary Session](#) of the African Commission on Human and Peoples' Rights held in Dakar Senegal between 23rd November and 7th December 2004. This is in line with the Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa - ACHPR/Res. 370 (lx) 2017, available at <http://www.achpr.org/sessions/60th/resolutions/370/>.

Information relating to the COVID-19 Pandemic

The COVID-19 disease has engulfed countries across the globe, affecting all facets of human natural order. By 6th June 2020 more than 7 million cases had been reported to WHO and more than 400,000 people had lost their lives. By the same date, Kenya had recorded 2600 positive cases, with 83 fatalities and 706 recoveries. Following the first COVID-19 positive case recorded in Kenya on 13th March, 2020, the government came up with a raft of measures and mechanisms to contain the pandemic and support the citizens affected by it.

The KNCHR recognizes that the State has an obligation, within its jurisdiction and internationally, to take measures to combat the pandemic and in doing so, it must respect and promote human rights across the whole COVID-19 spectrum. Respecting human rights is crucial to successful response to the pandemic. Therefore, as an independent constitutional Commission with a legal mandate to promote and protect human rights in Kenya, KNCHR not only continued to offer regular services to the public but also set up an elaborate process of monitoring the government's response to COVID-19 pandemic with a view of enhancing protection and promotion of human rights. While appreciating the daunting challenge faced by the government following the disease outbreak, KNCHR is duty-bound to take appropriate interventions towards protection and promotion of human rights which includes advising and calling out actions or inactions with a view to enhance mainstreaming of human rights standards and principles in the COVID-19 pandemic management and response. Thus, the Commission embarked on various strategies in monitoring human rights-based approach in the response and management of the COVID-19 pandemic. The Commission did this through dissemination of relevant public education messages, media engagement, review of laws and regulations, submission of advisories to various duty bearers, direct engagement with duty bearers and civil society, monitoring places of detention among other interventions.

As a result, the Commission has published a report, **Pain and Pandemic-Unmasking the State of human rights in Kenya in containment of the COVID-19 Pandemic.**⁶

In line with its mandate, the Commission has received various complaints relating to COVID-19. Slightly over 300 cases were received in the period between March 2020 and February 2021 related to Covid-19 incidents. Majority of the cases were on civil political rights followed by economic social cultural rights. A breakdown of the complaints is as shown below:

⁶ KNCHR Pain and Pandemic report available at https://www.knchr.org/Portals/0/Reports/KNCHR-Pain-and-Pandemic_Final%20Report.pdf?ver=2020-12-10-091017-467.

	Total Number of Complaints received	305
	ECOSOC rights	94
	CPR rights	159
	Group Rights	52
	Complaints from Persons with disabilities	8
	Complaints from Intersex persons	37
	Complaints lodged against the police	97

Source of data: KNCHR's Complaints Management System.

Thematic Focus 1: Enforcement of COVID-19 Prevention and Control Measures

Article 6- Right to life

Article 6 of the ICCPR and article 26 (1) of the Constitution of Kenya, 2010 protect the right to life and prohibit the intentional deprivation of this right unless authorized by the law.⁷ In the course of enforcing COVID-19 measures, the KNCHR has documented fifteen (15) cases of deaths reported from various parts of the country caused by police including fatal police shootings, extrajudicial and two cases of deaths in police custody.

Some highlights of cases received include:

Matuga, County	Kwale	A boda-boda rider was allegedly assaulted by police officers after he ferried an expectant mother to hospital during the curfew hours and died due to the injuries.
Mumias, County	Kakamega	A market trader died after police lobbed tear gas canister at him in a market area to enforce social distancing directive. He took refuge in a stall and was later found dead inside the stall.
Embakasi, County	Nairobi	A 27-year-old man sustained injuries after being assaulted by police officers enforcing curfew orders. He was then abandoned by the officers

⁷ Article 26 (3) Constitution of Kenya, 2010.

	by the roadside and his family members picked him up while in serious pains. He succumbed to the injuries a day after the assault.
Changamwe, Mombasa County	In Mombasa, a 19-year-old man was assaulted and succumbed to the injuries inflicted by a vigilante group who were assisting the local administration officers enforce the curfew orders.

Proposed Recommendations

- The State should investigate and prosecute police officers responsible for loss of life occasioned in enforcement of COVID-19 measures;
- The State to publicize actions taken against individual police officers who violated rights of the public during the enforcement of the curfew order directive; and
- While coming up with any operational directives, embed the human rights accountability measures including reporting and feedback mechanisms of cases reported.

