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CIVIL SOCIETY PRISON REFORM INITIATIVE

Constitutionality of Criminal Procedure and Prison Laws in Africa

Kenya

Narrative report

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2016

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The aim of CSPRI is to improve the human rights of people deprived of their liberty through research-based advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes.

CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity-building.

Introduction

Kenya's 2010 Constitution is liberal with regard to the rights of persons in the country's criminal justice system. Its notable novel provisions include the entrenchment of the rights to fair trial and *habeas corpus* and the separation of criminal investigations and prosecutions under two independent systems. The country's penal and criminal procedure laws predate the Constitution, and the consequence of the latter's supremacy has been a spate of statutory reforms aimed at compliance with the consistency rule. On this score, new police legislation was enacted in 2011, pursuant to provisions of a kind required to give effect to provisions of the Constitution that are not self-executing. Various amendments to the country's criminal procedure code and law of evidence have been effected, most recently in 2014. Some of those amendments secure guarantees of rights, but others limit rights under exceptions permitted on grounds such as national security.

Given this background, evaluating statutory conformity to constitutional guarantees for rights of persons in the criminal justice system produces a mixed picture. As the study shows, there is a difference between conformity in terms of legal formalism that solely pays attention to the black-letter rule of the Constitution, and the transformation of criminal justice through instilling in it a culture of constitutionalism, as intended by the framers of the Constitution. Associated with this formalism is a risk that statutory reform will obfuscate the rights of persons in criminal justice through its predominant police-power orientation.

This study identifies conformity gaps between, on the one hand, constitutional protections of the rights of arrested, accused and detained persons and, on the other, statutory criminal procedure requirements. The starting-point is the Constitution and, accordingly, the study is concerned with provisions in criminal procedure law that are directly or indirectly within the scope of application of an explicit right in the Constitution. Section 1 provides general information on the 2010 Constitution and identifies the relevant mechanism of constitutional review. Section 2 evaluates the conformity of statutes to rights of arrested persons. Section 3 does the same regarding rights of accused persons. The conclusion is followed by some tentative recommendations.

1. General information

1.1. Recent constitution-making history

In the 1990s, demands by civil society for good governance in response to illiberal politics and corruption-serving economic liberalisation eventually led to agitation for constitution-making,[1] which resulted in in the Constitution of Kenya Review Act 1997. This legislation provided for the collection of public views on constitutional review, the drafting of constitutional proposals,[2] their consideration at a national constitutional conference,[3] followed by parliamentary enactment and presidential promulgation of a new constitution. This phase of constitution-making ended with rejection of a constitutional proposal in 2005.[4]

The second phase of constitution-making, characterised by inter-party political negotiation in the framework of a government of national unity, followed in the wake of severe post-electoral violence in 2008. A revised harmonised draft constitution was proposed by parliament with technical expert input and subsequently approved by a 70 per cent referendum vote in August 2010. The 2010 Constitution entered into force in November 2010. Typical of a compromise charter that incorporates divided political opinion, the 2010 Constitution derives its foundational principles from diverse sources.

1.2. Judicial system and constitutional review

Judicial power is directly vested to the courts[5] under provisions that cement the judiciary's personal, institutional and financial independence.[6] The major institutional innovation is the apex Supreme Court, composed of seven judges.[7] The Chief Justice, who heads the system of courts, also presides in the Supreme Court, whose decisions are constitutionally binding on all other courts.[8] Judicial review remedies lie with the High Court which has original jurisdiction to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom guaranteed in the Bill of Rights.[9] The Court may make any order it deems fit for the fair administration of justice,[10] with appeals to the Court

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[1] Willy Mutunga *Constitution-Making from the Middle*: *Civil Society and Transition Politics in Kenya 1992-1997* (SAREAT/Mwengo 1999).
[2] The Constitution of Kenya Review Commission tasked to draft the proposals published its report and proposed draft constitution in 2002.
[3] The national conference, popularly known as the 'Bomas conference', was convened during 2003 and 2004, with some 604 delegates.
[4] Fifty-nine per cent of voters rejected the proposal in a referendum held by the defunct Electoral Commission of Kenya.
[5] Art. 159(1).
[6] Art. 160(1).
[7] Art. 160(7).
[8] Art. 163(7)
[9] Art. 165.
[10] Art. 165.

of Appeal and to the Supreme Court at the last resort. Institutional reform required by the 2010 Constitution has increased the number of judges[11] and dispersed court services.

In general, the question whether a statutory limitation conforms to the Constitution will be answered by considering if it passes the test under article 24 of the Constitution. This cardinal provision permits a limitation (1) by law; (2) that is reasonable and justifiable in a democratic society; and (3) that withstands proportionality analysis considering the nature of the right, the importance of the limitation, its nature and extent, the need to secure the rights of others, and rational connection between limitation and its purpose, taking account of any less restrictive means to achieve that purpose.

To support the approach in which the rights and freedoms of citizens are fought for in the courts, article 22 protects the right of every person to institute High Court proceedings claiming a right has been infringed. This provision covers the rights of arrested and accused persons relevant to this study. The 2010 Constitution grants standing to institute proceedings to any person or group acting on behalf of other persons, in their own interests or in the public interest.[12] If it finds an unjustified infringement of a right, the Court may grant any appropriate remedy, which adds teeth to the potential impact of article 22. It should be remembered that the courts have power to develop statutes to conform to the Constitution and they are not bound by any law other than the Constitution.

