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Agenda item 6

**Consideration of reports submitted by States parties
under article 40 of the Covenant**

**Replies of Kenya to the list of issues in relation to its fourth
periodic report*, ****

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* The present document is being issued without formal editing.

** The annex to the present report may be accessed from the web page of the Committee.



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List of Abbreviations

AJS	Alternative Justice System
ARA	Asset Recovery Agency
DCI	Directorate of Criminal Investigation
EACC	Ethics and Anti-Corruption Commission
FGM	Female Genital Mutilation
FRC	Financial Reporting Centre
FIDA	Federation of Women Lawyers (FIDA Kenya)
GBV	Gender Based Violence
GOK	Government of Kenya
IAU	Internal Affairs Unit
IAWJ-K	International Association of Women Judges-Kenya
IDPs	Internally Displaced Persons
IEBC	Independent Electoral and Boundaries Commission
IJM	International Justice Mission
IPOA	Independent Policing Oversight Authority
JTI	Judicial Training Institute
KFS	Kenya Forest Service
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KRA	Kenya Revenue Authority
LGBT	Lesbian, Gay, Bisexual and Transgender
LRF	Legal Resources Foundation
MAT	Multi-Agency Team
NCAJ	National Council and Administration of Justice
NEMA	National Environment and Management Authority
NGEC	National Gender and Equality Commission
NLAS	National Legal Aid Service
NIS	National Intelligence Service
NPS	National Police Service
OAG&DOJ	Office of the Attorney General and Department of Justice
ODPP	Office of the Director of Public Prosecutions
PWDs	Persons with Disabilities
SGBV	Sexual and Gender-Based Violence
SOA	Sexual Offences Act
TJRC	Truth, Justice and Reconciliation Commission

I. General Information on the National Human Rights Situation

1. Judiciary: To safeguard the protection of human rights, the courts have declared certain sections of domestic law incompatible with the Bill of Rights in the Constitution. For example, the Penal Code: at section 204 on the basis that it violates the right to a fair trial¹, section 194 because criminal libel is an unjustifiable limitation of freedom of expression² and section 25 (2) & (3) that allows child offenders and mentally ill persons to be detained at the president's pleasure on the ground that it violates the principle of separation of power and the rights of children³. Section 166 of the Criminal Procedure Code has also been declared unconstitutional on the basis that the indefinite detention of persons at the pleasure of the President violates the separation of powers since it vests in the executive powers reserved for the Judiciary⁴.
2. The courts have further re-affirmed the rights of refugees, protected the religious beliefs and practices of students and also made pronouncements in favour of persons who have changed their sex and wish to subsequently have their documents amended to reflect the change. To ensure continuous access to justice the courts the judiciary has introduced an E-Filing system in Nairobi, and the electronic hearing of cases in the wake of the COVID 19 pandemic.
3. The Office of the Director of Public Prosecutions (ODPP): The ODPP has also contributed to the protection of human rights by formulating the Diversion Policy in 2019 and developing the Criminal Procedure (Plea Bargaining) Rules, in 2018.
4. The National Legal Aid Service Board: The Board formulated the National Action Plan on Legal Aid (2017-2022). The Plan outlines various activities to make it easier for indigents and persons falling within specific areas of focus, such as, women, children and persons with disability, to access justice through legal aid.
5. Other protective measures taken in the period under review include the draft Victim Protection Fund Regulations 2020, which will allow the payment of compensation to victims of crimes and the Mental Health Amendment Bill, 2019 to avail greater protection to persons who suffer from mental conditions.
6. The Kenya National Commission on Human Rights (KNCHR) continuously undertakes dissemination and public awareness programs to increase human rights consciousness, interest and understanding of various human rights players and the public as a whole. In this regard, the KNCHR has conducted dissemination fora for judges, magistrates, parliamentarians, prison officers, law enforcement officers, and public officers. Between 2017 -2018, the Commission disseminated the Covenant, including the rights of the human rights defenders to 131 magistrates. The Commission has also disseminated the Covenant to police officers on various human rights themes, including on electoral laws and democratic policing, human rights and counter terrorism.
7. The Judiciary Training Institute (JTI) incorporates human rights education in its training curricula.
8. The table below outlines the status of the harmonization of all sources of law in the country in line with the human rights provisions in the Covenant.

¹ [2017] eKLR, Petition No. 15 of 2015 (as consolidated with Petition No 16 of 2015) [*Muruatetu*].

² *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

³ *A O O & 6 others v Attorney General & another* [2017] eKLR.

⁴ *Republic vs SOM* (Criminal Case No. 6 of 2011) eKLR.

<i>ICCPR Article</i>	<i>Written law/ Subsidiary legislation</i>	<i>Harmonized provisions</i>	<i>Comments</i>
Articles 2, 6, 7 and 14 – fight against impunity and past human rights violations	Kenya Reparations Bill, 2019	Review of legislative proposal for establishment of a reparations commission	Includes provisions for awarding compensation for victims of past human rights violations and establishment of a victims' memorial, with specific provisions for equal treatment/non-discrimination in implementation
Articles 3 and 27 – Gender Equality	Amendments to the Law of Succession, 2015, the Political Parties Act, the Independent Electoral and Boundaries Act 2011	Review of succession and election laws to provide for gender equality	Provides for equality in inheritance between men and women. Amends electoral and related laws to give effect to promote the representation to Parliament of women and other special interest groups.
Articles 2, 4, 7, 9 and 14 – Counter-Terrorism Measures	Prevention of Terrorism, Act 2012	Complete review of existing legislation for compliance with human rights protections	Includes harmonization of all penalties and proposed redrafting of provisions that limit freedom of expression in respect of incitement to violence and radicalization and strengthening of procedural fairness provisions

ICCPR Article	Written law/			Comments
	Subsidiary legislation	Harmonized provisions		
Articles 2, 3, 6, 7, 24 and 26 – Violence against Women, including domestic violence	Protection Against Domestic Violence Rules, 2019		Provisions for protection orders for a person subject to domestic violence, from a gender sensitive and victim-centric perspective	Orders include provisions for personal safety, residence, custody, compensation and restitution
Article 6 – right to life	Penal Code and Criminal Procedure Code		Provisions regarding the death penalty, including substantive provisions removing mandatory nature of death penalty and procedural provisions regarding re-sentencing of capital offenders previously subject to mandatory death penalty	Recommendations for law reform and harmonization are contained in the Final Report of the Task Force on Review of the Mandatory Death Sentence, and include proposed revisions to penal code to abolish the death penalty and revisions to criminal procedure code to provide for re-sentencing of capital offenders
Articles 7 and 10 – prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and treatment of persons deprived of liberty	Penal Code and Criminal Procedure Code		Provisions regarding life imprisonment, including proposed new provisions for implementation of parole eligibility for life imprisoned offenders	Recommendations for law reform and harmonization are contained in the Final Report of the Task Force on Review of the Mandatory Death Sentence, and include establishment and implementation of an entirely new system of parole for life imprisoned offenders (i.e. introduction of eligibility for early release from imprisonment where formerly not available)