Article 7- Protection from Torture, Cruel, Inhuman or Degrading Treatment

Article 29 of the Constitution and article 7 of the ICCPR protects the freedom and security of the person which includes; the right not to be subjected to any form of violence from either public or private sources and the right not to be subjected to torture in any manner and treated or punished in a cruel, inhuman and degrading manner.

KNCHR in the period between 15th March 2020 and 6th June 2020 received a total of eighty-seven (87) complaints on allegation of violations of freedom and security of the person and they are all related to enforcement of the COVID-19 regulations.⁸ Reports received by the Commission indicate that Police either assaulted or shot members of the public who were deemed to be in violation of the COVID-19 regulations.⁹ This is a clear indicator that police officers engaged in abuse of power and use of excessive force when enforcing COVID-19 government directives. This in turn resulted to massive human rights violations. KNCHR notes the use of force was against the standards set out in Section 61 (2) and sixth schedule of the National Police Service Act, 2011 and statement by the Human Rights Committee calling on State Parties not to result to emergency measures which violate non-derogable provisions of the ICCPR including article 7 prohibiting torture and article 6 protecting the right to life¹⁰.

⁸ Pain and Pandemic report p. 22.

⁹ Pain and Pandemic Report p. 24

¹⁰ Human Rights Committee 'Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic (2020)' available at <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

The court in **Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR** *the Court declared the security force's unreasonable use of force in enforcing the Public Order (State Curfew) Order, 2020 as unconstitutional. holding that, "it appears that in confronting the coronavirus, which is by all means a faceless enemy, the police brought the law and order mentality to the fore. Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights".*¹¹

Proposed Recommendations

It is on this basis that the Commission recommends that:

- a. The State carries out investigations and prosecutes reported cases of torture, cruel, inhuman or degrading treatment or punishment
- b. The State publicizes actions taken against individual police officers who violated rights of the public during the enforcement of the curfew order directive.
- c. Intensified sensitization of law enforcement to apply the Prevention Against Torture Act, 2017
- d. Enhanced cooperation amongst the various investigative agencies for increased efficiency and effectiveness in redress.

Article 9 – Right to liberty and security of person

The right to liberty and security of person entails that no person shall be arrested arbitrarily and detained; and no person's liberty shall be curtailed unless the grounds for the same are expressly provided for by law. The Constitution of Kenya protects this right under article 29.

On 6th April 2020, H.E. the President of the Republic of Kenya in a media briefing at State House gave a raft of measures meant to contain the fast-spreading Corona Virus.¹² Among the said measures was a directive for the cessation of movement in and out of Nairobi, Mombasa and Kwale Counties¹³. The cessation of movement order took effect in Nairobi Metropolitan area on the same day at 7.00 pm and in Mombasa and Kwale Counties on Wednesday 8th April from 7.00 pm. On the same day, the Cabinet Secretary for Health gazetted the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 vide Legal Notice No. 50 of 2020 (hereinafter referred to as the Rules).

¹¹ Law Society of Kenya case accessed at <http://kenyalaw.org/caselaw/cases/view/193192/> par 137 & 154.

¹² Presidential address on enhanced measures in response to COVID-19 available at <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/presidential-address-6th-April-2020.pdf>

¹³ Legal Notices 51, 52, 53 & 54 on cessation of movement in Nairobi, Mombasa, Kilifi & Kwale respectively available at <http://kenyalaw.org/kenyalawblog/kenyas-response-to-covid-19/>.

Dissatisfied with the declaration of cessation of movement and the subsequent regulations the Law Society of Kenya in **Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties) [2020] eKLR** challenged the constitutionality of the Public Health Regulations (COVID-19 Restriction of Movement of Persons and Related Measures Rules, 2020) issued by the Cabinet Secretary for Health on grounds that the Regulations were enacted without any public participation, were vague and failed to comply with the provisions of the Statutory Instruments Act, 2013 relating to parliamentary scrutiny.¹⁴

The Commission also submitted an advisory to the Senate Standing Committee on Justice, Legal Affairs and Human Rights on the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020. KNCHR submitted that the rules were enacted without involvement of the public and Parliament, and that the immediate enforcement of the rules made compliance difficult especially for travellers.