But the Constitution is not the sole basis for the courts' decisions. Under the supremacy clause, the courts can consult international human rights law and the decisions of international judicial organs.[13] The role of the Supreme Court here is pivotal. When appeals come to it, it has the power to consider whether or not to maintain old precedents as correct interpretations, being the only court not bound by precedent.[14]

1.3. Overview of law enforcement

The law enforcement agencies directly created by the Constitution are the Director of Public Prosecutions, the National Police Service and the National Intelligence Service. The Constitution establishes a dual structure in which prosecution powers are vested in the Director of Public Prosecutions (DPP)[15] while other law enforcement powers are vested in the National Police Service under the supervision of the Inspector General (IG).[16] The DPP may direct the IG to investigate any allegation of criminal conduct while retaining a quasi-judicial discretion to commence prosecutions, but the role in most cases presupposes that some investigations, whether preliminary or substantive, have been carried out. The DPP may withdraw prosecutions with leave of court, and the law is silent on the reasons to be adduced.

[11] The Court of Appeal shall have not more than 30 judges and High Court not more than 150 judges. See section 3 of Judicature (Amendment) Act No. 10A of 2012, Kenya Gazette Supplement, 15th June 2012.
[12] Art. 22(2).
[13] Constitution 2010, art. 2(5) and (6).
[14] Constitution 2010, art. 163(7).
[15] Arts. 157 and 158.
[16] Arts. 243, 244 and 245.

1.4. Relevant criminal justice system legislation

The following legislation is evaluated in the study:

- Criminal Procedure Code, Cap 75 Revised 2011;
- Evidence Act, Cap. 80 of 1963;
- National Police Service Act, Cap. 84 of 2011;
- Penal Code, Cap. 63;
- Prevention of Terrorism Act, No. 30 of 2012; and
- Security Law (Amendment) Law, 2014.

2. Constitutionality of provisions relating to arrest

2.1. Policies leading to arrest

The provisions of the 2010 Constitution related to arrest also make the contextual nexus between arrest and criminal charge, hence permitting a power of arrest part and parcel of any policy connected to upholding the criminal law. The rights of arrested persons may be limited by criminal law in accordance with article 24. What would be logically impermissible are arrests unconnected with the purposes of criminal law, for instance, to enforce contract or non-statutory customary law.

Even so, the constitutional nexus itself is much narrower than that which law enforcement policies could pursue using arrest in criminal operations for reasons other than primarily criminal charge and prosecution. For instance, police could use arrests in a policy of disruption of known criminal activity without necessarily taking every person arrested to trial. Whether arrest within such operational parenthesis is constitutional means analysing praxis rather than statutory conformity, and is hence beyond this study.

The 2010 Constitution does not address institutional powers or duties of arrest and does not authorise distinctions; children are the exception, which may result in discriminatory treatment in arrests. The Constitution's sole concern is with the rights of arrested persons as such, irrespective of whom is effecting the arrest.

2.2. Rights of arrested persons

The explicit rights of arrested persons are contained in article 49 of the 2010 Constitution. They are the right

- to be informed promptly in a language the person understands, of the reasons for the arrest, the right to remain silent and the consequences of not remaining silent;
- to remain silent;
- to communicate with an advocate and any person whose assistance is necessary;
- not to be compelled to make any confession or admission that could be used in evidence against the person;
- to be held separately from persons serving a sentence;
- to be brought before a court as soon as is reasonably possible, but not later than 24 hours after being arrested or by the end of the next working court day following an intervening holiday;
- at the first court appearance, to be charged or informed of the reasons for detention continuing, or to be released;
- to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released; and

- not to be remanded in custody for an offence if the offence is punishable by a fine only, or by imprisonment for not more than six months.

Two forms of rights are new and require statutory changes. The first are informational rights: to be informed promptly of one's constitutional rights at the time of arrest, in a language understood by the arrested person, of the reasons for arrest; the right to remain silent and to be informed of this right, and at first court appearance to be informed of reasons for custodial detention if it is ordered by the court. The second are procedural rights: to release if no compelling reasons justify detention; rights to communicate with counsel and to any person needed for assistance at arrest and at first court appearance following arrest, and not to be compelled to give self-incriminating evidence. Procedural rights would include the manner of effecting arrest as part of the protection of personal integrity and liberty, taking account of experience of torture allegations and alarming levels of extra-judicial killings in lieu of arrest.[17]

2.2.1. Informational rights during and following arrest

Constitutional standard

An arrested person must be promptly informed of the right to remain silent under article 49(1)(a)(ii) and of the consequences of not remaining silent, under article 49(1)(a)(iii). The right to remain silent is exercised separately and additionally under article 49(1)(b). This information should be a language understood by the arrested person. Under article 49(1)(c) an arrested person who is detained has the right to communicate with his or her advocate or with any other person whose assistance is necessary.

At the first appearance in court, an arrested person must be informed of any compelling reasons warranting his or her custodial detention. This information should be provided by the court issuing a detention order for a detention after the permissible 24 hours.

The constitutional standards cover the content of information and the form of its communication at a highly general level. Legislation is required to give effect to this guarantee by stipulating the time the information should be provided, its language, by whom it should be provided, and, in the case of arrests effected by police, supervisory follow-up to show, either orally or in writing, that the arrested person's rights under article 49(1)(a) were respected.