ICCPR Article	Written law/ Subsidiary legislation		Harmonized provisions	Comments
Article 9 – liberty and security of the person	Power of Mercy Act, 2011 and Power of Mercy Committee (Procedure) Regulation, 2016	Substantive provisions on eligibility for early release from imprisonment, and procedural provisions on fair administrative action and rights of persons who are imprisoned, including habeas corpus		Complete overhaul of the framework for operationalization of constitutional provisions (Art. 133) for remission, commutation, pardon and parole
Articles 19 and 20 – freedom of expression (includes right to information)	Access to Information Regulations, 2020 Data Protection Act, 2019	Legislative proposal for new regulations to operationalise right to access information held by public institutions and private bodies carrying out activities that affect the public interest		Includes procedural provisions on requesting access to information including from a disability rights perspective, regulation of fees, oversight by the Commission on Administrative Justice, strictly limiting restrictions to respect of the rights or reputations of others and for the protection of national security, public order or of public health or morals The Access to Information Act and Regulations are subjected where necessary to the Data Protection Act, to ensure data protection principles are upheld while accessing information.

ICCPR Article	Written law/			Comments
	Subsidiary legislation	Harmonized provisions		
Articles 23, 24 and 26 – rights of the child	Children Act, 2001 and all subsidiary legislation	Complete review and overhaul of law relating to all aspects of life touching on children, drafted from a child-centred perspective		Provisions on protection from discrimination, best interests of the child, protection from sexual abuse and exploitation, including child online protection provisions, protection from forced labour, rights of child offenders (juvenile justice), parental responsibility, right to name and nationality.
Articles 25– Access to public service	Huduma Bill 2019	To have access, on general terms of equality, to public service		The Biometric identification and registration of persons will facilitate faster and more effective implementation of the GOK'S development agenda.

II. Specific Information on the Implementation of the Articles

9. The Government (GOK) continues to take measures to reduce incidences of corruption in the country. In this regard, the prosecution of corruption cases has been intensified. Additionally, the training of police and other law enforcement officers, prosecutors and judges on the anti-corruption laws is ongoing.

10. Other measures taken in the fight against corruption include: the establishment of a Multi –Agency Team, which brings together all agencies involved in the investigation and prosecution of corruption; the setting up of a Financial Reporting Centre (FRC) and an Assets Recovery Agency (ARA); the enhancement of cooperation with different jurisdictions through Mutual Legal Assistance agreements; and the establishment of the National Anti-Corruption Academy in November, 2018.

11. The Multi- Agency Team (MAT) was established in November, 2018 to enhance coordination and collaboration among all key agencies in the fight against corruption and organized crime. The agencies under MAT share relevant information on a real time basis, and joint investigations and operations by the MAT agencies enable the pooling of resources, synergy and avoidance of duplication.

12. The mandate of the Ethics and Anti-Corruption Commission (EACC) is to combat and prevent corruption and economic crimes in Kenya through law enforcement, asset recovery, preventive measures, public education and promotion of standards and practices of ethics and integrity. As at April 2019, EACC had 407 corruption and economic crime cases in court. Out of these, 41 involve high profile personalities such as heads of county

governments, cabinet secretaries, members of parliament, chief executive officers of parastatals and state agencies.

13. The mandate of the Office of the Director of Public Prosecutions (ODPP) is to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect to any offence alleged to have been committed.

14. The Proceeds of Crime and Anti-Money Laundering Act, 2009 provides for the offence of money laundering and measures to combat money laundering and to provide for the identification, tracing, freezing, seizure and confiscation of proceeds of crime. The Act is administered by two key institutions- The Asset Recovery Agency and the Financial Reporting Centre (FRC). The ARA is established under Section 53(1) of the Act. The principal mandate of the ARA is to identify, freeze and recover assets acquired and/or are benefits or profits of proceeds of crime. The recovery of proceeds of crime has acted as a deterrent measure against corruption and money laundering in Kenya.

15. The FRC is established under Section 21 of the Act and is mandated to assist in identification of proceeds of crime and combating money laundering. It does this through receipt of suspicious transaction reports from banks and other financial institutions.

The fight against impunity and past human rights violations (arts. 2, 6, 7 and 14)

16. Access to justice is a fundamental right under both the Constitution of Kenya and the Covenant. The Constitution introduced the use of alternative forms of dispute management, including traditional approaches to conflict resolution, as part of the legal framework on access to justice across various sectors in Kenya. It is noteworthy that alternative approaches are only acceptable to the extent that they do not contravene the Bill of Rights, and are not repugnant to justice, morality or inconsistent with the Constitution or any written law.

17. On 27th August 2020, the Alternative Justice System (AJS) Baseline Policy and associated Policy Framework were launched. The development of the policies marked an important milestone in Kenya's efforts to ensure the full fulfillment, respect, observance, promotion and protection of the right to access to justice. The policies seek to mainstream into the formal justice system, traditional informal mechanisms to ensure access to justice in Kenya. AJS is the administration of justice by the people using their culture, customary law, practices and beliefs to resolve disputes. Alternative justice processes help to reduce the burden on courts and are meant to strengthen the links between formal and informal justice systems rather than replace the reliance on courts. The Policy makes clear recommendations and viable options on how the judicial system and Alternative Justice Systems can interact in a manner that is mutually reinforcing and focused on an effective system of justice.

18. The ability of Kenya's formal justice system to guarantee access to justice for all is heavily constrained by the complexity and cost of formal legal processes, time taken to finalize a matter, geographical and other physical impediments. The GOK, through the judiciary, has over the years developed various measures to enhance access to justice, including the appointment of additional judges, construction of courts in all counties and adopting the use of information communication technology, to bolster the Judiciary. While these measures have worked marginally well, they have not been enough to deal with the huge backlog of cases, time taken to finalize a matter and the cost of litigation. Consequently, a majority of the people- particularly the poor and the vulnerable- cannot then access the judiciary to have their disputes settled.

19. A survey on justice needs and satisfaction in Kenya conducted by the judiciary and the World Bank indicates that only 10 per cent of Kenyans chose the courts as a way of solving their legal problems. A majority prefer other non-judicial dispute resolutions platforms of which the AJS is just one. To this end, it was thought necessary for the country to introduce other comprehensive, coordinated and systematic systems, which strictly comply with the various values highlighted in the constitution to decongest the formal justice system. AJS reflects the lived realities of Kenyans and is an effective mechanism for increasing access to justice for many Kenyans. The use of AJS facilitates efforts to ensure no one is left behind.

20. The Covenant underscores the importance of anti-discrimination, access to justice and equality. The Constitution of Kenya, too, advances values and principles of governance which are compatible with the Covenant.