In addition to the cessation of movement in the various counties, the Cabinet Secretary Ministry of Health issued isolation and quarantine directives in line with WHO standards to protect members of the public from exposure to the COVID-19 virus. Initially, all persons arriving into the country were expected to self-isolate. However, on 23rd March 2020, the government imposed a mandatory quarantine for all persons coming into Kenya to reside in select quarantine facilities.¹⁵

KNCHR established that the quarantine centres have been used to arbitrarily punish persons who violate government directives; such as curfew orders, failure to wear face masks or failing to adhered to social distancing directives. This is carried out through forceful and compulsory 14 days' quarantine and thereafter arrest, arraignment and charging in court under the Public Health Act.¹⁶

Proposed recommendations

- a. The State should refrain from criminalization of the pandemic.
- b. Any interventions set up to combat the pandemic must adhere to human rights principles and standards.

¹⁴ Statutory Instruments Act (No. 23 of 2013).

¹⁵ CS Health Press Statement on the update of Corona virus as at 23rd March 2020 accessed at https://www.health.go.ke/wp-content/uploads/2020/03/COVID19_Press-Statment-March-23-2020.pdf.

¹⁶ Pain and Pandemic Report p 50.

Information relating to insecurity in Turkana County (Kapedo town)

The Commission has previously conducted a public inquiry in the North Rift region of Kenya on the impact of insecurity on the enjoyment of human rights.¹⁷ In the report, it emerged that one of the causes of perennial conflicts in the region is administrative boundaries. One of the regions notorious for conflict is Kapedo town, whose boundary has been disputed as to whether it belongs to Baringo County or Turkana County. Historical documents indicate that this dispute has been ongoing, with some periods of peace.

The episodic moment of peace and calm was abruptly halted recently in January 2021 as Kapedo once again witnessed a surge in insecurity cases after gunmen raided Kapedo, forcing security officers to evacuate four schools among them; Kapedo Primary, Kapedo Girls Primary, Lomelo Primary and Kapedo Secondary School. Few days after this incidence, police officers in a routine security mission in Kapedo were waylaid and attacked by gunmen where a senior police officer in charge of operations was killed and two other officers sustained serious injuries.¹⁸

Consequently, following these flurry of attacks and rising insecurity cases, the government embarked on a security operation to flush out and disarm the criminals responsible for the escalating violence against both the locals and security officers. Few days after the operation was launched, six bullet-riddled bodies were recovered by the police from a thicket at Arabal, a distant place from Kapedo. The families of the six blamed the police for their kins' abduction, torture and killing although the government through the Rift Valley Regional Commissioner insisted that the six people were part of criminals who had attacked Arabal and their deaths was a result of the ensuing shoot-out with the security officers who had responded to the attack.¹⁹ It suffices to note that manner in which the six people met their deaths violated the freedom and right to security of the person as guaranteed under Article 29 of the Constitution.

The disruption of lives and livelihoods of Kapedo residents has been immense. For instance, Kapedo-Lomelo-Kainuk and the Kapedo-Chemolingot-Marigat roads were rendered impassable due to insecurity. A trader from Kapedo who spoke to a local daily newspaper had this to say "Right now, even opening a shop is a problem. We have run out of stocks. We are surrounded by a lot of resources that are not helping us in anyway because of people who cannot just live in peace. All we see here are police men and police vehicles. Our children cannot even study."²⁰ The locals

¹⁷ MENDING THE RIFT: A Public Inquiry on Insecurity and its Impact on the Enjoyment of Fundamental Human Rights in the North Rift Region of Kenya, (May 2017) available at <https://www.knchr.org/Publications/Thematic-Reports/Civil-and-Political-Rights/Security-Sector>.

¹⁸ Ministry of Interior and Coordination of National Government Press Statement available at <https://twitter.com/InteriorKE/status/1351167514408079368>.

¹⁹ As reported by the People Daily Newspaper on <https://www.pd.co.ke/news/mystery-surrounds-discovery-of-six-bullet-riddled-bodies-65874/>.

