

Annexure One

COVID-19 restrictions and the impact on criminal justice and human rights

Kenya



By

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1. Introduction

On 10 March 2022, Africa Criminal Justice Reform (ACJR) together with Legal Resources Foundation Trust-Kenya (LRF) hosted a stakeholder engagement workshop in Nairobi, Kenya to discuss the socio-economic impact of COVID-19 in Kenya and its impact on criminal justice and human rights.

The workshop was attended by 25 participants representing civil society organisations, community-based organizations, oversight institutions, the police, and the judiciary.¹ The objectives of the workshop were three-fold. First, to discuss the state's response to the COVID-19 pandemic and document the limitations of rights during the COVID-19 period. Second, to document the socio-economic consequences of state responses on the public. Third, the workshop aimed at documenting good-practice examples in the criminal justice and human rights sector for future use.

This report summarises workshop participants' professional views, informed by practice and experience, and is further supported by contextual information. It covers the following:

- Kenya government COVID-19 measures
- Problematic COVID-19 measures
- Enforcement of COVID-19 measures
- Penalties, sanctions and prosecutions for violations
- The impact of COVID-19 on the criminal justice system
- Socio-economic impact of COVID-19 restrictions
- Operation of oversight institutions during COVID-19
- Access to information and public awareness
- Innovative, effective and efficient responses to COVID-19
- Good practice for future use

2. Documenting rights violations

2.1. Kenya government COVID-19 measures

The 2010 Constitution introduced a bicameral legislative house, devolved county governments, a constitutionally tenured judiciary and electoral body. This has contributed to significant social and

¹ Appendix 1: Stakeholder Participation List.

economic reforms and political stability gains over the past decade.² There has now been three general elections under the 2010 Constitution and the next is scheduled for August 2022.³

Kenya's economic growth was averaging at 4.7% per year between 2015 and 2019, which significantly reduced poverty, and this was dampened by the COVID-19 pandemic which heavily impacted on economic growth and achievements gained over the preceding decade by disrupting, amongst others, business activity, transport, international trade and access to justice.⁴

The government invoked a Curfew Order and issued Public Health Rules to control the spread of COVID-19.⁵ Some of the main COVID-19 measures included the mandatory wearing of masks in public places, the suspension of public gatherings, the establishment of a curfew and the closure of most public spaces (e.g., schools, hotels, bars, and churches). The public transport industry was also affected with restrictions to limit the number of passengers in public service vehicles. The government's COVID-19 response measures, as gleaned from desktop research, are highlighted in an earlier report.⁶

The COVID-19 rules were amended regularly during 2020 and 2021, depending on the infection rate. Although the COVID-19 measures were applicable to everyone, the workshop participants felt that the enforcement of measures was concentrated in urban centres (i.e., Eldoret, Kisumu, Mombasa, Nairobi and Nakuru). The curfew declared in March 2020 (from 10 pm to 4 am) was completely lifted in October 2021. At the time of the workshop (March 2022) some the COVID-19 rules remained, such as compulsory mask wearing and social distancing in public spaces, but restrictions on public gatherings had been lifted, presumably in anticipation of the August 2022 elections.

As with most new processes, there were some 'teething problems' with the enactment and implementation of COVID-19 measures at the outbreak of the pandemic. In some cases, citizens had to petition the Court to have these issues resolved (i.e., petition to the Court to have lawyers recognised as essential workers) and in most cases these problems were identified and addressed in due course (i.e., implementation of rules for the operation of Courts). There was overall consensus amongst workshop participants that the public initially did not understand the nature and

² The World Bank, "The World Bank in Kenya: Overview," *The World Bank*, April 14, 2022, <https://www.worldbank.org/en/country/kenya/overview>.

³ The World Bank.

⁴ The World Bank.

⁵ Republic of Kenya, "Kenya Public Order Act" (2009), https://www.icnl.org/wp-content/uploads/Kenya_PublicOrderActCap56.pdf; Republic of Kenya, "Legal Notice 36 of 2020, Public Order (state Curfew) Order" (2020), http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN36_2020.pdf.

⁶ L Muntingh et al., "Criminal Justice, Human Rights and COVID-19 - a Comparative Study of Measures Taken in Five African Countries" (Africa Criminal Justice Reform, 2021), <https://acjr.org.za/acjr-publications/combined-covid-19-report-13-10-2021-final.pdf>.

consequences of the virus and there was a public perception that only rich people were infected by the virus. As a result, some believed that they did not have to follow the COVID-19 restrictions enacted by the state leading to law enforcement officials having to enforce restrictions.

2.2. Problematic COVID-19 measures

A number of COVID-19 measures were regarded as ‘problematic’ by workshop participants. They noted their concern regarding the rule on mandatory mask wearing in public spaces and the fact that violations attracted a fine of Ksh 20 000 (US\$ 173). Measured against the country’s GDP per capita such a fine would be more than a month’s income.⁷ Workshop participants further observed that the rules were not fairly applied and there were also instances reported where the police seemingly regarded themselves above the law by arresting people for not wearing masks but themselves not wearing masks. The enforcement of mask wearing was identified as a source of bribes by law enforcement officials.

During the workshop, participants described their personal experiences of arbitrary and unreasonable enforcement of the Curfew Order. Although a curfew was applicable throughout the country, presidential directives were issued indicating different curfew times in areas where COVID-19 infections were high. It was observed by participants that the police arbitrarily implemented these presidential directives and set up roadblocks in areas that were not subjected to a different curfew.

The normal functioning of the courts in the country were disrupted as a result of restrictions on gatherings. The prosecution of all cases was halted, particularly at the start of the pandemic in 2020. This impacted accused persons right to a speedy trial. A member of the Judiciary, (who is also a member of the National Council on the Administration of Justice - NCAJ) noted that when the pandemic hit the country, courts immediately ceased operations for almost three weeks and as a result, the justice sector was brought to a halt. Criminal trials could not be heard and normal court operations and execution of services could not take place. As a result, people seeking redress, were temporarily denied of it. For example, people’s homes were attached due to defaulting on their mortgage payments as the courts were was not in operation to protect them which was an unfortunate situation, and the result of general confusion and lack of direction. It was acknowledged by workshop participants that many mistakes were made at the start of the pandemic, but slowly, as the justice

⁷ The World Bank, “GDP per Capita - Kenya,” *The World Bank*, 2022, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=KE>.

sector came to terms with COVID-19, measures were put in place, including the prioritisation of urgent cases and the hosting virtual hearings.