21. Progress in the implementation of the recommendation of the Truth, Justice and Reconciliation Commission (TJRC) include:

- Public apology by the President on 25 March 2015
- Establishment of the 10 billion Restorative Justice Fund. The draft Reparations Bill and Policy are at the consultative stage.
- Erection of monuments
- Compensation of Internally Displaced Persons (IDPs) and other victims, including victims of the Nyayo House torture among others

22. Mechanisms that are in place to provide remedies for violence occurring in the context of elections held after 2008:

- The Victim Protection Fund
- The establishment of a specialized thematic section in the Office of the Director of Public Prosecutions to handle cases relating to sexual and gender based violence cases (including those emanating from election violence)
- The Director of Public Prosecutions has also gazetted special prosecutors, specially trained by the office, on the prosecution and investigation of SGBV cases. The prosecutors are nominated by FIDA, IJM and other civil society organisations
- There has been aggressive training and sensitization of Prosecution Counsel and Investigators on Sexual and Gender Based Violence cases.
- Publication of a trainer's manual for the prosecution of SGBV and guidelines for the investigation and prosecution of SGBV cases
- Victims platforms for 150 victims in 8 counties (Bungoma, Kakamega, Kisumu, Siaya, Vihiga, Homabay, Migori and Nairobi) were established for offering psychosocial support and empowerment programs.

Measures taken to effectively implement the Victims Protection Act 2014, including the status of the Victim Protection Trust Fund

23. The Victim Protection Board has been established to oversee compensation to victims of crime. The Draft Victim Protection (Trust Fund) Regulations to provide for payment to victims have been prepared and are currently awaiting parliamentary approval.

Non-discrimination (arts. 2 and 26)

24. Kenya does not have a specific equality and non-discrimination law, however the GOK assures the Committee that equality and non-discrimination principles are fully respected and conscientiously enforced through various pieces of legislation, policies and other interventions. Relevant laws include: The National Cohesion and Integration Act, 2009; the National Gender and Equality Commission Act 2012; the Persons with Disability Bill, 2018, the Law of Succession Act 1981, the HIV and AIDS Prevention and Control Act, revised in 2012.

25. The Registration of Persons (Amendment) Bill, 2019 provides for the registration of intersex persons, who hitherto had not been recognized by Kenyan laws.

26. Institutional frameworks in place to protect people living with HIV/AIDs from discrimination and unequal practices, include the HIV and AIDS Tribunal established under Section 25 of the HIV Prevention and Control Act of 2006. The HIV and AIDS Tribunal holds the mandate to adjudicate cases relating to violations of HIV-related human rights.

27. The Independent Electoral and Boundaries Commission (IEBC) further mainstreams disability issues in all its activities including access to both information and polling station by persons with disability during any given election year.

28. Existing policies include the Diversity Policy for the Public Service, which provides strategies to build an inclusive public service that takes care of the interests of diverse Kenyan communities including gender, ethnicity, youth, persons with disabilities, minority and marginalized groups.

29. With regard to intersex people, it is worth noting that the courts have recognized and protected their rights. Following the judgment in Petition No.266 of 2013, *Baby A Vs Attorney General and others*, eKLR- a Taskforce was established to review legislation and policies to address the plight of intersex people in Kenya, which led to the official recognition of the Intersex (I) marker in addition to male and female in the 2019 National Population Census

Decriminalization of sexual relations

30. Sexual relations between same sex persons is expressly prohibited by the national law and is deemed unacceptable to the Kenyan culture and values. However, every person in Kenya, whatever their orientation, is guaranteed the full protection of the law in the event that their rights are violated. There are a number of institutions set up where all persons can complain about the infringement of rights. These include the Independent Policing Oversight Authority (IPOA), and the Kenya National Commission on Human Rights (KNCHR) and the National Police Service.

31. The National Gender and Equality Commission (NGEC) and a number of non-governmental organizations, such as Kenya Human Rights Commission (KHRC), the Legal Resource Foundation (LRF) have been sensitizing public officers, including law enforcement officers, on the principles of the universality of human rights and the importance of non-discrimination among the population at large.

32. The GOK actively promotes the fair provision of all public goods and services to all persons without discrimination, notwithstanding their sexual orientation and gender identity or expression. To this end, several pieces of legislation and policies have been developed that attest to the realization of the principles of equality and non-discriminations. These include, inter alia; the Health Act 2017, the Education Act 2012 and the Diversity Policy for the Public Service, 2016. One is not required to indicate his/her sexual orientation when accessing any government service.

33. The GOK is aware that stigma is one of the greatest barriers to accessing services for lesbians, gays, bisexuals and transgender (LGBT). Men having sex with men (MSM) who are living with HIV are particularly unlikely to take up services, with a consequent negative impact. Some of the measures taken by the State to address the situation include: sensitization of health care workers to reduce stigmatizing attitudes in healthcare settings; the development and dissemination of population specific and user friendly information; and the promotion of the acceptance of all persons as part of the community for increased service uptake. Sensitization forums for judges, prosecutors, the police, prison officers, and law and policy makers on how to handle matters concerning LGBT individuals are conducted.

34. *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) eKLR:*

- Section 162 of the Penal Code, prohibits sexual relations against the order of nature. Section 165 prohibits sexual relations between men whether in public or private. The Petitioners sought a declaration from the Court that sections 162 and 165 of the Penal Code were unconstitutional and invalid because they violate the constitutional rights of LGBT persons in Kenya.

35. On 24 May 2019, the High Court judges rejected the petition and declared that section 162 and 165 of the Penal Code did not violate the Constitution. The court reiterated the fact that same sex acts, by virtue of the national law such as the Penal Code, are still considered offences and as acts that are contrary to culture and the society's morals.

Gender equality (arts. 3 and 26)

36. The Political Parties (Amendment) Bill, 2016 amended the Political Parties Act 2011 to include provisions that facilitate gender equity in political parties. The following actions have been taken to implement the amendments:

37. The Representation of Special Interest Groups Laws (Amendment) Bill 2019 is currently before Parliament. The Bill requires political parties to ensure: that at least a third of its candidates for parliamentary and county assembly elections are of either gender; bars the Independent Electoral and Boundaries Commission (IEBC) from accepting lists of candidates from political parties that do not meet the gender rule; and proposes that 20 per cent of the political parties' cash be distributed according to the number of the special interest groups elected as an incentive for political parties to ensure more women, youth and persons with disability win elective seats.

38. The Political Parties Primaries Bill, 2020 is a legal framework for the conduct of political party primary. It seeks to ensure that political parties comply with the constitutional provisions on non-discrimination, inclusion and gender equity, when conducting the party's primaries.

39. Huge inroads have been made and continue to be made to improve women's participation in appointive positions in the civil service, judiciary and constitutional commissions. Strategies to improve gender equality include:

40. The sensitization of chairpersons and secretaries of County Public Service Board's on mainstreaming of Special Interest Groups (SIGs) in County Governments. In total, 41 County Public Service Boards were sensitized and they committed to ensure gender equality and inclusion in County Public Service.