²⁰ As reported by the Daily Nation on <https://nation.africa/kenya/news/in-the-bowels-of-kapedo-where-the-gun-has-replaced-the-law-3265990?view=htmlamp>.

complained of lack of supplies due to restrictions imposed to effect the ongoing security operation while Kenya Union of Post-Primary Education Teachers (KUPPET) and Kenya National Union of Teachers (KNUT) threatened to withdraw teachers from Kapedo and Baringo areas if the government did not restore calm and assure teachers of their security.²¹

It is evident that freedom of movement and residence provided under Article 39 of the Constitution has been curtailed and the economic and social rights enshrined under Article 43 have been jeopardized. The lives of both Kapedo locals and security officers have been put at risk and their right to life as enshrined under Article 26 of the Constitution cannot be guaranteed. The situation is likely to be exacerbated further if the government goes ahead with the decision to gazette Kapedo as a disturbed and special operation area, paving way for curfew extension and a sustained operation to flush out criminals and disarm them.²² However, the gazettelement is yet to be effected.

Proposed recommendations

- a. A comprehensive disarmament / removal of illegal guns from the civilian population needs to be undertaken.
- b. Conduct a proper mapping to establish the boundaries of Turkana County.
- c. Construction of boarding schools in areas affected by conflict to provide security for pupils, teachers and continuity of learning. Boarding schools should also have teachers' houses
- d. State to enhance accountability and in particular to conduct investigations and prosecutions of perpetrators of community tensions and ethnic animosity.
- e. State to intensify strategies and foster political good will that build peace and coexistence amongst the warring communities through the National Cohesion and Integration Commission (NCIC).²³

Article 17-Right to Privacy

The right to privacy is constitutionally protected under article 31 of the Constitution and further protected under article 17 of the ICCPR. Though the right is not absolute, a patient's information held in confidence can only be breached in accordance with the provisions of section 11 (2) of the Health Act, 2017 (No. 21 of 2017) which are; user consents to such disclosure in writing in the

²¹ As reported by Citizen TV on <https://citizentv.co.ke/news/knut-kuppet-threaten-to-withdraw-teachers-from-kapedo-over-insecurity-4925857/>.

²² As reported by Capital FM on <https://www.capitalfm.co.ke/news/2021/01/govt-to-declare-kapedo-a-special-security-zone-in-impending-gazette-notice/>

²³ NCIC is established under the National Cohesion and Integration Act. NCIC is charged with facilitating and promoting equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. See NCIC website <https://www.cohesion.or.ke/index.php>.

prescribed form; court order or any applicable law requires such disclosure; or nondisclosure of the information represents a serious threat to public health.

During the monitoring period, KNCHR received complaints of illegal entry and searches by law enforcement officers. In one incident, it is reported that police officers forcefully entered homes in Nakuru and arrested individuals found without masks. KNCHR recorded violations of the right to privacy, protection from discrimination and profiling of individuals who were accused of breaking the curfew orders and other COVID-19 management directives; and persons who tested positive to the virus²⁴.

Thematic Focus 2: Access to Justice

Access to Justice is a basic principle of the rule of law, and a fundamental human right protected by Article 48 of the Constitution. The COVID-19 directives and legislations have greatly impacted on the access to justice in the country. KNCHR findings indicate that the regulations and directives put in place to support suppression of the pandemic, have resulted in some of the provisions creating criminal offences and penalties. These offences include restrictions of movement, maintenance of physical distancing and use of face masks in public spaces. Consequently, there has been an increase in the number of arrests and charges, making the demand for access to justice services higher. This, coupled with scaling down of court services will continue to increase the backlog of cases.²⁵

The UNODC and UNDP guidance notes on ensuring Access to Justice in the context of COVID-19 (May 2020) give short, mid and long-term interventions aimed at ensuring justice is served during and after the pandemic. On preparation, it highlights a need for; multi-sectoral strategy; prioritization of cases such as serious crimes; violence against women and cases involving child offenders; support remote hearing; enhance accountability and oversight of law enforcement; increase use of alternatives to detention and support access to legal education. The Judiciary is advised to ensure justice is dispensed in a timely manner, adopt strategies for reducing risk of the pandemic in places of detention, ensure effective remedies for victims and survivors of violence and support remote access to justice. The COVID-19 pandemic has not suspended constitutional rights. Thus, based on the foregoing KNCHR sought to assess: accessibility of courts during the COVID-19 Pandemic period; adequacy of measures put in place to safeguard the right to a fair trial and measures put in place to safeguard access to justice by marginalized persons.

²⁴ Pain and Pandemic Report, p. 22.