Statutory standard

The principal legislation here is the Criminal Procedure Code (CPC) and the National Police Service Act. Under the CPC, a police officer may stop and detain any person whom he or she witnesses doing anything which is unlawful or finds in possession of anything contrary to any written law. But it includes

[17] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Mission to Kenya* (2009) A/HRC/11/2 Add.6 and Kenya National Commission on Human Rights, *'The Error of Fighting Terror with Terror'* (2015) <http://www.knhrc.or.ke> accessed 31 January 2016.

no mention of informational rights either for such *in flagrante delicto* arrests or for arrests pursuant to a warrant.[18]

A new Sec 6A was introduced to the National Intelligence Service Act to permit an officer of the service to stop, arrest and hand over to the nearest police station any person whom the officer witnesses engaging in a serious offence or finds in possession of any object or material that could be used for the commission of a serious offence.[19] No provision is made here for the right to be informed of rights under article 49.

Under the National Police Service Act, arrest starts when a person is admitted into the holding area and record of the time and reason for arrest made in an occurrence book.[20] Under the CPC, arrest starts at the point when police confine a person whether or not that person is informed he or she is under arrest.[21] So it is not clear at what stage of arrest a person is entitled to information of his or her rights during and after arrest. Under the police legislation, the responsibility to provide information rests with the officer in charge of the station where an arrested person is detained, but there is no specification of when and how information on rights must be conveyed, or of the penalties for failure to convey it.

Evaluation

The CPC predates the 2010 Constitution. Where the CPC has been amended post-2010, the legislature has not provided for informational rights. The result is a grey area of incompatibility due to insufficient statutory guidance on the nature, quality and amount of information to be communicated, and by what rank of state official, in order to enable an arrested person to exercise intelligibly a right against self-incrimination.

2.2.2. Procedural rights during and following arrest

2.2.2.1. Use of force during and following arrest

Constitutional standard

Article 49, which deals with the rights of arrested persons, is completely silent on the use of force. However, article 29 provides that '[e]very person has the right to freedom and security of the person, which includes the right not to be— (a) deprived of freedom arbitrarily or without just cause; (b) […]; (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological […].' An arrested person also retains the protection of

[18] See s. 29 of the National Police Service (Amendment) Act No. 11 of 2014, Kenya Gazette Supplement No. 103, 2nd July 2014.
[19] Security Laws (Amendment Act) 2014, s. 52.
[20] National Police Service Act, Fifth Sch., r. 8.
[21] CPC, s. 21(1).

article 29. The protections of articles 29[22] and 49 persist in custodial detention after arrest, but may be limited by law in accordance with article 24 of the Constitution.

Statutory standard

The principal statutes regulating how state officers use armed force during arrest are the CPC and the National Police Service Act.

Under the CPC, a police officer may use force if a person forcibly resists arrest.[23] What guidance is offered – that the use of force is reasonable or necessary in the circumstances – is open-ended. Presumably greater force may be reasonably justified in self-defence, but this is not precisely stated in the law. Non-physical forms of violence, such as the threat of its use as well as the psychological form contemplated in article 29, are not addressed by the CPC. Hence, the use of force is largely a question of factual evaluation. So far, no authoritative case has outlined the approach courts will take to outline when and how force and other forms of restraint may be used during arrest.

The National Police Service Act obligates a police officer to use force lawfully[24] or be liable for an offence, and a victim of police misconduct has a statutory right to compensation.[25] A police officer has the power to arrest a person without a warrant on eight statutory grounds.[26] Subsidiary regulations provide for the procedures during arrests with or without a warrant[27] and these reiterate the rights in article 49, 50 and 51 of the Constitution. Furthermore, a police officer may use armed force during arrest in accordance with conditions set out in subsidiary regulations.[28] These conditions permit the use of force when non-violent means are ineffective, provided the force used is proportionate. There is an obligation to report when force is used resulting in death or serious injuries, and the police oversight authority has to investigate in such cases.[29]

Evaluation

On the face of it, there is no obvious inconsistency or conflict between the statutory provisions regarding the use of force during arrest and the constitutional protections of the rights of arrested persons, notwithstanding the language in article 29 that a person has a right not to be subjected to violence from public sources. The statutory provisions permitting reasonable, necessary and proportionate force to effect arrest are couched not as limitations on constitutional rights but as straightforward police procedures essential in policing. In view of article 49 and article 24, it is praiseworthy that the police regulations mandate impartial albeit internal investigations in cases where persons are injured or killed during arrest, and that victims are afforded a right to compensation without prejudice to their constitutional rights under article 22.

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[22] Article 25 stipulates that protection against torture in article 29(d) and freedom from slavery in article 29(f) shall not be limited.
[23] CPC, s. 21(1).
[24] National Police Service Act, s. 49(4).
[25] National Police Service Act, s. 49(10).
[26] National Police Service Act, ss. 58(a)-(h).
[27] National Police Service Act, s. 59, requires police officers to adhere to the Fifth Schedule.
[28] National Police Service Act, Sixth sch. and s. 61(2).
[29] National Police Service Act, Sixth sch., r. 5 and s. 61(2).