Workshop participants also noted concerns regarding the forced isolation that people were subjected to in government quarantine facilities lacking proper sanitation and left in dire conditions. In May 2020, the media reported on cases of forced quarantine at government quarantine facilities of people who displayed COVID-19 symptoms, travellers (and those that had encountered travellers), those who violated the curfew and those found without face masks in public.⁸ As a result of the outcry, the Ministry of Health released guidelines in June 2020 in accordance with the World Health Organization's recommendations, on how people with mild or asymptomatic cases of COVID-19 could self-isolate at home.⁹

2.3. Enforcement of COVID-19 measures

Since the onset of the pandemic, there has been strict enforcement of COVID-19 measures by law enforcement officials. As already noted, workshop participants reported that the police used excessive force and enforcement was frequently irrational and counterproductive in preventing the spread of the virus.

Widely published in the media in March 2020 were reports of police brutality and fatalities as a result of the enforcement of COVID-19 rules, especially at the start of Kenya's dusk-to-dawn curfew whereby a reported 15 people were killed by police officers during the first nine weeks of the curfew.¹⁰

A civil society organisation representative working with youth noted that many young people, particularly men, were targeted for COVID-19 arrests. The representative noted that their organisation interviewed young people who shared their experiences about encounters with law enforcement officials. This included instances of being beat up, arrested and bundled into small police vans with limited social distancing. Workshop participants also noted that the police used excessive and sometimes lethal force to disperse protestors calling for an end to police brutality.¹¹

⁸ Human Rights Watch, "Kenya: Quarantine Conditions Undermine Rights," Human Rights Watch, May 28, 2020, <https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights>.

⁹ Human Rights Watch, "Kenya Stops Abusive Forced Quarantine Related to Covid-19," Human Rights Watch, July 3, 2020, <https://www.hrw.org/news/2020/07/31/kenya-stops-abusive-forced-quarantine-related-covid-19>.

¹⁰ T Riley and J Namu, "Nine Weeks of Bloodshed: How Brutal Policing of Kenya's Covid Curfew Left 15 Dead," *The Guardian*, October 23, 2020, <https://www.theguardian.com/global-development/2020/oct/23/brutal-policing-kenyas-covid-curfew-left-15-dead>.

¹¹ Africa News, "Kenya: Protesters Clash with Police in Nairobi over Covid Curfews, Brutality," *Africa News*, July 7, 2021, <https://www.africanews.com/2021/07/07/kenya-protesters-clash-with-police-in-nairobi-over-covid-curfews-and-restrictions/>.

The excessive, and at times fatal, use of force by the police in 2021 was reported by Amnesty International (AI).¹² AI reported that the police had unlawfully killed 167 people, including some of those arrested for violating COVID-19 restrictions. The incident involving a 13-year-old boy, Yassin Hussein Moyo, who was fatally shot by the police pursuing suspects for violating the Curfew Order is a case in point.¹³ According to AI, only 28 prosecutions were initiated against suspected perpetrators of unlawful killings and enforced disappearances.¹⁴

Whereas the COVID-19 restrictions were supposed to protect poor and vulnerable people, its enforcement appeared to be used more against the poor and vulnerable such as hawkers and other low-income earning individuals. A representative from the Street Hawkers Association noted that law enforcement was poorly done, particularly in the first year of the pandemic and did not reduce the spread of the virus. Instead, he explained that law enforcement officials arrested people and placed them in vehicles and facilities with no social distancing and poor ventilation which exacerbated the spread of the virus.

A further challenge relating to the enforcement of COVID-19 measures was with regard to the zoning out of certain geographical areas or counties which were placed under 'lockdowns'. This meant that if a person was travelling from one county to another, he/she would not be allowed to enter a county placed under lockdown. It was observed by workshop participants that the Kenyan population generally do not bother much with county borders but the county-specific lockdowns meant that people who found themselves outside their area of residence had to quickly return when the lockdowns were announced, otherwise they would find themselves 'locked-out'.

A representative from the police internal complaints department acknowledged that the police harshly enforced COVID-19 measures. He noted that the police were requested to enforce rules under difficult circumstances, with a lack of resources, and the absence of training and guidelines for policing during a pandemic. The representative bemoaned the fact that the government did not put adequate measures in place to protect police officers who were frontline workers, from the virus. The representative further pointed that there was a need to reflect on what went wrong and to make improvements in the future.

¹² Amnesty International, "Kenya 2021," *Amnesty International*, 2021, <https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/kenya/report-kenya/>.

¹³ France 24, "Probe Ordered into Fatal Shooting of Kenyan Teenager during Virus Curfew," *France 24*, March 31, 2020, <https://www.france24.com/en/africa/20200331-coronavirus-kenya-shooting>.

¹⁴ Amnesty International, "Kenya 2021."

2.4. Penalties, sanctions and prosecutions for rights violations

The workshop participants generally held the view that sanctions for non-compliance with COVID-19 rules were disproportionate. Formal penalties were at the discretion of judicial officials and citizens could be fined a maximum of Ksh 20 000 (US\$ 173) or six months imprisonment. During the workshop, a case was reported of a young man who was detained for more than four months because he was unable to raise the bond terms set by the court after pleading not guilty for the offence of failing to wear a mask in a public place.

Moreover, participants reported rampant corruption during this period. Many bribes were solicited by law enforcement officials during this period, especially from informal traders and public transport operators. The unusual circumstances also appear to have had an inflationary impact on bribe amounts as it was reported that it increased from less than US\$ 1.00 to as high as US\$ 87. Some participants felt that the COVID-19 restrictions, which were intended to protect the public against a virus, became a punishment for informal traders, taxi operators and people in general.

During this period, there were reported incidences of human rights violations, such as assaults, the use of force, torture, killings, bribes and arbitrary detention committed by law enforcement officials against ordinary citizens. There were also cases where the public were subjected to humiliating experiences and this has already been dealt with in the section 'Enforcement of COVID-19 measures.'

A representative of the Kenya police internal oversight section noted that disciplinary charges were instituted against police officers for human rights violations. Reportedly, some police officers had already been criminally charged and cases are pending. There has, reportedly, been one conviction where an officer was sentenced to two years imprisonment or a fine of Ksh 200 000 (US\$ 1 733).