41. The Judiciary Gender Audit Report, 2019 identified a number of gaps affecting the full gender sensitivity and responsiveness of the Judiciary. Following, are some of the recommendations made by the Report to address the situation: adopt a comprehensive gender policy, integrate gender in the next judiciary strategic plan, allocate resources to a gender equality budget report, design and implement a discrimination and equality jurisprudence training module for judges and judicial officers, consider reporting Kadhi's Court decisions to encourage Kadhis to explicitly consider how the constitution affects Kenyan Sharia law and initiate formal consultation with the Muslim community on female Kadhis.

42. The audits and assessments informs advisories to the judiciary and other government agencies charged with implementation of the various issues identified. The different agencies have begun implementing the recommendations. The report is available on:https://www.ngeckenya.org/Downloads/Judiciary_Kenya_Gender_Audit_Dec.pdf

43. NGEN developed a legislative handbook on Principles of Equality and Non-Discrimination. The handbook clarifies the different roles of legislators at the National Assembly, Senate and County Assemblies in coming up with responsive laws, rules and regulations and policies that address equality and inclusion issues. Additionally, NGEN provided technical expertise to Council of Governors and County Assemblies Forum in development of curriculums for training women leaders in the public sector.

44. National Gender and Equality Commission (NGEC) in 2019 issued advisories to all Ministries, Departments and Agencies (MDAs) to comply with the Health Act, No.21 of 2017 which requires all public offices to set up lactation stations for use by breastfeeding female employees.

45. Further, through an initiative dubbed Equality and Inclusion in Private Sector (EIPS), NGEN rolled out a framework on integrating equality and inclusion in the private sector focusing on the media, telecommunication and banking sectors

46. Dialogue meetings were held with political parties to attain zero tolerance of violence against women during campaigns and elections. Capacity-building forums were held to equip special interest groups' aspirants, with knowledge and skills on how to navigate political field to succeed. Men were also engaged in the fora address the culturally entrenched attitudes about women's involvement in political and electoral life that may potentially trigger election violence.

47. NGEN developed a Model Legislative Framework and the County Government Policy on Sexual and Gender Based Violence with the aim of providing guidelines to the County Governments on critical elements and considerations for law on Sexual and Gender Based Violence (SGBV).

48. NGEN identified the Company of the Year Awards (COYA) programme as a suitable platform where best practice for mainstreaming gender in the work place can be show cased. The best performing companies are recognized and awarded during the annual company of the year awards ceremony.

49. However, as outlined in Kenya's 4th periodic country report on the Covenant, Kenya continues to face challenges with regard to the implementation of the gender rule in the political representation of women in Parliament.

Counter-terrorism measures (arts. 2, 4, 7, 9 and 14)

50. It must be emphasized that Kenya faces an ongoing terrorist threat from the Al-Shabaab Militia group which has already attacked learning institutions, hotels and shopping malls in Kenya. The GOK has thus intensified its counter-terrorism measures and strategies to ensure that lives are protected. The Security Laws (Amendment) Act 2014 sought to amend some aspects of the Prevention of Terrorism Act, the Penal Code, the Criminal Procedure Code, the Refugee Act and the National Police Service Act, to facilitate the efficient and effective fight against terrorism. In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, the High Court declared certain sections of the Security Laws (Amendment) Act 2014 to be contrary to the letter and spirit of the Constitution. It therefore, declared the sections to be null and void to the extent of their unconstitutionality.

51. The impugned sections in the Security Laws (Amendment) Act, 2014 were declared unconstitutional, and therefore have no legal effect. The Office of the Attorney General and Department of Justice is in the process of amending all the provisions of the impugned provisions to comply with the court's decision.

52. Arbitrary arrests, harassment, extortion, ill-treatment, forcible relocation and expulsion of any person is not encouraged by the Government. The fight against terrorism does not target any single community. Suspects are usually individuals and not communities. Due process is strictly followed if a law enforcement officer is suspected of mistreatment of suspects. The officer is investigated and charged in court.

53. Some foreign nationals are found to be illegally in the country. They are deported in line with procedures spelled out in the country's laws.

Violence against women, including domestic violence (arts. 2, 3, 6, 7, 24 and 26)

54. The Prohibition of Female Genital Mutilation Act, came into effect in 2011. The full enforcement of the Act has resulted in increased prosecution and prevention of the practise. (refer to Table). Indeed, the two strategies have led to a significant decline of cases from 32 per cent in 2003 to 21 per cent in 2014.

55. The following actions have been taken to implement the Sessional Paper No. 3 of 2019 on the National Policy on the Eradication of Female Genital Mutilation (FGM) Policy:

- Promotion of public education and community dialogues on FGM prevention and punishment.
- The involvement of elders in the fight against FGM has brought on board more men who have become champions for the protection of the rights of girls and their education.
- Enhanced cross borders collaboration and cooperation in the fight against regional
- Development of a training manual 'Stopping Medicalization of FGM' that targets medical personnel.

56. Kenya has robust policies and laws that seek to prevent and respond to gender based violence (GBV). Legislative frameworks include: Sexual Offences Act, Prohibition of

Female Genital Mutilation, Protection Against Domestic Violence Act, 2015, The Penal Code, Children's Act, Model County Legislation on Sexual and Gender-Based Violence (SGBV).

57. A special unit was created in the ODPP to address and prosecute FGM, child marriages and GBV Cases. The unit is made up of 20 prosecutors.

Below is a table detailing the country's responses on paragraph 9 of the List of issues.

• **The number of cases registered in court and convictions for SGBV & FGM**

A. Sexual & Gender Based Cases 2019/2020

<i>Offence</i>	<i>Convictions</i>		<i>Acquittal</i>	<i>Withdrawn</i>
	<i>New Cases Registered</i>			
a) Rape	388	143	43	57
b) Attempted Rape	173	85	25	47
c) Defilement	2,313	592	162	191
d) Attempted Defilement	345	148	40	43
e) Gang Rape	120	27	13	12
f) Incest	208	69	14	11
g) Sexual assault	84	24	10	6
h) Bestiality	4	3	-	-
i) Bigamy	10	-	-	-
j) Deliberate HIV Transmission	5	-	-	-
k) Trafficking for Sexual Exploitation	8	2	-	1
l) Child Prostitution/ Tourism/ Pornography	14	-	-	3
m) Indecent act with child	320	109	28	47
n) Unnatural offences	75	12	1	4
o) Other Offences related to mortality	21	-	-	-
Sub-total	4,088	1,214	336	422
Child neglect, Cruelty, child labour, child abuse	547	229	41	58
Total	4,635	1,443	377	480

B. Offences Under Prohibition Female Genital Mutilation (FGM) Act 2019/2020

<i>Offence</i>	<i>Conviction</i>		<i>Acquittal</i>	<i>Withdrawn</i>
	<i>New Cases Registered</i>			
a) Conducting FGM	18	11	2	6
b) Aiding and abetting FGM	19	4	0	4
c) Procuring a person to perform FGM	2	0	0	0
d) Use of premises to perform FGM	6	4	0	1
e) Failure to report FGM	16	15	1	0
f) Use of derogatory language	9	1	0	0
g) Subjecting a child to harmful cultural practices	15	6	2	1
Sub-total	85	41	5	12