What is missing in the legislation however are clear criteria on the attributes of such quasi-judicial investigatory procedures, these being left to the executive to formulate. A relevant observation here is that the incentive for compliance with the Constitution and statutory conditions for use of force is higher when the manner of arrest is a significant issue in any ensuing a trial, assuming the case goes to trial, and where an arrested person is able to prove claims of excessive use of force. Clearer guidance in the legislation, for in instance on the purpose, form, duration and supervision of physical restraints during and immediately after arrest, would do more to substantively vindicate the constitution prohibition of the use of violence against arrested persons.

2.2.2.2. Right against self-incrimination

Constitutional standard

Under article 49(1)(d), a person who is arrested may not be compelled to make any admission or confession that may be used in evidence against him or her. This prohibition, which applies irrespective of who is making an arrest, is sufficiently broad to cover the use of force to compel an admission or confession with the intention of obtaining evidence. Torture is clearly prohibited under all circumstances.[30]

Statutory standard

The CPC permits plea negotiation and plea agreements in which accused persons will admit to charges in exchange for leniency for offences tried in subordinate courts.[31] Such agreements are reached by prosecutors with the consent of the Director of Public Prosecutions as the protector of public interest in such cases. There is no statutory standard for the informational rights against self-incrimination of arrested persons who are offered plea agreements.

Under the Prevention of Terrorism Act, a person is not excused from answering a question or producing a document on the ground of self-incrimination, but provided the evidence obtained shall not be used in any criminal proceedings against him or her other than for perjury.

Evaluation

In cases where a person incriminates him- or herself without legal representation to avoid criminal trial and harsher sentence, the risk is that the standards contemplated by article 49 are diluted or skirted altogether. The statutes do not outline the consequences of infringing the right against self-incrimination in order to obtain an admission with the intent of obtaining evidence in connection with plea agreements. The presupposition is that the admission obtained at arrest through infringement of self-incrimination is vindicated only in cases that proceed to trial and the accused person requests the application of the exclusionary rule under article 50 to exclude statements obtained in violation of guaranteed rights. With plea arrangements, cases do not need to proceed to trial.

[30] Arts. 25(a) and 29(d).
[31] CPC, s. 198.

Under terrorism offences, there is a contradiction between the guarantee of immunity for self-incrimination and the threat of prosecution for perjury for individuals who have been compelled by law to provide information. So far this issue has not been tested before the courts.

Statutory conformity in a formalistic manner is aided by the imprecise language of the Constitution on this particular protection. Article 49(1)(a) stipulates that an arrested person is informed promptly of reasons for arrest at the time of arrest, that is, before the first appearance in court. The requirement simply is to promptly provide understandable information related to the arrest. It is connected to the negative obligation to not use arrest as a device to obtain evidence that will incriminate the arrested person. The provision does not lay down criteria for the quality of reasons or information to be provided, leaving it to the legislature to provide guidance. Such guidance is missing in the relevant statutes. The quality of reasons for arrest and information provided against self-incrimination are left as questions of fact to be assessed by courts at a later stage, assuming the case goes to trial.

2.2.2.3. Right to conditional release before first appearance in court and pending trial

Constitutional standard

Under article 49(1)(h), an arrested person has a right to be released on bond or bail on reasonable conditions pending a charge or trial, presupposing an arrest by law enforcement officers. Typically, a bond is backed by a third-party surety and/or collateral security, while bail involves a deposit of a cash amount to secure conditional release. Article 49 requires the police to detain an arrested person only where there are compelling reasons that warrant detention.

Article 49(1)(f) requires an arrested person to be arraigned in court and charged (or informed by the court of the reasons for continuing detention) within 24 hours or released. An arrest that does not comply with the duty to inform and to be arraigned within the stipulated time-frame would be arbitrary or unlawful.

Statutory standard

Section 36 of the CPC provides that in cases of arrest without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence, the officer in charge of the police station where the arrested person has been brought shall release such person if it is not practicable to bring him or her to a court within 24 hours, on a bond to appear in court on a specified date and time. However, it also provides that, if detained in custody, the arrested person may be brought to court after 24 hours from when taken into custody, or 'as soon as practicable'.[32] The CPC is therefore more flexible than article 49(1)(g) concerning the 24-hour detention period.

[32] The still-applicable precedent, set in 2004 by the Court of Appeal in *Albanus Mutua v Republic*, Criminal Appeal No. 120 of 2004 (unreported), is that an unexplained violation of a constitutional right will result in an acquittal irrespective of the nature and strength of evidence adduced in support of the charge. The Court has interpreted section 36 of the CPC as requiring an explanation for delay beyond 24 hours and will leave it at that if satisfactory explanation is provided by the prosecution.

Section 36A introduced into the CPC by a 2014 amendment[33] requires a police officer to produce an arrested person in court within 24 hours pursuant to article 49(1)(g) of the Constitution. If the police officer has reason to believe lengthier detention is necessary, he or she shall apply in writing to the court for an extension of time for custodial detention. The application shall be supported by affidavit sworn by the police officer specifying the nature of the offence for which the person has been arrested, the general nature of the evidence on which the person has been arrested, inquiries already made by police and further inquiries proposed to be made, and the reasons necessitating the extension. The court may release the suspect unconditionally or conditionally, or make a detention order. The court may not make a detention order unless there are compelling reasons for believing that the suspect shall not appear for trial, or may interfere with witnesses or the conduct of investigations or commit an offence while on release. The detention order may also be made as a protection measure of the suspect, and for the suspect's welfare if he or she is a minor. A detention order under this section shall not exceed 30 days.[34] During the extension period, the police may seek a further extension with leave of court. If the court grants a further extension, such period – taken together with the period for which a suspect was first remanded in custody – shall not exceed 90 days.[35] This amendment does not require the arrested person to be entitled to legal representation when the application is made for extension of detention orders.