3. The impact of COVID-19 measures on the criminal justice system

The COVID-19 restrictions placed by government had a notable impact on the criminal justice system and affected the due process rights of arrested persons and detainees in Kenya.

3.1. Courts

As previously noted, the normal functioning of the courts was negatively impacted as a result of court closures for the first three weeks of the pandemic. As a result, the prosecution of criminal cases was

halted and this created a huge backlog. Moreover, accused persons' right to a speedy and fair trial was undermined. In April 2020 the National Council on the Administration of Justice (NCAJ) issued Practice Directions outlining measures aimed at adjusting the operations and processes of the judiciary to minimize the risk of infection to staff and court users.¹⁵ The measures were also put in place to address the case backlog in courts and ease congestion at detention facilities.

Amongst others, the measures included the prioritisation of urgent criminal and civil matters and the hosting of virtual hearings. In terms of the use of virtual hearings, a participant from the judiciary noted that virtual hearings had advantages and disadvantages. Judicial officers were able to adjudicate and process more cases, but this created a backlog with drafting judgments, particularly in civil matters. Moreover, a representative from the Legal Resources Foundation noted that at the beginning of the pandemic not all prisons were equipped with technology such as laptops and electronic screens needed to enable virtual proceedings. This was especially a problem at smaller prisons which are often neglected and lack resources. Through the assistance of donors and other state departments, the necessary resources were made available to all prisons. As of March 2022, all prisons in Kenya had at least one laptop available for the purposes of virtual hearings.

The NCAJ Practice Directions provided that the Office of the Director of Public Prosecutions remains open and that one officer is put in charge of every regional office to process files for plea-taking and other urgent matters. The representative from the judiciary noted that the urgent matters heard in the High Court were, amongst others, bail applications, revisions from the lower courts and murder cases. Furthermore, magistrates' courts were also prioritising urgent cases, but what was considered to be urgent depended on the circumstances of each case and this was at the judicial officers' discretion. This was a challenge as accused persons cases that were not considered as 'urgent' or did not want to enter a plea, were therefore held in detention for a longer period than expected. Moreover, in terms of civil cases, the Directions noted that a duty judge in each of the Superior Courts and a Magistrate in every station were available daily to deal with urgent matters.¹⁶ Applicants were allowed to file matters under a Certificate of Urgency if they wanted their cases to be heard and reconsidered as urgent by a judicial officer.

¹⁵ Kenya Judiciary, "Statement on Justice Sector Operations in the Wake of the COVID-19 Pandemic," April 1, 2020, <https://www.judiciary.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>.

¹⁶ "Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya," April 1, 2020, <https://www.judiciary.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>.

3.2. Police

The workshop participants acknowledged that there were efforts made by the government to decongest police holding cells by providing bail and free bond for persons unable to pay cash bail and who had remained in cells for a long time.¹⁷ For instance, the Directions by the NCAJ noted that petty offenders should never be held at police stations for more than 24 hours and they should be released on either cash bail or free police bond. Moreover, the Directions emphasised that officers in charge of police stations were under strict instructions to implement these directions. It was, however, noted that later in the pandemic, prisons refused to admit remandees who had not been tested for COVID-19 and these individuals were consequently remanded to police stations waiting to be tested on top of the 14-day incubation. This resulted in some people remaining in police holding cells for up to three months; adding to congestion at police station cells and thereby increasing the risk of infection. The Karen police station in Nairobi was singled out in this regard.

3.3. Prisons

In March 2022 the total prison population stood at 52 979, or an occupancy level of 176.6%.¹⁸ At the start of the pandemic, there was a concerted effort from criminal justice agencies under the NCAJ to reduce prison overcrowding. In April 2020 low-risk prisoners' sentences were reduced, resulting in some 4800 releases.¹⁹ In March 2020 the government announced a temporary 30-day ban on visits to all prisons to curb the spread of the virus. This resulted in many detainees not receiving regular support (e.g., medical supplies) from families and organisations.²⁰ The Prison Service made an effort to secure extra phones to enable detainees to communicate with their families and lawyers in the absence of in-person visits. The restriction on prison visits lasted four months and was lifted in July 2020.²¹

The Human Rights Commission found that while some prisons allowed lawyers to consult with detainees, others did not. This resulted in some lawyers not being able to consult with their clients and preparing for their cases, resulting in their court cases being deferred. Some participants noted that it appeared as if detainees' wellbeing and protection against the virus was being neglected, as the focus was primarily on supplying personal protective equipment to members of the public. The same

¹⁷ "Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya."

¹⁸ World Prison Brief, "Kenya: World Prison Brief Data," 2022, <https://www.prisonstudies.org/country/kenya>.

¹⁹ A Salaudeen, "Kenya Has Freed Nearly 5000 Inmates via Newly Adopted Skype Court Sessions," *CNN*, April 2, 2020, Aisha Salaudeen CNN, "Kenya Has Freed Nearly 5000 Inmates via Newl<https://www.cnn.com/2020/04/02/africa/kenya-courts-on-skype/index.html>.

²⁰ K Langat, J Melly, and M Nyawira, "Impact of COVID-19 on Incarcerated Offenders and Community Reintegration Challenges in Kenya Prisons" 3, no. 6 (2020): 55–62.

²¹ S Maombo, "Government Suspends Prison Visits by Another 30 Days," *The Star Kenya*, April 5, 2020, <https://www.the-star.co.ke/covid-19/2020-04-05-government-suspends-prison-visits-by-another-30-days/>.

was true with regards to vaccinations. However, workshop participants noted that as of March 2022, all detainees had been fully vaccinated.

4. Socio-economic impact of COVID-19 restrictions on citizens

Kenya is a lower-middle income economy with a population of 55.5 million.²² It is estimated that 36.1 percent of the population live below the international poverty line of US\$1.90 a day.²³ It goes without saying that the socio-economic impact of COVID-19 restrictions were severely felt by the general public, and especially the poor and marginalised.