Including prosecutions and convictions of perpetrators and remedies provided for victims

Measures to tackle GBV by ODPP

- (a) The Establishment and Operationalization of a specialized SGBV division within the office to handle SGBV cases;
- (b) Established a specialised unit to support and facilitate witnesses during the court process.
- (c) Increased presence of prosecutors through recruitment to cover the 47 counties and sub-counties;
- (d) Dissemination of the Investigators and Prosecutors Manual on Ending Sexual and GBV in Kenya;
- (e) Preparation and dissemination of Sample Charge Sheet Models to all Prosecutors Countrywide;
- (f) Aggressive training and sensitization of Prosecution Counsel, and Investigators on Sexual and Gender Based Violence cases. The ODPP has not relented on its efforts to empower Police Investigators who are Key Actors in the Criminal Justice System;
- (g) ODPP worked closely and in collaboration with the Task Force on the Implementation of the Sexual Offences Act(SOA), which developed and gazetted Regulations, a draft Policy and rules for effective implementation of the SOA;
- (h) Moot Court sessions for members of public: joint moot court sessions with International Association of Women Judges (IAWJ-K), Prison services, and ODPP.
- (i) The ODPP works with Key Partners in the Promotion and enhancement of Interagency Cooperation and Collaboration Mechanisms in the fight against SGBV with partners i.e. Governments ministries and departments, international partners, international and national non-governmental organisations and Public Benefit organisations (PBOs).
- (j) National Policy on the Prevention and response to gender based violence, Model policy on GBV for County Governments.
- (k) Development of National Plan of Action Against Sexual Exploitation of Children in Kenya 2018 -2022.
- (l) Children are also provided with life-skills education on how to avoid sexual abuse.

Policy on sexual offences

An Interagency Committee is in the process of drafting the Policy on Sexual Offences

Remedies for victims

- (a) There are Guidelines for support and facilitation of victims of crime.
- (b) Prosecutors ensure that victims and prosecution witnesses are handled in a dignified manner throughout the course of criminal justice system. Secondly, ensure both the victims (who are witnesses) and witnesses are aware of and understand their rights in the criminal justice system and are able to participate in proceedings.

Including prosecutions and convictions of perpetrators and remedies provided for victims

2. The ODPP has set up a toll free line for victims of crime to report human rights violations including SGBV cases

Reports of gang rape of women and girls All cases of gang rape are investigated and due process followed.

Reports that women and girls with albinism have been subjected to sexual violence All cases of attacks and rights violations against all persons in Kenya, including people with albinism, are investigated and prosecuted properly and immediately. For now, Kenya does not have statistics that is disaggregated with regard to albinism. All cases are prosecuted under rape, attempted rape, defilement. However, the vulnerability and marginalization of persons with albinism is considered an aggravating factor.

Voluntary termination of pregnancy and sexual and reproductive rights (arts. 6 & 17)

58. Abortion in Kenya is regulated by Art. 26(1) of the Constitution, which states that abortion is not permitted unless in the opinion of a trained health professional, there is need for emergency treatment or the life or health of the mother is in danger, or if permitted by any other written law.

59. One of the enabling laws is the Health Act, which defines "health" as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Section 6(1) provides that every person is entitled to access treatment by a trained health professional for any medical condition exacerbated by the pregnancy to such extent that the life or health of the mother is threatened.

60. The Court in **Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; [2019] eKLR** Case, sought to clarify this matter further by declaring that a pregnancy issued from rape and defilement, if in the opinion of a trained health professional, poses a danger to the life or health, mental, physical and social wellbeing of the mother may be terminated under the exceptions provided under Article 26(4) of the constitution. The Court declared that:

“..... abortion is illegal in Kenya save for the exceptions provided under Article 26(4) of the Constitution”.

61. The Standards and Guidelines for reducing morbidity and mortality for unsafe abortion in Kenya have been resubmitted to stakeholders for further multi-sectoral discussions in order to capture the contributions of all.

Right to life (art. 6)

62. The Kenyan courts have begun resentencing eligible offenders. The inmates petition the courts to have their cases heard again. The Courts rehear the matters based on a sentencing report compiled by the Kenya Prison Service and the ODPP. There were 646 inmates on death row in Kenya as at 3rd July 2020.

63. Soon after the Supreme Court’s declaration that the mandatory death penalty was unconstitutional, the Task force on the Review of the Mandatory Death Penalty was appointed to make recommendations for the full implementation of the Court’s ruling. The Task force reviewed all laws that carry the mandatory death sentence and made recommendations for their amendment; developed draft resentencing regulations, proposed appropriate sentences for murder and other capital offences, and recommended the retention of life imprisonment as naturel life, but tempered with parole.

64. In order to guarantee a structured and well-coordinated rehearing process the Task force also recommended that an Implementation Committee should be set up under the

auspices of the National Council on the Administration of Justice to oversee the resentencing process. In this regard, the Committee is expected to prepare a Re-Sentence report on the circumstances of the offence and the offender, the characteristics of the offender including pre- and post-conviction conduct and mental health, any other mitigating circumstances, and a statement of the victim on the impact of the offence. At the rehearing, the presiding judicial officer will receive submissions on the Re-Sentence Report and on the recommended new sentence and eligibility for parole. Prisoners will be categorised for the purposes of resentencing in terms of the following priority:

- Longest serving (20 years and longer);
- Vulnerable (elderly i.e. offenders over 60 years of age, offenders with disabilities, offenders who are terminally ill, women, and offenders who may have been a minor at the time of commission of the offence);
- Robbery with Violence
- Murder

65. Additionally, the Task force has designed a comprehensive framework for resentence hearings to guide courts to conduct the resentence hearing process in a structured and evidence-based manner, taking into consideration all the key information that is necessary for mitigation, reintegration and resettlement needs of the offenders, allow the input of the victims, families and communities to be considered, and ensure consistency in resentencing judgements across the country.

66. To develop the framework, the Task force, in 2019, conducted an audit of all offenders incarcerated who have been sentenced to the death penalty, including those whose sentence had been commuted to life imprisonment, to obtain data that will assist in the prioritisation and scheduling of offenders eligible for resentencing.

67. The judiciary is in the process of establishing an Implementation Committee under the auspices of the National Council on the Administration of Justice (NCAJ) that will be responsible for overseeing the re-sentencing process.

68. The Taskforce in their report, made a recommendation to Parliament to fully abolish the death penalty.

Right to Life (Article 6)

69. The GOK established the Independent Policing Oversight Authority (IPOA) to investigate and recommend prosecution of unlawful practices by the law enforcement officers. Equally, the Internal Affairs Unit of the National Police Service handles all complaints against the police. Where allegations are made that individual officers have exceeded their mandate, comprehensive investigations are conducted and officers arraigned in court in accordance with the due process of the law. Arrests and detention have been done in accordance with the law where there is probable cause. The following police officers have been charged before courts of law and others convicted. (refer to attached report-annexure). The GOK is working towards operationalizing a National Coroners Service to provide independent investigations and determination of reportable deaths.