The new section 123A of the CPC provides for a limitation on the right to bail.[36] Subject to article 49(1)(h) of the Constitution and notwithstanding the general principle to admit bail under section 123, the new provision essentially leaves bail to the discretion of the court, but permits continued detention if this is warranted variously by the nature or seriousness of the offence; the character, antecedents, associations and community ties of the accused person; the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and the strength of the evidence of his having committed the offence. Under section 123(a)(2), arrested persons may be kept in custody for their own protection.

Other recent statutory amendments[37] make it easier to hold arrested persons in custodial detention for longer periods of time rather than release them on bail. For instance, an order to release an arrested person made by a subordinate court or the High Court may be stayed for 14 days to allow the Director of Public Prosecution to appeal against the bail order, on the ground that the charges contemplated relate to terrorism, narcotics, organised crime, human trafficking or money laundering.[38]

Similarly, an amendment to section 33 of the Prevention of Terrorism Act proposes that courts may issue detention orders for up to 360 instead of the previous ceiling of 90 days.[39]

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[33] Security Laws (Amendment) Act of 2014.
[34] CPC, s. 36(a)(7).
[35] S. 36A (10) as amended December 2014.
[36] See Schedule in Statute Law (Miscellaneous Amendments) Act, No. 18 of 2014, Kenya Gazette Supplement No. 160, 24th November 2014.
[37] Statute Law (Miscellaneous Amendments) Act No. 18 of 2014, Kenya Gazette Supplement No. 160, 24th November 2014; Security Laws (Amendment) Act, No. 19 of 2014, Kenya Gazette Supplement No. 167 of 22 December 2014, ss. 20 and 21.
[38] See CPC, ss. 364(1)(c) and 379A.
[39] Security Law (Amendment) Act of 2014.

Evaluation

According to the 2010 Constitution, conditional release is a right that is trumped only when compelling reasons exist. Amendments to the CPC define compelling reasons widely and only in relation to a belief that a person will fail to appear for trial, interfere with witnesses or investigations or commit another crime.[40] These reasons mirror the bail risk-assessment that obtained before the current Constitution. The statutes appear to limit a constitutional right without invoking the grounds of necessity, reasonableness and proportionality under article 24. Custodial detention appears to be the norm and release on bail or other conditions appears to be the exception.

Recent amendments that extend permissible detention periods make no mention of a right to compensation for lengthy post-arrest custodial detention, including the 360 days permissible under the terrorism legislation. Compatibility with article 49 should require consideration of a compensatory regime to remedy the violation of rights of arrested persons, in order to impose costs on detaining officials for lengthy pre-trial custodial detention. Instead, officials have little to fear from the law for failure to respect a right to conditional release.

It should be remembered that the CPC is more permissive than the Constitution regarding arrest and custodial detention. Where the Constitution refers to a strict 24-hour custodial detention and only when compelling reasons exist after arrest, the CPC standard obscures the right to conditional release to a question of procedure.

Only children benefit as a special group from the protections of rights during arrest afforded under article 49, protections that prohibit their custodial detention after arrest unless as a measure of last resort.[41] If detained, a child must be held for the shortest appropriate duration and separately from adults, taking account of the child's age and sex. The purpose of this protection is stated in article 52. It is to provide greater certainty in the application of rights to certain categories of persons, in this case children. By virtue of article 52, the provisions dealing with an arrested person must be construed as applicable to a child, defined as a person under the age of 18. Article 53 is intended to sharpen the fundamental rights guaranteed adults, in respect of the child's needs. The Constitution is silent on the age of criminal capacity, but presupposes that children too are subject to criminal justice procedures. It stipulates no alternatives to arrest of a child, thus leaving the issue to be settled by statute.

2.2.2.4. Rights concerning humane conditions of custodial detention

Constitutional safeguard

Article 51 does not address any specific rights of persons in custodial detention. It does impose a positive obligation on parliament to provide for statutory rights under a regime of humane detention. It requires the statutory conditions to conform to international instruments such as the UN Standard Minimum Rules for the Treatment of Prisoners.

Statutory safeguard

[40] Security Law Amendments of 2014.
[41] Art. 53(1)(d).

The principal statute on the issue of separate custodial detention here is the National Police Service Act. Its schedules clearly require arrested persons to be detained only in designated holding areas, typically cells in police stations. The National Intelligence Service Act obligates intelligence officers who arrested persons *in flagrante* to hand them over immediately after arrest to the nearest police station.

All persons in custodial detention outside police stations must be under the control and supervision of the Commissioner of Prisoners, in accordance with the Prisons Act. The Act is yet to be amended in response to article 51 of the Constitution. At the end of 2014, new legislation was enacted – the Persons Deprived of Liberty Act, 2014, to give effect to the article 51 requirement of humane detention. The new statutory protections call for administrative reviews and oversight of conditions in detention, which is what obtained before the 2010 Constitution. Furthermore, the entitlements are generic and non-justiciable, echoing the intent in Art 51 to enforce humane conditions through prudent administrative use of available resources.