4.1. General public

Workshop participants opined that at the start of the pandemic, the government gave little to no consideration on how the curfew and lockdown restrictions would impact on the population. It was only after the lockdown was instituted in 2020 and as the pandemic progressed that the government gave more serious consideration to the needs of the population and undertook three main initiatives to ease the burden of restrictions. The first initiative was based on tax concessions and financial assistance. The turn-over business tax was reduced from 3% to 1% for one year.²⁴ A 100% tax waiver was also put in place for those earning Ksh24 000 (US\$ 210) and less per month; and the Value-Added-Tax (VAT) rate was reduced from 16% to 14% on 1 April 2020.²⁵

The second initiative was a relief fund in the form of cash transfers for low-income earners to the value of Ksh 10 000 (US\$ 87) per month to cushion the effects of the COVID-19 restrictions. The relief fund targeted the elderly, poor and vulnerable persons and was implemented to safeguard the dignity and welfare of the most severely affected. The relief fund was targeted to reach at least 669 000 citizens; however, workshop participants reported that the eligibility criteria for the fund was vague.²⁶ An

²² Worldometer, "Kenya Population," *Worldometer*, April 8, 2022, <https://www.worldometers.info/world-population/kenya-population/>.

²³ Kenya National Bureau of Statistics (KNBS), "The 2020 Comprehensive Poverty Report," 2020.

²⁴ Ernest and Young, "Kenyan Government Issues Public Notice on Expected Resumption of Pre-COVID Tax Rates" (Ernest and Young, December 7, 2020), <https://taxnews.ey.com/news/2020-2814-kenyan-government-issues-public-notice-on-expected-resumption-of-pre-covid-tax-rates?uAlertID=Sd%2FG8rua1oj6%2FI58EZ2AiA%3D%3D>.

²⁵ Ernest and Young.

²⁶ N Wangari, "Kenya's Chaotic COVID-19 Vaccine Roll out Exposes Rich-Poor Divide," April 21, 2021, <https://globalvoices.org/2021/04/26/kenyas-chaotic-covid-19-vaccine-roll-out-exposes-rich-poor-divide/>; M

investigation by Human Rights Watch found numerous irregularities in the distribution of funds.²⁷ Firstly, there was a lack of transparency on the application process, resulting in many, presumably eligible, residents of Nairobi's informal settlements not applying as they were either not aware of its existence or were ignorant about how to apply.²⁸ Secondly, in some Nairobi settlements, authorities tasked village elders, heads of neighbourhood associations and community health volunteers to oversee the implementation of the funds. Many of such entrusted persons indicated that they received no training and were not provided with selection criteria in order to distribute the funds, leading them to distribute the funds to people that they personally knew.²⁹ Thirdly, the intended recipients were due to receive 35 weekly transfers over an 8-month period; yet, most received far less, with some even as few as two or four payments in total.³⁰ The final, and perhaps most devastating issue regarding the cash transfer programme is that there is to date no official report on the actual allocation of funds. Instead, allegations of corruption have emerged.³¹

The third initiative undertaken by the government to cushion the socio-economic burden of the pandemic was the provision of relief food packages to some informal settlements. A report on the impact of COVID-19 on food security in the east-African region indicated that the restrictions on movement during the peak of the pandemic significantly disrupted regional and national food supply chains in countries like Kenya.³² This affected the availability of food, labour markets and supplies of critical agriculture inputs. The report recommended that the Kenyan government consider humanitarian programming as essential services, thus exempting humanitarian personnel and supplies from movement restrictions in order to assist populations in need. The report also called for the government and donors to sustain supply chains and livelihoods despite the pandemic.³³ The distribution of food packages by the government was supported by civil society organisations who provided supplies of basic food products to vulnerable groups such as persons living with HIV/AIDS and child-headed households. It was reported during the workshop that instances of nepotism riddled the

Igoe, "Devex Newswire: What Happened to Kenya's COVID-19 Cash?," *Devex*, July 21, 2021, <https://www.devex.com/news/devex-newswire-what-happened-to-kenya-s-covid-19-cash-100424>.

²⁷ O Namwaya and N Abdi, "'We Are All Vulnerable Here': Kenya's Pandemic Cash Transfer Program Riddled with Irregularities." (Human Rights Watch, July 20, 2021), <https://www.hrw.org/report/2021/07/20/we-are-all-vulnerable-here/kenyas-pandemic-cash-transfer-program-riddled>.

²⁸ Namwaya and Abdi.

²⁹ Namwaya and Abdi.

³⁰ Igoe, "Devex Newswire: What Happened to Kenya's COVID-19 Cash?"

³¹ Igoe.

³² G Ouma and M Brown, "The Reality of Covid-19 Burden On Food Security in the Horn And Eastern Africa" (Action Against Hunger, June 1, 2020), <https://reliefweb.int/sites/reliefweb.int/files/resources/COVID-19-Food-Security-Burden-HEARO.pdf>.

³³ Ouma and Brown.

distribution of food packages in some villages, particularly in Uwino-Uhuru where it was alleged that chiefs only provided food packages to fellow tribesmen.

Noting the above efforts undertaken by the Kenyan government, the below provides a brief description of the impact of COVID-19 on businesses, the education sector, gender-based challenges, mental health issues, public transportation and art and cultural activities.

4.2. Business

A large portion of the population was impacted by the curfew restrictions placed by government including farm workers, commercial sex workers, street traders and hawkers, transport industry workers, as well as owners and staff of bars, taverns, hotels and restaurants as they all faced a significant loss in income due to a decrease in customer patronage. The pandemic also impacted the labour market and it is predicted by the World Bank that post COVID-19 recovery and economic transformation will be increasingly service-sector led.³⁴ While some business people became creative in adapting to the restrictions, a large number were forced to shut down and the few that survived are struggling to recover as the consequences of the pandemic will have long-term implications.³⁵

Workshop participants reported that in major cities the county-specific lockdowns made it difficult for farmers to bring their produce to the cities unless they had a permit to enter counties under 'lockdown.' Even when farmers became aware of the need to have a permit, it was difficult for them to navigate the bureaucracy around it. The limited import and export of fresh produce impacted people in the villages relying on the income from agricultural outputs as well as street traders who sell the produce in the cities. The representative of the Street Hawkers Association pointed out that street traders and hawkers had to reduce their working hours, and those who relied on produce coming in from farms and port cities such as Mombasa, were severely affected by the curfew and county-specific lockdowns.

³⁴ "Post-COVID-19 Recovery and Economic Transformation Will Be Increasingly Service-Sector-Led," *World Bank*, December 14, 2021, <https://www.worldbank.org/en/country/kenya/publication/post-covid-19-recovery-and-economic-transformation-will-be-increasingly-service-sector-led>.