70. The Sixth Schedule of the National Police Service Act, 2011 sets out the conditions as to police use of force. Conditions 1 and 2 provide that a police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders. Other relevant laws include: the Penal Code and the Firearm's Act.

71. Kenya ensures that the above standards are respected through continuous training of police officers. In cases where the said standards are not upheld, suspected officers are charged and prosecuted.

72. The Kenya Police Training College (Kiganjo) has the mandate to train staff to the highest possible standards of competence and integrity and to respect human rights and dignity as provided for under Article 244 (d) of the Constitution.

73. In the case, four Administration Police (AP) officers were charged with the murder of Kimani, his client Josephat Mwenda and driver Joseph Muiruri. The accused police officers were arraigned at Milimani High Court. The hearing of the case is ongoing and is an advanced stage. The court has so far taken testimonies from 41 witnesses and only two are remaining to close the prosecution case.

74. Kenya has developed various strategies to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors:

- The Environmental and Coordination Act 2012, outlines several environmental regulations frameworks, including: The Environmental (Prevention of Pollution in Coastal Zone and other Segments of the Environment) Regulations, 2003, Environmental Management (Lake Naivasha Management Plan) Order, 2004, Environmental Management and Co-ordination (Water Quality) Regulations, 2006,
- The Act also establishes the National Environment Management Authority (NEMA) charged with enforcing environmental regulations. NEMA is the principal instrument of government charged with the implementation of all policies relating to the environment, and to exercise general supervision and coordination over all matters relating to the environment. The Authority ensures: water quality, waste management, controlled substances, biodiversity, wetland, river and seashore, and compliance with environmental impact assessment (EIA) regulations.
- The National Climate Change Action Plan (NCCAP) 2018-2022 - a five year Plan to guide Kenya's climate change actions, including the reduction of greenhouse gas emissions; and the Community Lands Act 2016, which requires communities to establish strategies to protect critical ecosystems and conserve resources in community land among others.

75. Kenya Forestry Service (KFS) works with County Governments and private land holders to plant trees, and developed actions on the Reduction of Emissions from Deforestation and forest Degradation to prevent deforestation and forest degradation by active forest protection and provide alternative livelihoods for local communities living in and around the forest area. Kenya is establishing a Forest Reference Level as an objective benchmark for assessing performance of REDD+ activities. Kenya has invested heavily in geothermal power generation, which supplies low-cost, low-emissions energy. Private companies are also generating electricity using renewable energy sources, including solar, biogas and bagasse. The Kenya Association of Manufacturers (KAM) works with the Ministry of Energy to support energy audits, and efficiency improvements, aimed at reducing GHG emissions.

Prohibition of torture and other cruel, inhuman or degrading treatment or punishment and treatment of persons deprived of their liberty (arts. 7 & 10)

76. Torture and ill-treatment, particularly in the context of security operations and other counter-terrorism measures is prohibited. State agencies mandated with oversight duties carry out comprehensive investigations of alleged violations and persons found violating the law are charged and prosecuted accordingly. IPOA holds the mandate to investigate police excesses and recommend prosecution to the ODPP.

77. Kenya also has the Prevention of Torture Act 2017. The State has encountered some challenges in enforcing the Act. The OAG&DOJ, ODPP, KNCHR, IPOA and the NPS are collaborating to address the anomalies in the Act. The National Coroners Service Act enacted in 2017 established a National Coroners Service to provide independent forensic investigations and determination of the causes of reportable unnatural deaths in Kenya. An Implementation Committee has been set up to ensure full operationalization of the Service.

78. The three agencies, ODPP, IPOA and IAU have formed a task force to training and sensitize police officers on the need to observe and adhere to human rights when executing

their mandate. The task force also ensures that complaints against human rights abusers are investigated and prosecuted and that every suspect is held to account.

79. Table particularizing the number and nature of allegations of torture received by the Independent Policing Oversight Authority within the reporting periods as well as the volume of corresponding investigations, prosecutions and convictions.

<i>S/No</i>	<i>Item</i>	<i>Number</i>	<i>Nature</i>
1.	Number of complaints received between 2014 to June 2020 on allegations of torture¹		
	Deaths out of police action	769	Includes death from police actions including shooting, injuries, etc.
	Physical assault/injuries	2603	Includes assault causing both serious and non-serious injuries
	Sexual assault cases	176	Complaints on rape and defilement
2.	Investigations conducted and finalized on cases of torture ² from 2014 to June 2020		
	Deaths	562	Deaths resulting from shooting, injuries
	Physical assault/injuries	943	Includes assault causing both severe and other forms of injuries
	Sexual assault	35	Rape and child defilement
3.	Cumulative Number of case files submitted to the ODDP for action since inception to June 2020	274	This includes cases of deaths, serious injuries, sexual offences, police inaction by failing to offer medical assistance to a detainee among others.
4.	Number of cases proceeding in courts as at 30 th 202	76	
5.	Convictions made from 2014	8	Deaths -2+1+1+2 Serious injuries -1 Sexual assault -0 Police inaction -1

¹ The IPOA has investigated cases of police misconduct around murder, manslaughter, assault, grievous harm, unlawful wounding among other crimes allegedly committed by members of National Police Service as guided by the Penal Code and its constitutive Act.

²Ibid

80. The IPOA- has recorded 2 cases -**IPOA/INU/-2018-** Investigating a case of torture by the Administration police in Homabay and **IPOA/INU/000158-2020** Investigating cases at Kilome Police station of cruel inhumane and degrading treatment.

81. With regard to reparation for victims please refer to paragraph 23 of this report.

82. The Protocol is one of the treaties under examination by the Attorney General.

83. Kenya Prisons Service in partnership with the Judiciary has used the following measures to reduce overcrowding in prisons:

1. Community Service Orders (CSO)

2. Use of Bail and Bond
3. Review of sentences
4. Revision of sentences

84. The representations of the above mentioned in form of releases that took place between 15th March 2020 and 5th June 2020 are tabulated as below;

<i>S/NO</i>	<i>Region</i>	<i>Normal release</i>	<i>CSO/Revision of sentence</i>	<i>Fine/Cash Bail/Bond</i>	<i>Total</i>
1	Coast	380	472	344	10196
2	North Eastern	85	100	74	1259
3	Eastern	419	1014	453	1886
4	Central	699	665	573	1937
5	Rift Valley	1371	1555	962	3888
6	Western	166	362	210	738
7	Nyanza	254	568	224	1046
8	Nairobi	592	286	160	1038
TOTAL		3,966	5,022	3,000	11,988

85. Arrests and detention in Kenya are carried out in accordance with the law and only where there is probable cause. Once arrested, an accused person must be arraigned in court within 24 hours or released. Bail is a right unless there are compelling reasons not to be released. The writ of habeas corpus is available as a recourse for unlawful detention or imprisonment. The Bail and Bond Policy Guidelines were elaborated in 2015 by the judiciary to guide the police and judicial officers in the application of laws that provide for bail and bond.