Evaluation

The positive obligation in article 51 can properly be interpreted to mean that a person has a constitutionally protected right to humane conditions of detention, such as access to adequate or reasonable food, health care, education, physical and occupational programmes and appropriate special measures for detainees with disabilities. The Constitution has left it to parliament to address humane conditions as a policy issue with resource implications. New legislation on humane prison conditions transfers obligations to the hands of the executive and detention authorities to realise both appropriate conditions and redress procedures. Administrative judicial review remains the means to redress the administrative decisions of prison authorities regarding compliance with any statutory conditions in specific cases.

Furthermore, persons in custodial detention retain all their rights under the Constitution, including against violence, subject only to de facto limitations taking account of the fact of detention. Rights can be exercised in custodial detention only where humane conditions exist.

3. Constitutionality of trial-related provisions

3.1. Policy and trial-related rights

As observed above, arrest presupposes criminal trial. From the state officials' perspective, a criminal trial should end in conviction and sentencing.[42] Policies to secure conviction no doubt inform a prosecutor's preparedness for trial. It seems axiomatic that Kenyan legislation on criminal trial provides the means for the state to prepare and advance its prosecution, and the Constitution protects the accused person's using a language of rights.

Article 50 protects the right to fair hearing in two guarantees: first, a right to have a dispute settled by a fair and public hearing before a court, and, secondly, under article 50(2), a right to fair trial.

The right to fair trial, which is entrenched by article 25 against limitations, includes the right to:

- presumption of innocence;
- be informed of the charge with sufficient detail to answer it;
- to have adequate time and facilities to prepare a defence;
- a public trial before a court established under the Constitution;
- to have the trial begin and conclude without unreasonable delay;
- to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- to choose and be represented by an advocate and to be informed of this right promptly;
- to have an advocate assigned to the accused by the state at state expense if substantial injustice would otherwise result, and to be informed of this right promptly;
- to remain silent and not to testify during the proceedings;
- to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence;
- to adduce and challenge evidence;
- to refuse to give self-incriminating evidence;
- to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law;
- not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
- if convicted, to appeal to, or apply for review by, a higher court as prescribed by law;

[42] In *R vs Commissioner of Police and Anor, ex p Michael Monari and Anor* (2012) eKLR, the court stated that the predominant reason for instituting criminal proceedings has to be the vindication of criminal justice. Courts will not interfere with decisions regarding prosecutions, provided the state has acted in a reasonable manner.

- to have information given in language that the accused person understands;
- to have evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice;
- to have, during the trial, a copy of the record of the proceedings of the trial on request;
- to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law; and
- to petition the High Court for a new trial if new evidence emerges.

Article 50(2) rights can be grouped thematically into four clusters for the purposes of evaluation of statutory conformity:

- transparency rights, such as publicity of trials, impartiality of tribunals, presumption of innocence, adversarial proceedings and reasonable duration of trial;
- legal representation rights;
- evidentiary rights related to adducing and confronting evidence; and
- sentencing and conviction rights.

3.2. Transparency rights

Constitutional standard

Article 50(2)(e) guarantees the right to fair trial, which includes the right to have the trial begin and conclude without delay. The protection is against unreasonable delay.

Statutory safeguard

Under the CPC, a criminal trial begins with the charge and ends with acquittal or, if conviction is held, with sentencing. The period covered by appeals against conviction and sentencing until appeal is exhausted is included within this scope. The CPC does not define unreasonable delay.

Section 87 of the CPC permits the DPP to withdraw charges against an accused person at any time before judgment is pronounced. A withdrawal before the accused is put on their defence is no bar to re-arrest and new prosecution on account of the same facts, and there is no limit on the number of times such re-arrests can occur.

Section 193 on plea agreements means trial is avoided. On the face of it, it conforms to section 50(2)(e), except that avoiding trial altogether as a way to avoid delay has its risks.

Evaluation

Trial delay is endemic in practice and can be attributed, inter alia, to the complexity of criminal procedure even at the level of subordinate courts. Unreasonable delay may be attributed to the

procedures for securing witness participation. In some cases, for example prosecution of piracy offences in high seas,[43] it is extremely difficult to obtain the attendance of any witnesses.

Section 87 of the CPC places no bar on the number of times the prosecution may terminate proceedings only to arrest and charge persons on the basis of the same facts. However, the Office of the Director of Public Prosecutions Act now requires the permission of the court for the termination of proceedings at any time before judgment.[44] This permission, even if granted, is still no bar to arresting and charging persons on the same facts. While it has been argued that the wide discretion granted to prosecutors by section 87 of the CPC is liable to increase the duration accused persons spend facing similar charges, the courts have upheld the general provision, which predates the 2010 Constitution, albeit without in that instance going into the merits of its effect on the right to speedy trial.[45]

The legislation on fair hearing envisaged by article 50 is pending, though a Witness Protection Act was enacted under this provision. There is no authoritative judicial interpretation of the requirements of a right to trial without unreasonable delay, leaving accused persons to the piecemeal approach of assessment of the merits in each case. It is notoriously difficult for an accused person to assert this right when adjournments, say to obtain witness attendance, are granted at the prosecution's expediency.

3.3. Legal representation rights

Constitutional standard

Article 50(2)(g) guarantees the right to choose and retain own advocate.