²⁵ Judiciary 2020 accessed at <https://www.judiciary.go.ke/fw-kasarani-courts-handle-1000-cases-related-to-breach-of-covid-19-regulations/>

Effective 15th March 2020, the National Council on the Administration of Justice (NCAJ), issued a series of statements scaling down court services across the country.²⁶ In the statements, police officers were required to issue police bonds for petty and traffic offenders while maintaining centralized records for persons arrested and released on police bonds to promote accountability. In addition, plea taking for urgent criminal matters would continue with hearing of sexual offences cases expedited upon the request of the ODPP. Further, the High Courts would continue to review files for petty offenders to promote prison decongestion.

The National Police Service published curfew guidelines on the 27th March 2020, instructing Station heads to grant police bonds to detained persons where possible, to enable social distancing by limiting numbers of persons detained in police holding cells. In offering bond for petty and traffic offences, the Police are guided by the Bail and Bond Policy Guidelines. Release of children and vulnerable persons without a surety is also provided for. On children cases, a police officer is expected to consider the best interest of the child.

The Office of the Director of Public Prosecution developed staff guidelines on preventative measures against the spread of COVID-19 in Kenya. The guidelines were on handling fresh matters and conduct of matters before court. The ODPP staff members were guided to suspend all pre-trial conferences as well as meetings with complainants. Prosecution of new cases was suspended for 14 days with exception of serious cases (murder, robbery with violence, sexual offences, terrorism, human and drug trafficking). New matters would be handled at the police stations subject to guidelines that were to be issued by the Inspector General. The police were expected to update the ODPP regional and county heads on how they disposed of the cases as well as seek their guidance. Equally the prosecution heads were expected to report weekly on the recorded statistics. To deal with possible backlog, the suspects on cash bail/police bond are to be given bi-weekly court attendance dates, which can be extended subject to the prevailing pandemic situation.

The Judiciary embraced use of ICT to support seamless delivery of services during the pandemic. The Chief Justice gazetted Practice Directions on Electronic Case Management Gazette number 2357 of 2020[1], to guide the integration of Information Communication Technology (ICT) in judicial proceedings. This would include filing cases electronically, conversion of cases to electronic exchange of proceedings and virtual hearings and electronic case tracking system amongst others. The practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global pandemic were further issued vide Gazette number 3137 of 2020. County governments, public health departments together with representatives of the Judiciary have conducted sanitary inspections of courts to

²⁶ Dated 15th March 2020, 19th March 2020, 1st April 2020, 15th April 2020 and 21st April 2020.

ascertain preparedness and suitability of court premises, structure and measures to fight COVID-19 in preparation for up scaling court services.

The practice directions have seen judicial officers hear urgent matters and deliver rulings and judgment virtually. Whereas, criminal hearings were suspended save for serious cases, some hearing and delivery of judgment and ruling for persons in custody are done via video links. There have been some technical challenges in rolling out the virtual hearings, which are resolved respectively with feedback from the court users. The Cabinet Secretary for National Treasury and Planning through Legal Notice No. 59 of 2020 waived court fees in respect of commercial disputes where the value of the suit does not exceed one million shillings, for a period of two years.²⁷ The NCAJ continues to issue statements on up scaling of services.²⁸

Based on the judicial interventions to ensure continuity of access to justice; KNCHR makes the following findings on access to justice.²⁹

- i. The judiciary has put in place strategies to ensure continued dispensation of justice during the pandemic. The strategies were developed in a participatory manner through high level NCAJ membership save for the limited prioritization of children's access to justice evident by lack of children court case practice guidelines.
- ii. Use of ICT to support remote functions for justice system is a notable progress. However, the applicability and accessibility of the same across the country remains a challenge. In addition, the platform fails to measure up to the human rights standards specifically, accessibility, non-discriminative and acceptability among the people with low level of literacy, persons with disabilities like visual, hearing impairment, learning disabilities, autism, spectrum disorders and mental health conditions.
- iii. Whereas NCAJ has developed accountability measures requiring law enforcement to share centralized records of reports on released persons; there is need for the directive to be applied in all police stations especially in far flung areas. Further, members of the public should be provided with information on lodging of complaints arising from the directive.
- iv. The scaling down of court services and high demand for access to justice service amid creation of offences under public health regulations have increased the backlog of cases. The Judiciary in supporting Kenya Prison Service decongestant programme, had at 1st April 2020, released 4,800 petty offenders jailed for less than six months and others who had less than six months to complete their jail terms.