³⁵ "Post-COVID-19 Recovery and Economic Transformation Will Be Increasingly Service-Sector-Led."

4.3. Education

One of the first measures that the government announced at the onset of the pandemic in March 2020 was the closure of schools, universities and all places of learning.³⁶ A study conducted on the impact of the COVID-19 lockdown on the education system found that it increased adolescent pregnancy and affected their sexual and reproductive health.³⁷ It is reported that within the first five months of the pandemic, almost 4000 school-going girls became pregnant.³⁸ According to workshop participants, it appears that in the majority of the cases, the pregnancies occurred within the close family or neighbourhood set-up. Due to cultural norms and the prejudices that come with unwanted pregnancies, many young girls were married off to families in other counties in fear of carrying the stigma of incest and bearing children out of wedlock. When schools re-opened some 10 months later in 2021, there was extensive school dropout among secondary schoolgirls.³⁹

In an attempt to salvage the 2020/2021 academic year, the Ministry of Education reverted to virtual learning (albeit with disruptions) through platforms such as email, Zoom and Microsoft Teams for schools and universities.⁴⁰ While virtual learning was possible for some students in urban areas, the unbalanced access to computers, laptops and internet connection meant that children from rural areas were disadvantaged. The lack of electricity in villages such as Kajiado, Narok, Samburu, Turkana and Kilifi resulted in marginalised children in these villages not being able to access virtual learning even if they wished to.⁴¹

³⁶ D Parsitau and E Jepkemei, "How School Closures during COVID-19 Further Marginalize Vulnerable Children in Kenya," *Brookings Education*, May 6, 2020, <https://www.brookings.edu/blog/education-plus-development/2020/05/06/how-school-closures-during-covid-19-further-marginalize-vulnerable-children-in-kenya/>.

³⁷ G Zulaika et al., "Impact of COVID-19 Lockdowns on Adolescent Pregnancy and School Dropout among Secondary Schoolgirls in Kenya," *BMJ Global Health* 7 (2022), <https://gh.bmj.com/content/7/1/e007666>.

³⁸ M Oduor, "Close to 4,000 School Girls Impregnated in Kenya during Covid-19 Lockdown," *Africa News*, June 17, 2020, <https://www.africanews.com/2020/06/17/close-to-4000-school-girls-impregnated-in-kenya-during-covid-19-lockdown/>.

³⁹ Zulaika et al., "Impact of COVID-19 Lockdowns on Adolescent Pregnancy and School Dropout among Secondary Schoolgirls in Kenya."

⁴⁰ N Miller, "Virtual Learning under Lockdown Casts Doubt on Kenya as the Silicon Savannah," *London School of Economics*, August 19, 2020, <https://blogs.lse.ac.uk/africaatlse/2020/08/19/virtual-learning-lockdown-casts-doubt-kenya-silicon-savannah-digital-education/>.

⁴¹ Parsitau and Jepkemei, "How School Closures during COVID-19 Further Marginalize Vulnerable Children in Kenya."

4.4. Gender-based Challenges

The pandemic had a disproportionate impact on women and girls who faced significant challenges such as job losses, increased household and care duties, and vulnerability to sexual and gender-based violence. In April 2020 the outgoing Chief Justice David Maraga raised concerns over the fact that within the first two months of the lockdown, 35.8 percent of cases filed in courts across the country related to sexual and gender-based violence.⁴² Women also had challenges accessing reproductive health facilities.⁴³ In response to these challenges, several gender-based violence desks, safe houses, toll-free numbers and virtual justice centres were launched between 2020 and 2021.

4.5. The Rise of Mental Health Issues

According to workshop participants, mental health challenges became more apparent in Kenya during the COVID-19 pandemic. The Kenyan Ministry of Health embarked on efforts to deliver mental healthcare during the pandemic against the backdrop of an under-resourced system characterized by inaccessible services, an acute shortage of mental health workers and limited funding.⁴⁴ However, the general observation from the workshop was that not enough was done by the Ministry of Health to avail mental health experts and psychologists to advise the population on how to deal with the pandemic. Participants noted that limited COVID-19 knowledge resulted in rising levels of fear and anxiety in both adults and children. One participant provided an anecdotal example of his young children who experienced bouts of stress and anxiety whenever the Chairperson of the National Emergency Response Committee on Coronavirus (NERCC) appeared on television, as this translated to a longer confinement period and less chances for them to go out and play with friends. The example provided by the participant is supported by evidence from Childline Kenya which administers assistance to children and young people in need of help.⁴⁵ It is reported that the number of calls received from children and teenagers relating to depression, anxiety and other forms of mental health

⁴² K Maichuhie, "Kenya: Covid-19 Has Fanned Cases of GBV, Report Shows," *All Africa*, December 9, 2020, <https://allafrica.com/stories/202012090638.html>.

⁴³ Maichuhie.

⁴⁴ F Jaguga and E Kwobah, "Mental Health Response to the COVID-19 Pandemic in Kenya: A Review," *International Journal of Mental Health Systems* 14, no. 68 (2020), <https://doi.org/10.1186/s13033-020-00400-8>.

⁴⁵ H Wylie and J Muraya, "Impact of COVID-19 on Poor Mental Health in Children and Young People 'Tip of the Iceberg' – UNICEF," *UNICEF*, October 5, 2021, <https://www.unicef.org/kenya/press-releases/impact-covid-19-poor-mental-health-children-and-young-people-tip-iceberg-unicef>.

issues more than doubled since the start of the pandemic.⁴⁶ In 2020, the Mental Health Bill was proposed to draw attention to the importance of mental health issues in the country.⁴⁷

4.6. Public Transportation

The COVID-19 measures restricting the number of people in public transport vehicles resulted in the doubling of fees rendering it unaffordable to the poor and working class. Workshop participants noted that collusions between law enforcement officials and public transport operators increased during the COVID-19 period as public operators often obeyed the capacity restrictions in urban areas but once outside city limits, would load passengers in excess of the restriction, but were not penalised.