Article 50(2)(h) guarantees the right to 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. The elements of the protection are to have an advocate appointed, if lack of legal representation would result in an unfair trial and to be informed of this right promptly.

Statutory standard

The right to legal representation appointed by state at state expense is yet to be operationalised by statute. A detailed Legal Aid Bill of 2015, if enacted, will apply a means test to pay for legal representation in criminal and some civil law matters, in order to effectuate the right in article 50(2) of the Constitution.[46]

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[43] Permitted by s. 143 of the CPC.
[44] S. 26 of Office of the Director of Public Prosecution Act, Act No. 2 of 2013.
[45] *George Taitimu v Chief Magistrate's Court Kibera, The Attorney-General and The Director of Public Prosecutions*, Petition 81 of 2014, available at <http://kenyalaw.org/caselaw/cases/view/96183/> accessed 31 January 2016.
[46] The Bill is available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/LegalAidBill2015.pdf>.

Evaluation

In some instances, the CPC and Evidence Act provide for expedited procedures by consent only when an accused has retained legal representation. Hence they place a premium on representation. A rights-oriented approach would ensure those procedures benefitted all accused persons through the appointment of legal aid representation to avoid discrimination. The need for expedited procedures is in the interest of justice and trial without unreasonable delay, and this need is not served if two persons charged with the same offence are treated differently under statute on account of the means available to one and not the other to retain an advocate at own expense. [47]

There is no clarity on who should inform an arrested person of his or her right to an advocate at state expense. There is no statutory or judicial criteria so far where lack of representation would lead to substantial injustice. Some convictions, say under the Prevention of Terrorism Act, draw sentences of up to 20 years,[48] and convicted persons are imprisoned separately from the general prison population. It could be argued that substantial injustice would result from a conviction for such penalties where the person had no lawyer during custodial interrogation.

Given the wording of articles 50(2) and 25, it is not clear as a question of statutory compatibility what aspects of the right to fair trial may be limited by law.

3.4. Evidentiary rights

Constitutional standard

Article 50(2)(i) is a guarantee of the right to remain silent and not to testify during the proceedings. Two elements are, first, the right to remain silent and, secondly, not to be compelled to testify at all or in own defence for purposes of obtaining evidence.

Article 50(2)(j) guarantees the right be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

Article 50(2)(l) protects the right to refuse to give self-incriminating evidence.

Article 50(4) provides for the exclusion of evidence obtained through violation of rights where its admission would be unfair or cause prejudice.

Statutory standard

Following an amendment in 2014, section 42A of the CPC upholds the right of the accused to be informed of evidence to be used in trial against him or her. But, in proceedings under the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act and the Counter-

[47] See *John Swaka v The Director of Public Prosecutions and others*, Constitutional Petition No. 318 of 2011; *David Njoroge Macharia v Republic*, Criminal Appeal No. 497 of 2007, available at <http://kenyalaw.org/caselaw/cases/view/74661>.
[48] S. 23 of Prevention of Terrorism Act, 2012.

Trafficking in Persons Act, the prosecution may, with leave of court, not disclose certain evidence on which it intends to rely until immediately before the hearing. The grounds are that the disclosure of evidence may facilitate the commission of other offences, is not in the public interest, or may be used to influence or intimidate witnesses.[49]

The meaning of 'public interest' to which evidence relates is broad.[50] It includes evidence touching on matters of national security, on the identity of an informer or a witness whose identification may expose him or her to harm, or which may facilitate the commission of other offences or alert someone in custody that the person is a suspect. It also includes 'unusual forms of surveillance or methods of detecting crime',[51] some of which presumably may involve infringements on rights to privacy. Disclosure of evidence covered by section 42(a) shall only be done *in camera*.[52]

Amendments in 2014 to the Evidence Act permit the use of statements where a person making the statement cannot read it in court, provided the accused person does not object within two days before the trial.[53] Secondly, they permit admission of statements as evidence in lieu of presence in court during trial of the person making such statements, ostensibly to protect the witness. Here the prosecution has more time to inform the accused person. No amendment has been made to this Act to enforce the rule excluding use of evidence and statements of accused persons obtained by means that violate constitutional rights.[54]

A new section 78A of the Prevention of Terrorism Act provides for the admissibility of electronic messages and digital material as evidence in proceedings under this Act. Electronic and digital evidence generated by a person in the ordinary course of business is, on its mere production in a criminal trial, admissible and rebuttable proof of the facts contained in it. The manner in which evidence is generated, which includes secret interception, may be considered a factor in estimating the weight to be attached to it.

Section 35 of the Prevention of Terrorism Act limits constitutional rights by invoking article 24 of the Constitution. One of the limitations relaxes the rules for adducing and confronting evidence. Section 38 of the Act now allows evidence that an object is a weapon for purposes of the Act to be given under certificate by an appropriate authority without signature to authenticate it, and section 39(a) directs the courts to prioritise the authenticity (even without signature of certifying person) and accuracy of the evidence presented before it without undue regard to technicalities of procedure. It should be remembered that under section 38 of this Act, the jurisdiction to try offences is vested in subordinate courts[55] rather than in a superior court, such as the High Court, where judicial officers enjoy constitutionally protected tenure.

[49] CPC, s. 42A (2)
[50] CPC, s. 42A (3)
[51] CPC, s. 42A (3)(d).
[52] CPC, s. 42A (4).
[53] Evidence Act, ss. 20(a)(1) to (5).
[54] Constitution 2010, art. 50.
[55] Only a Subordinate Court of the First Class would have jurisdiction in accordance with section 7 of the CPC.