Elimination of slavery, servitude and trafficking in persons (arts. 2, 6, 7, 8, 24 and 26)

Prosecution of trafficking cases table

<i>Offence</i>	<i>New Cases Registered</i>	<i>Conviction</i>	<i>Acquittal</i>	<i>Withdrawn</i>
Trafficking in persons	18	1	1	4
Child trafficking	9	1	1	2
Promotion of trafficking in persons	-			1
Acquisition of travel documents, fraud or misrepresentation	13	5		
Facilitating entry into or exit out of country	109	54		5
Interfering with travel documents and personal effects	1			
Trafficking in persons for organized crime	1	4		
Other offences related to human trafficking	23	8		1

86. The government has developed a draft Standard Operating Procedures (SOPs) to combat labour trafficking. The SOPs are guiding tools for law enforcement, prosecutors, and others involved in the identification, investigation, and prosecution of labour traffickers and those taking part in unethical recruitment practices. The goal of the procedures is to holistically address the crimes of labour trafficking and exploitative recruitment practices, while ensuring both preventative and responsive protection for victims and potential victims, and bringing those involved in trafficking to justice.

87. The National Plan of Action to Combat Human Trafficking, has included as a strategic priority the element of reducing fraudulent employment opportunities in terms of preventions. It also factors in monitoring and assessing employment agencies, and their

processes and practices to detect misconduct or potential gaps that could be used by traffickers

88. Other data on labour trafficking (2019/2020):

Category

Children in worst form of labour 273 female
161 male

Persons with albinisms trafficked for body parts No data

Trafficking of women in refugee camps No data

89. Efforts to increase the identification of perpetrators and improve the rate of prosecutions and convictions, of trafficking cases include: -

- The development of Standard Operating Procedures by the Counter Trafficking Advisory Committee
- The preparation of a Prosecutor's Manual on trafficking
- Establishment of an anti-human trafficking unit that carries out investigations on child trafficking and online child abuse under the Office of the Inspector General of Police
- Establishment of a Transnational Organized Crime Unit that carries out investigations on adult trafficking and smuggling in persons in liaison with the Director of Criminal Investigations (DCI)
- The Counter Trafficking in Persons Advisory Committee, which coordinates training for law enforcement officers on investigations and prosecutions
- Trainings of law enforcement officers on investigations: police, children's officers, prosecutors
- Information education communication materials are given out to the public conveying information of how to identify a perpetrator and the numbers to call such as child help line 116 for assistance
- Community sensitization through public barazas.

90. The Counter Trafficking in Persons Act, 2010(CTIP) under Section 22 has established the National Assistance Trust Fund for victims of Trafficking in Persons. The funds are used for victim's assistance, such as psychosocial support as provided for under section 15(e) of the CTIP Act, 2010.

91. The GOK developed the National Assistance Mechanism Guidelines for assisting victims of human trafficking contains provisions on psychosocial support.

Treatment of aliens, including refugees, asylum seekers and migrants, and population displacement (arts. 2, 6, 7, 9, 13 and 26)

92. The Refugee Bill 2019 provides for the recognition, protection and management of refugees and to give effect to the 1951 UN Convention relating to the Status of Refugees. The Bill had been tabled before the National Assembly, but was referred back to the relevant Ministry to undertake further public participation and consultations. As at February 2018, 78,517 refugees from Dadaab Refugee Camp, Kakuma Refugee Camp and Urban centres had been voluntarily repatriated. To enhance security in the Dadaab and Kakuma refugee camps, an expanded community policing programme has been introduced, and more police units have been deployed to the camps. The GOK has not received any reports of xenophobia and repressive policies against undocumented migrants, including house raids following the

introduction of a hotline for citizens to report such individuals. More information is required including the details of the victims.

93. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, was enacted in 2012 to guide GOK action in efforts to protect IDPs. The Act establishes a Fund for meeting the capital and recurrent expenditure relating to the displacement including the reconstruction of destroyed basic housing and rehabilitation of community utilities and institutions; The furthered outlines preventive mechanisms, i.e, public awareness campaigns, sensitization, training and education on the causes, impact and consequences of internal displacement and allows displaced persons to make voluntary and informed choices of sustainable reintegration at the place of origin, sustainable local integration in areas of refuge, or sustainable integration in another part of Kenya.

94. The National Policy on the Prevention of Internal Displacement, Protection and Assistance to IDPS 2011 provides a national policy guideline for the protection of the rights of IDPs and ensures that Kenya becomes a nation free from internal displacement by finding sustainable and durable solution for all IDPs and preventing any future displacement.

Forced eviction (arts. 7, 12, 17, 26 and 27)

95. The Land Laws (Amendment Act) 2016 introduced comprehensive procedures to govern evictions in Kenya. Evictions undertaken by the government must strictly conform to constitutional provisions, the law and must be conducted in a humane manner.

Freedom of assembly (arts. 19 and 21)

96. The Public Order Act 1950 was revised in 2012 to align its provision to the constitutional principles on the right to assembly, picket and demonstrate. The GOK does not arrest human rights defenders for exercising their right to freedom of assembly. An arrest can only be made where a crime has been committed or a breach of the peace has occurred. Human Rights defenders who conduct their demonstrations peacefully and while unarmed do so freely without interference by the State.

97. The Public Order (Amendment) Bill 2019 seeks to amend the Public Order Act (revised edition 2012) to create the offences of causing grievous harm, damage to property and loss of earnings. Additionally, the Bill proposes compensation to victims by demonstrators and organizers. While the Constitution guarantees the rights to assemble, demonstrate, picket and present petitions to public authorities, these rights must be enjoyed peaceably and while unarmed.

98. Indeed, the High Court in the case of **Ngunjiri Wambugu vs Inspector General of Police, & 2 voters [2019] eKLR**, directed the State to change or develop new law and regulations to ensure peaceful assembly, and to write Codes of Conduct for organizers of demonstrations. The court in its ruling declared that the individual's right to picket was conditional on the protestors or demonstrators conducting themselves peaceably and unarmed and that police officers are duty bound to immediately stop protestors or demonstrators if they are armed with any form of weapons. It is against this background that the Public Order (Amendment) Bill 2019 was drafted. Kenyan laws and regulations require only proportionate and lawful use of force in quelling unruly assemblies and demonstrations. However, any law enforcement officer who contradicts these laws is investigated and charged accordingly.

Freedom of expression (Arts. 19 and 20)

99. The right to freedom of expression is protected by the Constitution. The courts have declared certain sections of domestic law unconstitutional on the basis that they violated the right to freedom of expression.

100. The case of **Jacqueline Okuta & another v Attorney General & 2 others, eKLR**, sought to challenge the constitutionality of the offence of criminal defamation created under the provisions of section 194 of the Penal Code. The court, declared the said section unconstitutional on the basis that it violates the fundamental right to the freedom of expression.