4.7. Art and Cultural activities

The art and cultural sector was also impacted by the pandemic as many performing artists faced a reduction of events due to the curfew and restrictions on gatherings. In April 2020 the Ministry of Sports, Culture and Heritage announced an emergency relief package of Ksh 100 million (US\$ 866 724) for artists, actors and musicians to continue to entertain during the pandemic through television and radio.⁴⁸ The sports industry was also impacted by the restrictions. In March 2020, the Kenyan Athletic Authority ordered the closure of training camps and clubs to curb the spread of the virus.⁴⁹ A year later, in March 2021, another suspension on all sporting activities was announced to control the spread of COVID-19.⁵⁰ Workshop participants noted that children who contribute to household expenses through earnings made from sports were deprived of this income, pushing some children to become hawkers to support their families.

⁴⁶ Wylie and Muraya.

⁴⁷ Republic of Kenya, "Kenya Mental Health Bill" (2020), <http://www.parliament.go.ke/sites/default/files/2021-03/The%20Mental%20Health%20%28Amendment%29%20Bill%202020.pdf>.

⁴⁸ A Joffe, "Covid-19 and the African Cultural Economy: An Opportunity to Reimagine and Reinvigorate?," *Routledge* 30, no. 1 (2021): 31.

⁴⁹ Omar Mohammed, "Kenya Orders Closure of Training Camps and Clubs over Coronavirus Worries," *Reuters*, March 18, 2020, <https://www.reuters.com/article/us-health-coronavirus-athletics-kenya-idUSKBN2151ZV>.

⁵⁰ M Pavitt, "Sport Suspended in Kenya as Government Aims to Tackle COVID-19 Spike," *Inside the Games*, March 27, 2021, <https://www.insidethegames.biz/articles/1105940/kenya-government-suspends-sport-covid-19>.

5. The operation of oversight institutions during COVID-19

Human rights institutions and oversight bodies play an important role in promoting and protecting human rights. They can monitor the human rights situation in the country, investigate and resolve complaints, and engage the government on laws and policies that do not comply with the Constitution and international human rights standards. The Kenya National Commission on Human Rights (KNCHR) and Independent Police Oversight Authority (IPOA) were represented at the workshop. The police Internal Affairs Unit (IAU) which is not a constitutional body, but an internal administrative oversight unit of the police was also present. The IAU works closely with IPOA in investigating police officers for misconduct and crime, and referring such cases for prosecution.

5.1. Kenya National Human Rights Commission

The KNCHR has been campaigning for the entrenchment of a human rights and democratic culture in Kenya since its foundation in 1992.⁵¹ Kenya has not yet ratified the Optional Protocol of the Convention of Torture (OPCAT), but there are two legal frameworks in place enabling independent visits to places of detentions; respectively under the Prisons Act and the Kenya National Commission on Human Rights Act.⁵²

On 15 March 2020, the Head of Public Service released a directive indicating that public officials were to work from home during the pandemic. In response to this, the KNCHR announced a down-scaling of its operations. While the Complaints and Investigation Division and the Commission's toll-free lines and SMS platforms (which deals with concerns raised by members of the public) continued to function on a full-time basis, other divisions adopted a work-from-home approach.

A representative from the Commission noted three main activities of the Commission at the start of the pandemic. Primarily, the Commission undertook monitoring visits to 75 of the country's 130 prisons to observe how these facilities were managing the spread of COVID-19. In addition to the visits, a socio-economic survey was undertaken in prisons across the country to gauge the impact of the

⁵¹ Kenya Human Rights Commission, "Kenya National Human Rights Commission - About US," 2020, <https://www.khrc.or.ke/about-us.html>.

⁵² Kenya National Commission on Human Rights, "Implementation of the United Nation Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," 2022, <https://www2.ohchr.org/english/bodies/cat/docs/ngos/NCHRKenya41.pdf>.

pandemic. Secondly, the Commission held engagements and wrote a number of memoranda to various state departments including the Ministry of Education, Ministry of Labour, Consumer Protection Agency, the Inspectorate General of Prisons as well as the Judiciary. A number of issues were addressed, including the management of COVID-19 cases, the brutal enforcement of COVID-19 regulations by police as well as concerns regarding price gauging.

In the third place, the Commission produced at least three reports highlighting issues such as the country's overall COVID-19 preparedness, the inadequate supply of sanitisation products, the state of places of detention and human rights violations during the COVID-19 pandemic. In the report "Pain and pandemic: Unmasking the human rights in Kenya in the containment of COVID-19 pandemic" an emphasis is placed on the monitoring that the Commission undertook with regard to the enforcement of COVID-19 measures.⁵³ In the report, the Commission documents ten cases of loss of life and 87 cases relating to inhuman and degrading treatment by law enforcement officials. In the report entitled "Wanton impunity and exclusion a report based on human rights violations amid COVID-19 in Kenya" the Commission compiled the observations of grassroots partners from 27 counties on the human rights impact of the pandemic.⁵⁴ Four main issues stand out: (a) degrees of preparedness and nature of responses to the pandemic at all levels; (b) responses by the state security and administrative agencies; (c) inclusion and accountability in the key decisions and facilities related to COVID-19 and (d) other emerging human rights and governance issues. In the report "Changing times: COVID-19 and access to justice in Kenya", the focus is on the protection of legal rights of people to continue to enjoy access to justice despite the presence of the pandemic.⁵⁵

5.2. Independent Policing Oversight Authority

Kenya's Independent Policing Oversight Authority (IPOA) oversees the Internal Affairs Unit (IAU) of the police to independently verify that the internal police system deals with complaints against officers

⁵³ Kenya National Human Rights Commission, "Pain and Pandemic: Unmasking the Human Rights in Kenya in the Containment of COVID-19 Pandemic" (Kenya National Human Rights Commission, 2020), <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic>.

⁵⁴ Kenya Human Rights Commission, 'Wanton Impunity and Exclusion A Report Based on Human Rights Violations Amid Covid-19 In Kenya (April - August 2020)', 2020, <https://www.khrc.or.ke/publications/223-wanton-impunity-and-exclusion-a-report-based-on-human-rights-violations-amid-covid-19-in-kenya-april-august-2020/file.html>.