²⁷ Legal Notice No. 59 of 2020 accessed at

http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN59_2020.pdf

²⁸ Justice Maraga, 2020. Statement on justice sector operations in the wake of the COVID-19 pandemic accessed at <https://ncaj.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>

²⁹ Pain and Pandemic Report.

- v. The measures put in place to safeguard access to justice currently are not inclusive for every court user. For instance, the Judiciary directives dissemination strategy using mainstream media and social media platforms and pinned notices in court stations leaves out a majority of court users like the persons with disabilities, the poor in informal settlements and the marginalized in remote areas. The right to information is a constitutional obligation that helps build public trust, confidence and institutional transparency.
- vi. Whereas the Judiciary has identified sexual violence as serious crimes as those deserving prompt hearing, there is limited support for victims of crime due to the pandemic. It is crucial to ensure effective access to online and offline support services, including psychological aid and other social services such as shelters, trauma support for victims of crimes such as sexual and domestic violence. Notable during the period, in response to the escalating cases of sexual and gender-based violence especially towards minors, is the introduction of a toll-free number by the directorate of community policing and gender and child protection to facilitate ease of reporting for such cases. In addition, the Judiciary should monitor implementation of the directive to avoid further victimization of victims especially the vulnerable.
- vii. The suspension of criminal trials has resulted in delayed justice especially for persons in trial custody.

Proposed recommendations

The National Council on Administration of Justice to:

- a. leverage on its membership including those at the Court Users level to ensure access to justice for the vulnerable and effective remedies for survivors of violence. This includes; (a) Sourcing for support towards acquisition of ICT equipment for the Kenya Prisons Service to allow increased remote hearing of cases. (b) Putting in place protective measures such as; shelters, counselling and exemption to movement restrictions for persons who have recovered from COVID-19.
- b. Publicize communication through media and networks platforms that will ensure wider dissemination of information to all including complaints reporting.
- c. Put in place special measures to ensure that cases relating to marginalized persons and specifically children in conflict with the law are fast tracked. ICT support to be given to the department of children services and the children courts to ensure evidence is secured and cases heard and determined in a timely manner.
- d. The Office of Director of Public Prosecutions should increase application of diversion as an alternative to prosecution so as to reduce the number of cases taken to court as a way of reducing case backlog while administering justice.

Thematic Focus 3: Media and Access to Information

Article 19- Freedom of information, opinion and expression

Access to information and media freedom are fundamental in a society that is governed by the rule of law. Timely and accurate information provides individuals with the knowledge required to participate effectively in the democratic processes and fosters openness and transparency in decision-making. These rights are protected under Articles 34 and 35 of the Constitution of Kenya.

KNCHR, taking note of the pivotal role of a free media in promoting access to information during a pandemic, monitored media freedom and access to COVID-19 related information. The monitoring sought to establish; if media freedom is guaranteed during the enforcement of COVID-19 emergency powers or regulations; whether the Government is guaranteeing fair and equal access to journalists and media to all information related to the COVID-19 health crisis and in cases where physical access is precluded by health measure, whether alternative access to the media for coverage and reporting is provided. The KNCHR also sought to establish whether access to information on COVID-19 is guaranteed including by vulnerable persons such as persons with disabilities and if the government has taken steps including addressing the digital divide to promote access to information on COVID-19 for all. The commission made the following findings on media freedom and access to information;

Media Freedom

KNCHR notes that since the first COVID-19 positive case was reported in the country, media work was listed as an essential service and journalists have been allowed to attend government press briefings and raise pertinent questions. In addition, media houses have been able to organize media interviews with relevant State officers. This saw increased coverage and information sharing on the pandemic. The Media Council and Kenya and the Kenya Union of Journalists undertook media specific trainings to mitigate on COVID-19 coverage and reporting. This resulted largely to journalists adhering to public health safety guidelines while on duty. However, there are reported cases that threatened media freedom in the course of covering and reporting the COVID-19 pandemic across the country. The immediate cases that came to the fore involved harassment and intimidation of journalists by law enforcement officers included; the assault of a NTV journalist in Mombasa; harassment of a WERU TV journalist in Meru, arrest of Citizen TV journalists in Eldoret and harassment of two Standard Media Group journalists in Nakuru. KNCHR issued a terse statement on the harassment of journalist and called to action the need for duty bearers to support media freedom during COVID-19 pandemic coverage and reporting.