Evaluation

The statutory trend here is to encourage courts to take judicial notice of certain facts related to terrorism offences and dispense with oral witness testimony in court. This trend quietly undergirds limitations on fair hearing rights. Justifications such as those to do with witness protection and the protection of surveillance methods require balancing between protection of witnesses/security agents and the rights of accused person to confront witnesses and to scrutinise the prosecution's evidence. What is obscure is the standard of review to be used to weigh rights and presumptions of innocence, on the one hand, against the interests of the state, on the other, in relation to its evidentiary burden in criminal justice. Whenever such limitations are stipulated in statutes alongside invocations of constitutional rights, it appears that the legislature interprets the latter as a pro forma procedural requirement and not as a substantive outcome of criminal justice.

Even the exclusionary rule against use of evidence obtained in violation of constitutional rights is not automatic. It requires a defence application and presupposes legal representation or a sufficiently high knowledge of one's rights and what constitute self-incrimination from the evidentiary perspective. The statutes do not provide for penalties in cases where courts exclude evidence because it was obtained by violating rights.

3.5. Sentencing and conviction rights

Constitutional standards

Article 50(2) provides, respectively, for the rights not to be convicted retroactively,[56] for the protection against double jeopardy,[57] for the benefit of the less severe punishment available when unlawful conduct was alleged committed,[58] and, if convicted, for application for review by a higher court as prescribed by law.[59]

Article 51 required the legislature to enact guarantees and standards for humane treatment of persons in detention within four years of promulgation, i.e., by 2014.

Statutory standard

The Prisons Act was amended in 2014 to remove the statutory remission of sentences of imprisonment and the review board in order to align it with the new constitutional stipulations in the exercise of the prerogative of mercy.[60] These amendments do not relate to article 51 on humane conditions. The Commissioner of Prisons has promulgated regulations and codes of practice that serve as the current legal basis for observing humane conditions in prisons, and whose provisions and acts have always been subject to judicial administrative law review.

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[56] Art. 50(2)(n).
[57] Art. 50(2)(o).
[58] Art. 50(2)(p).
[59] Art. 50(2)(q).
[60] Statute Law (Miscellaneous) Amendments Act No. 18 of 2014

Evaluation

The Persons Deprived of Liberty Act of 2014 provides for the humane treatment of prisoners in accordance with international standards. Parliament also amended the law in relation to the use of the prerogative of mercy in favour of convicted prisoners.

Article 26 of the Constitution, which protects the right to life, permits the infliction of the death penalty by law. The law has been amended to do away with mandatory death sentences leaving it for the court to determine the maximum penalty.

4. Conclusion

The provisions of the 2010 Constitution sound like good news to persons who will be caught up in a system with a notorious culture of infringement. The Constitution even mandates enactments in order to enforce its stipulations that are not self-executing. Statutory reform remains ongoing, and alongside it, institutional reforms of the judiciary and national police service. Some of it has removed explicit conformity gaps between the Constitution and criminal law statutes; such gaps are now much harder to find and to justify.

But a more nuanced conformity gap is emerging as a result of the legislature's interpretation of procedural rights and the limitations permitted by the Constitution. This outcome turns on the difference between formalistic statutory conformity and substantive statutory reform of the criminal justice system in order to build a culture of constitutionalism during arrest and criminal trial. This section suggests that statutory conformity increasingly gravitates toward pro forma ends and further away from the substantive transformation goals, particularly within the margins allowed by limitations on grounds of security.

In fact, pro forma statutory conformity is possible because of the imprecise prescriptions of the Constitution on criminal justice. The result is conformity 'grey areas'. Two grey areas of conformity emerge regarding fair trial rights. One is statutory treatment of procedural rights as formality and the rule of exception permitted by limitation clauses as the norm. Examples are found in the statutory treatment of the right to legal counsel and the right against self-incrimination. The other grey area is statutory diffusion or obfuscation of constitutional rights when guiding the role of courts in the margins where law enforcement blends confusingly with national security operations and where courts are less likely to second-guess security policy and operations. An example is statutory obfuscation of the right to conditional release after arrest. Without statutory operationalisation of substantively fair trials, persons in the criminal justice system will need to rely on interpretative considerations of the courts.

5. Recommendations

- Legislation which is required under article 50 and article 51 should be enacted, bearing in mind the intention to give effect to the letter and principles of the Constitution regarding the promotion of rights.
- Statutory enforcement of rights of persons in criminal justice should strengthen the payment of compensation for violations as a cost to state organs to incentivise better compliance.
- Legislate procedures to operationalize the right to legal representation where its unavailability would result in substantive injustice.
- Legislation on humane conditions of custodial detention, including for convicted prisoners and incorporating human rights instruments such as UN guidance on minimum standards, should be expedited.
- Given the trend in statutes to obscure rights while invoking limitations on the grounds of national security, more reliance should be placed on courts to develop authoritative

interpretation of rights against which statutes could be gauged. Until that stage is reached, assessments of incompatibility must remain highly tentative.

- Amend the arraignment procedures to enable confirmation that an arrested person was informed of his or her rights by authorised arresting officers under a written certification.
- Legislate penalties where courts acquit or dismiss evidence on account of rights violations, not only payment of compensation.

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