⁵⁵ Kenya National Human Rights Commission, "Changing Times: Covid -19 and Access to Justice in Kenya" (Kenya National Human Rights Commission, 2021), https://www.knchr.org/Portals/0/KNCHR_Covid-19_Access-to-Justice_B5.pdf.

fairly and effectively.⁵⁶ The IPOA representative present at the workshop pointed out that when the first set of restrictions were promulgated in March 2020, the police were classified as essential workers but IPOA, lawyers and paralegals were not recognised as such. In April 2020, the Kenyan High Court ordered the Interior Cabinet Secretary to include IPOA officials and lawyers among essential services after a petition was filed by the Law Society of Kenya.⁵⁷ IPOA also experienced a scaling down of operations, although there was never a vacuum in terms of the work being conducted as staff continued to work at the Head Office and regional offices. The representative from IPOA indicated that the Kenyan public was encouraged to contact IPOA through a toll-free number and digital means rather than physically going to the offices, although social distancing measures were in place.

6. Access to information and public awareness and engagement

The dissemination of COVID-19 information is important to ensure that the public is educated about the virus and are aware of their duties in response to measures. There was general consensus amongst workshop participants that the President and government officials held regular media briefings and kept citizens informed about COVID-19 preventative measures and updates through mainstream media (newspaper and radios and television) and social media. The government also raised awareness about the dangers of COVID-19 to children through educational cartoons. It was noted, however, that when updates on the virus were provided via television and other communication channels, people from disabled communities (the blind and those hard of hearing) were not considered in the method of conveyance. This prompted civil society organisations to draft a memorandum to government noting their grievance.

Workshop participants noted that the various counties made press releases on COVID-19 related data and village chiefs were educated on the dangers of the virus so as to relay this information in local dialects. While it appeared that the dissemination of information was adequate within the country, one workshop participant shared from his own experience that Kenyan citizens who were abroad at

⁵⁶ Independent Police Oversight Authority, “Independent Police Oversight Authority: What We Do?,” 2022, <https://www.ipoa.go.ke/>.

⁵⁷ Kenya Law, *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR (Kenya High Court April 17, 2020).

the start of the pandemic seeking to return home did not receive adequate information from Kenyan embassies and consulates regarding evacuations and returns to the country.

One of the biggest concerns raised by participants was the limited public participation in the development of COVID-19 measures. In March 2020 the Kenyan Senate passed a resolution to establish the *Ad-Hoc Committee on the COVID-19 Situation in Kenya*⁵⁸ to oversee actions and measures taken by the national and county governments in addressing the spread and effects of COVID-19 in Kenya.⁵⁹ The Committee engaged with various stakeholders such as civil society organisations, the education and religious communities regarding legislative, policy and other interventions that the government should consider when addressing the pandemic, and submitted progress reports with recommendations to the Senate and the National Emergency Response Committee on Coronavirus (NERCC) which was established by President Kenyatta to manage the COVID-19 situation in the country.⁶⁰ In compliance with constitutional provisions on public participation,⁶¹ the *Ad-Hoc Committee* invited civil society organisations and members of the public to make written submissions on the COVID-19 situation and some 88 submissions were received.⁶² However, it appears that besides this initiative, there were no other opportunities for public participation.

7. Innovative, effective and efficient responses to COVID-19

7.1. A range of responses

The general sense stemming from the workshop was that although there were a number of challenges in its implementation of COVID-19 restrictions, the Kenyan government did the best that it could, considering the unprecedented nature of the pandemic. It was noted that there is a need to have a multi-agency approach including civil society organisations, medical institutions, and the education

⁵⁸ “Ad-Hoc Committee on COVID-19 (2020) First Progress Report” (Kenya Senate Ad-hoc Committee, April 7, 2020), <http://www.parliament.go.ke/sites/default/files/2020-05/Senate%20Ad%20Hoc%20Committee%20on%20COVID19%20-%201st%20Progress%20Report%20%26%20Annexures.pdf>.

⁵⁹ “Ad-Hoc Committee on the COVID-19 Situation in Kenya: Third Progress Report” (Kenya Senate Ad-hoc Committee, April 28, 2020), <http://parliament.go.ke/sites/default/files/2020-05/Senate%20Ad%20Hoc%20Committee%20on%20COVID19%20-%203rd%20Progress%20Report.pdf>.

⁶⁰ Parliament of Kenya <https://www.facebook.com/ParliamentKE/posts/the-senate-ad-hoc-committee-on-covid-19-pandemic-chaired-by-nairobi-senator-john/1558688134312398/> (Accessed 28 March 2021).

⁶¹ Republic of Kenya, “The Constitution of Kenya,” § 18 (2010), <http://kenyalaw.org/kl/index.php?id=398>.

⁶² “Ad-Hoc Committee on COVID-19 (2020) First Progress Report.”

sector in dealing with a pandemic rather than leaving it to the criminal justice sector to handle. The workshop participants shared some innovative, effective and efficient initiatives that were undertaken by civil society organisations and aid agencies to ameliorate the negative impact caused by restrictions.

These include:

- Community-led initiatives such as dialogues focusing on human rights sensitisation as well as the provision of psycho-social support.
- The reporting and following up on human rights violations by civil society organisations during the pandemic.
- Provision of legal aid assistance through paralegals and pro-bono lawyers.
- The provision of food relief, medical assistance as well as masks and sanitizers to low-income earning communities by aid agencies such as the Red Cross Society. The organisation also provided cash grants to 915 pregnant women and mothers with children under five in Taita Taveta and Isiolo County for ante and post-natal appointments and child immunisations.⁶³
- The Red Cross Society created zones where inmates found with COVID-19 could be quarantined.
- The collaboration between the Law Society of Kenya, CSOs and paralegals providing legal aid and assistance.
- The Kenya Law Society reduced the fees for Continuous Professional Development Studies which advocates are subjected to before getting the renewal of practicing certificates. The rates normally range from Ksh 2000-5000 (US\$ 17- US\$ 43), but this was reduced to Ksh 1500 (US\$ 13) and a two-months grace period was given to those who failed to pay on time.

Workshop participants noted the importance of developing guidelines to guide possible future pandemics and emergencies. In 2020 the *Senate Ad-Hoc Committee on the COVID-19 Situation in Kenya* drafted the Pandemic Response and Management Bill which addresses various socio-economic issues related to pandemics and offers a legal framework for coordinating and managing responses, activities and temporary measures and relief during future pandemics.⁶⁴

From a preliminary reading of the Bill, there are several justifiable provisions. However, some provisions may provide government powers of over-reach as they are vague and pose a risk to fundamental rights and freedoms for an indefinite and unspecified duration.⁶⁵ The Senate has since 2021 passed the Bill with amendments and referred it to the National Assembly for debate; and if successful, it will be forwarded to the President for approval and enactment.