101. On 26th April 2017, the High Court of Kenya in *Robert Alai v The Hon Attorney General & another* [2017] eKLR, declared that the provisions of Section 132 of the Penal Code, which criminalises the uttering or publication of words that are construed to undermine the authority of any public officer, incompatible with the Kenya Constitution.

102. Section 181 of the Penal Code prohibits dealings in obscene matters. The prohibition extends to inter alia, trading in distribution, public exhibition, production, possession, importation, or assisting in the circulation of or traffic in any one or more obscene objects. It is important to note that the prohibitions cover all the areas of obscenity including those relating to LGBT. A person found guilty of dealing with the obscene matters is liable to imprisonment for two years or to a fine of seven thousand shillings. The State has on several occasions removed online content considered immoral or defamatory. The Computer Misuse and Cybercrimes Act 2018 criminalizes the distribution of obscene or intimate details, including child pornography. Further, to strengthen the regulation of information reaching the public, media owners have set up the Media Council of Kenya as a self-regulatory mechanism.

The compatibility of the 2018 Computer Misuse and Cybercrimes Act with the Covenant

103. Both Article 19(3) of the Covenant and the Constitution of Kenya enshrine the view that the right to freedom of expression may be validly limited in the public interest and to preserve the rights/reputation of others. The GOK has a legitimate responsibility to limit any component of expression that may be harmful. In furtherance of its responsibility to protect all persons, the GOK passed the Computer Misuse and Cybercrimes Act in 2018. The Act criminalises acts, such as: unauthorized interception and interference, publication of fake information, child pornography, wrongful distribution of obscene or intimate images- among other offences. It is notable that in 2020 the High Court in *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR dismissed a petition challenging the constitutionality and legality of several provisions of the Act. The Court, in finding that the provisions of the Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms, stated:

“the imminent danger lies in the inability of the GOK to ensure national security in view of the cyber-crimes and computer misuse offences; consequently, the need to protect the wider public from the dangers in the cyberspace outweighs the granting of the petition”. The Court found that the provisions of the effectively protected the public interest and as such the public interest need to be held in the highest esteem”.

104. As stated elsewhere in this report, sexual relations between same sex persons are expressly prohibited by the national law and is deemed unacceptable to the Kenyan culture and values. However, every person in Kenya, whatever their sexual identity, is guaranteed the full protection of the law in the event that any of their rights under the law are violated. Examples include, the legal and judicial recognition of intersex persons; the 2016 order by the Employment and Relations Court to the Anglican Church of Kenya to reinstate three priests who were suspended in 2015 after allegations surfaced that they were gay ;and a Court of Appeal ruling on 22 March 2018, that conducting forced anal examinations on people who are accused of same-sex relations is unconstitutional. The ruling reversed a 2016 High Court decision that had upheld the Kenyan authorities' use of forced anal exams to attempt to provide evidence of homosexual conduct. In addition, in 2013, the Cosmopolitan Affirming Church (CAC) opened in Nairobi, becoming the first openly LGBT church in the country.

State interference with the free press

105. Kenya is bound to a series of international and regional legal instruments regarding free expression. Articles 33 and 34 of the Constitution expand freedoms of expression and of the press, specifically, by prohibiting the state from interfering with the editorial independence of individual journalists as well as both state-owned and private media. In the same breadth, the Constitution also curbs press freedom with regard to privacy, incitement, hate speech, and anti-government propaganda in times of war.

106. Kenya has efficient and effective structures for safeguarding the rights of all persons in Kenya, including the Media. The GOK facilitates a good working environment for the Media and safety and security measures have been provided. The IPOA provides an important platform where the journalists and members of the media can report any grievances that they may have against the police.

107. The Media Council Act, 2013 outlines several criminal penalties that can be applied to journalists and the media channels as follows: 1) A fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding six months, or both; and 2) Any subsequent offence committed by the same person shall attract a fine not exceeding one million shillings, or imprisonment for a term not exceeding two years, or both.

108. Petition No. 28 of 2018 Okiya Omutatah Okiya vs Communication Authority of Kenya eKLR. The GOK complied with the court ruling and restored all television broadcast. The delay occurred because the GOK had been considering appealing the decision since its representatives had not been present at the court hearing where the order was issued.

109. The NCAJ Special Taskforce on Children Matters was appointed 29th January 2016 with a mandate to address gaps relating to the administration of justice with regard to children. One of the main terms of reference for the team was to consider and propose legislative, policy, procedural and practice directions reforms in matters concerning children. In this regard the Task force developed the Children Bill, 2018. The Bill proposes a total review of all aspects of the criminal justice that touch on and affect the child, including, increasing the age of criminal responsibility. The bill has had the input of the stakeholders and public participation and is due for presentation to the Cabinet for approval and subsequent tabling before the National Assembly for debate and passage into Law.

Participation in public affairs (arts. 7, 14, 25 and 26)

110. To guarantee free and transparent elections in 2017, IEBC focused on the following measures:

- i. Ensured that the Commission had a respectable corporate brand that communicates efficiency in mobilization of resources;
- ii. Through timely review of various laws that govern elections and referenda;
- iii. Through voter education, by ensuring equitable representation;
- iv. by ensuring timely audits of IEBC's electoral system to realize accountability, security and efficiency in the electoral processes;
- v. Putting in place accountability mechanisms in addressing electoral malpractices by election officials in the conduct of elections; and
- vi. Investing heavily in the improvement of its ICT infrastructure so as to enhance transparency in the electoral processes.

111. IEBC has also embarked on a number of other strategies aimed at improving the conduct of future General Elections. Some of the ways include enacting new electoral laws and the review of existing laws and regulations aimed at improving the electoral environment, improved training of election officials facilitated through the review of voter registration and election training manuals as well as enhancing voter education programmes by development of voter education curriculum for primary and secondary schools among others. The actions taken have been efficient.

112. The Government of Kenya does not condone or support the excessive use of force, any type of violence or the harassment and suppression of civil society organizations by its officials. All allegations are promptly investigated and if an officer is found culpable the due process of the law is strictly followed.

Indigenous peoples (arts. 2, 25, 26 and 27)

113. The Government recognizes its obligation to protect the rights of all vulnerable groups including marginalised communities in Kenya. Government has an obligation to all these

communities to ensure inclusion and non-discrimination. It is thus incumbent upon the State to address any issues concerning indigenous people in an all-inclusive and holistic manner.

114. The Constitution recognizes that indigenous people form part of marginalized communities who must be protected through specific affirmative action designed to ensure that they enjoy their human rights and fundamental freedoms on an equal footing with others. Their rights to land are recognized and protected under the Community Land Act 2016, the Forest Conservation and Management Act 2016, the draft National Forest Policy 2020 and the Representation of Special Interest Groups Laws (Amendment) Bill 201. The GOK has also elaborated the Indigenous Peoples Planning frameworks. All dealings with community land can only be conducted with the consent and participation of communities.

115. Kenya does not have a specific legislation to protect the rights of indigenous women. However, there are sufficient laws, policies and institutional frameworks in place to effectively safeguard the rights of all indigenous people and women in general.