Proposed recommendations

- a. State party should carry out impartial, prompt, thorough and independent and effective investigations, while ensuring access to effective remedies for journalists who have been assaulted by the Police.
- b. Establish a national mechanism for the safety and protection of journalists in line with the 2018 Addis Ababa Resolution on the creation of coordination mechanisms for the safety of journalists at the national, sub-regional, and regional level.

Access to Information

Prior to the first COVID-19 case being reported in Kenya, the government set up the National Emergency and Response Committee on Corona Virus whose mandate among others was to provide key and accurate information on COVID-19 pandemic and draft measures that the government would take to combat the spread of the virus. After the reporting of the first case the government, in conjunction with the media fraternity has endeavoured to develop and disseminate elaborate public communication messaging. The daily press briefings by Cabinet Secretary of Health and health officials alongside relevant government officials and other experts delved on statistics on the rate of COVID-19 infections, recoveries and update on measures put in place to avert the pandemic. The media has been a key source of information of government interventions with the journalists from a cross section of media houses being allowed to field pertinent questions relating to the government efforts. As at 6th June, 2020 and day 86 of COVID-19 infections in Kenya, the government through the Ministry of Health had issued 80 press briefings through mass media; there were (8) public Presidential addresses to the nation covering critical information on the government's initiatives regarding the COVID-19 pandemic. The inclusion of sign language interpreters during the briefing has enabled persons with hearing impairment to follow the proceedings. In addition, the disaggregation of data using gender, age and geographical groupings is a positive move.

Moreover, regular updates have been made available through traditional media (television and radio) as well as social media (Facebook, twitter, websites). The mode and frequency of information has helped counter misinformation, enhanced public confidence and encouraged collective efforts in mitigating the crisis. To boost coverage, the media fraternity through the Media Owners Association (MOA) contributed over Ksh 150 million in form of advertising space and airtime where pertinent information on the pandemic is relayed to the public. The media houses have regularly invited various industry players in health, business, technology, education and experts in various fields to help elaborate on initiatives put in place to combat the negative effects of the pandemic and also offer other relevant information.

In addition to media briefings and public education, the government has been enhancing its efforts on improvement of ICT Infrastructure to promote access to information. In context, citizens in urban areas enjoy almost unparalleled access to several medium of information through TV, radio, mobile and internet but the rural areas have lagged behind due to lack of appropriate infrastructure to ensure regular flow of information. The government, in attempts to address the digital divide, has been making inroads lessening the gap information access. These efforts include; launch of the Google Loons Project to ensure more Kenyans access 4G connectivity.

The government has also constituted the COVID-19 ICT Advisory Committee whose mandate includes: developing and implementing a framework for identifying, supporting and scaling local ICT solutions that can support the country's efforts in combating the pandemic.

Article 25- Right to participate in public affairs

The KNCHR established that effective public participation was not achieved during development of most of the Bills and regulation. The time frame for submission of memoranda from the public was too short and in certain cases the call for submission was issued after the fact e.g. the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020. Further KNCHR has observed that the provisions of the Statutory Instruments Act, 2013 have largely not been adhered to during this period. The Chairperson of the Committee on Delegated Legislation in the national assembly is on record stating that the Committee was constrained by time to review the various instruments and it would be an exercise in futility to review certain instruments whose lifespan had already lapsed.

Proposed recommendation

The State should fast track the enactment of the Public Participation Bill and adoption of the Public Participation Policy.

Right to self- Determination

Information relating to the Building Bridges Initiative

The 2017 General Election resulted in months of post-election violence, antagonism and confrontations in the country especially between the two political nemeses. To end the political unrest in the country, President Uhuru Kenyatta and opposition leader Raila Odinga made a “Handshake” agreement in March 2018. This created an opportunity to unite the country and set in motion a process to identify the comprehensive changes that will strengthen the Rule of Law, unite Kenyans, deepen our constitutionalism, and launch a comprehensive reform process to consolidate this momentous opportunity.

To this end, the President, through Gazette Notice No. 5154 of 31 May 2018, established the Building Bridges to Unity Advisory Taskforce with the mandate to ‘evaluate the national challenges outlined in the Joint Communiqué of ‘Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity; outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and national levels.’

One of the key issues that emerged from the Building Bridges Initiative was the need for various constitutional amendments in order to unify the country. The Constitution of Kenya (Amendment) Bill, 2020³⁰ seeks to amend the Constitution of Kenya to address issues arising from its implementation, specifically the need to resolve issues of divisive elections and promote gender equity in governance; strengthen the structure of devolution and increase resource allocation to the counties; broaden mechanisms for all the people of Kenya benefit from economic growth; harmonise certain roles and functions of the bicameral legislature; fortify national ethos by specifying the responsibilities of citizens; and strengthen accountability on public resources and the fight against corruption.

In this regard, the BBI secretariat has collected over one (1) million signatures in support of the report and the proposed constitutional amendments. Further, there is the Referendum Bill, 2020 that seeks to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and consequential amendments to the Elections Act 2011, which currently provides for the conduct of a referendum.³¹

³⁰ Constitution of Kenya (Amendment) Bill, 2020 available at <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2020/10/Constitution-of-Kenya-Amendment-Bill-25-11-2020.pdf> .

³¹ Referendum Bill available at <http://parliament.go.ke/sites/default/files/202005/The%20Referendum%20Bill%2C%202020.pdf> .

In addition, the critical BBI proposals have been translated into a proposed law; The Constitution of Kenya (Amendment) Bill, 2020³². This bill has now been forwarded to the 47 county assemblies by the Independent Electoral and Boundaries Commission for their consideration as per the provisions of Article 256 and 257 of the Constitution of Kenya. The looming referendum has heightened political tensions and may create unrest as the same comes a year before the country's next General Election expected in August next year (2022).

The process has been challenged through the Court. In **Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties)** [2020] eKLR, the petitioner challenged the establishment of the BBI Taskforce without taking into consideration the contributions of stakeholders, the first Respondent acted unfairly and unlawfully. They state that the Respondent's decision was biased, predetermined and unfounded in law, and it offends the letter and spirit of the Constitution; the Petitioners sought for the Taskforce to be declared unconstitutional, illegal, null and void. The court held inter alia, *that in determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative. The President's power to appoint a Taskforce is closely related to his broad, policy-formulating function, hence it is an executive power. It is a mechanism whereby the President can obtain information and advice so as to achieve his desired goal, in this case of promoting and ensuring national unity among the other terms of reference for the Taskforce.*³³

In seeking support for the BBI report, certain leaders were engaged in hate speech and divisive lobby strategies. The National Cohesion and Integration Commission³⁴ warned the politicians against engaging in hate speech or any other conduct that will interfere with the peace and calmness currently being experienced in the country.³⁵

BBI and separation of powers

The BBI proposes the amending of provisions of the Constitution to create the positions of the Prime Minister, Two Deputy Prime Ministers and also the Office of Leader of Official Opposition proposes to change the name of Cabinet Secretaries to Cabinet Ministers. The holders of these offices will be derived from Parliament. This proposal borrows from a Parliamentary system of governance in which the executive and legislature are closely entwined. The Prime Minister and a

³² https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/2ac70e_d879f92067a64003832df8db5a9d23d9.pdf

³³ Thirdway Alliance Case accessed at <http://kenyalaw.org/caselaw/cases/view/191344/> para 93.

³⁴ Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202008>

³⁵ As reported by Baraka FM on <https://barakafm.org/2020/02/20/ncic-warns-against-hate-speech-during-bbi-rallies/>.

majority of his or her Ministers are Members of Parliament and sit in the National Assembly. The executive is therefore present at the heart of Parliament.

It suffices to note that the Kenyan System of Governance is a presidential system of governance and the proposal by the BBI seeks to have the introduction of a hybrid system of governance through the creation of the offices of the Prime Minister and two deputies and still have a Presidential System of Governance.

The said BBI proposal may be viewed as retrogressive as it tends to take back the country to the earlier system of governance in which both the executive and the legislature were in Parliament under the Old Constitution and in which the Executive encroached on the independence of the Legislature, thus compromising on the much-needed oversight role that the country needs.

Under the doctrine of Separation of powers, it is envisioned that no one person should serve in two arms of government at the same time and this has adequately been provided for in the existing Constitution. For example, the President should not hold any other state or public office whereas in Section 3 of the repealed constitution, one of the prerequisites for one to be elected as president was that he had to be elected as a Member of Parliament. Article 152 (3) is categorical that a Cabinet Secretary shall not be a Member of Parliament whereas Ministers and Members of the Cabinet were to be appointed by the president from among the Members of Parliament in the old order.