⁶³ British Red Cross, "Humanitarian Aid in Kenya: Emergency Response to Covid-19, Locusts and Floods," 2021, <https://www.redcross.org.uk/about-us/what-we-do/international/kenya>.

⁶⁴ Republic of Kenya, "Pandemic Response and Management Bill" (2020), <https://mman.co.ke/sites/default/files/corona/Pandemic%20Response%20and%20Management%20Bill%202020.pdf>.

⁶⁵ Article 19, "Kenya: Measures to Tackle Covid-19 Pandemic Must Not Violate Human Rights," January 19, 2021, <https://www.article19.org/resources/kenya-measures-covid-19-must-not-violate-human-rights/>.

7.2. Good Practice for future use in the criminal justice sector

The workshop participants shared some good practice initiatives introduced by the government in the criminal justice sector that can be used in the future. They noted that the NJAC implemented various initiatives in the justice sector to decongest prisons and police cells. For instance, the files of petty offenders who were in prison for less than six months and others who had less than six months to complete of their sentence were presented to the High Court for sentence review and this led to the release of some 4 800 inmates, significantly helping to decongest the country's prisons.⁶⁶

Moreover, the NJAC issued directives on 1 April 2020 after meeting with various criminal justice stakeholders and reflecting on the challenges experienced, it was directed that the use of free bail and bond be widely implemented to persons unable to pay cash bail and those who had remained in cells for a long time.⁶⁷ The directives also noted that petty offenders should not be held at police stations for more than 24 hours, and should be released either on cash bail or free police bond.⁶⁸ Moreover, magistrates were also requested to review and revise bail and bond terms for petty offenders in prison in order to facilitate their release from prisons.⁶⁹ This was to ensure that the justice system does not get bogged down with minor cases.

A representative from the Street Hawkers Association noted that the City Court in Nairobi suspended their handling of petty offence cases as the police station was instructed to deal with such cases. As a result, people were released on a warning instead of being detained. It was reported that in the city centre of Nairobi, if a hawker was arrested for a COVID-19 related violation, they were required to fill in a form and were given an opportunity to be heard at station level. In most cases that were COVID-19 related, hawkers were released on warning.

Another efficient response to the pandemic was the introduction of virtual courts during the pandemic resulted in lawyers and clients not needing to travel and ensured that courts continued to operate. This was a good initiative as it allowed people to access justice during a crisis. Special courts were also created in Kasarani and other counties to prosecute cases of COVID-19 violations and this allowed for swift and efficient justice. Moreover, the virtual justice centres and gender-based violence desks set up during the pandemic allowed people to contact a toll-free call centre to lodge complaints. The

⁶⁶ "Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya."

⁶⁷ "Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya."

⁶⁸ "Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya."

⁶⁹ "Statement on Justice Sector Operations in the Wake of the COVID -19 Pandemic – The Judiciary of Kenya."

system of electronic filing of cases (e-filing system) introduced during the pandemic is a good practice as it prevented people from physically filing or registering cases.

The Judiciary also engaged the police service to advise them, where possible, to handle minor family disputes through alternative dispute resolution methods instead of arresting people. This has seen the rise of the Alternative Justice System Jurisprudence in Kenya, which has now been mainstreamed and is a recognised dispute resolution mechanism.⁷⁰ There has also been increased efforts by the government to digitalise the criminal justice system since the onset of COVID-19. With the assistance of the Rwandan government, there has been a move from an analogue to a digital system of criminal cases. The new system will enable criminal justice actors (court officers, investigating officers, Directorate of Public Prosecutors, and police) to access services and record information on a holistic integrated portal. The effectiveness of the system has not been tested yet, but the digitisation process will better assist the criminal justice system in pandemic preparedness. While a workshop participant noted that the system has enabled accessibility, efficiency and time management in the cases that court users are handling; it is important to develop guidelines for usage and the system should be strengthened to avoid manipulation.

8. Conclusion

The stakeholder engagement workshop held in Kenya offered a platform for civil society and officials from oversight institutions to discuss the socio-economic impact of COVID-19 and its impact on criminal justice and human rights. Like many other countries that enacted special measures to curb the spread of the virus, the Kenyan government instituted a curfew as well as county-specific lockdowns. A number of issues were raised in the workshop relating to the socio-economic impact of the pandemic and related restrictions as well its impact on the criminal justice sector. This report highlighted some of the lessons to be learnt and provides good practice examples particularly as far as the criminal justice system is concerned.

The COVID-19 vaccination roll-out is a new challenge in the country as there appears to be vaccination hesitancy amongst the population (on 31 March 2022, only 16% of the population had been fully vaccinated).⁷¹ For those willing to be vaccinated, there have been reports of bribery, line cutting and

⁷⁰ Judiciary of Kenya, “Alternative Justice System: Framework Policy,” 2020, https://www.unodc.org/documents/easternafrika/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf.

⁷¹ “COVID-19 Tracker: Kenya,” *Reuters*, March 31, 2022, <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/kenya/>.

corruption by the more affluent to the detriment of the poor and marginalised.⁷² Workshop participants reported that by March 2022, all prisoners in the country had been vaccinated.

The limited scope of public participation during the pandemic was detrimental not only because it resulted in a top-down approach in decision-making, but also because it offered the legislature an opportunity to pass other laws with limited input from the public. For example, in August 2021 the Nairobi County passed the Public Nuisance Act with very limited participation from civil society. The Act seeks to provide for the control of public nuisances and empower the county to take all lawful necessary and reasonably practicable measures for the maintenance of the county at all times in a clean and sanitary condition.⁷³ Unfortunately, the provisions of this act have a bearing on the poor and marginalised communities seeking to make a livelihood in Nairobi.

Kenya is one of the few countries in the region that have sought to introduce pandemic-specific law in the aftermath of the pandemic. The Pandemic Response and Management Bill proposes several justifiable provisions on disaster response and economic relief during a pandemic, yet, if not well managed, could provide the government a blank slate to limit fundamental rights and freedoms for an indefinite and unspecified duration which is not ideal.⁷⁴ The views from the stakeholder engagement workshop hosted in Kenya reaffirm the point that a criminal justice approach is not the appropriate response to a public health crisis. Instead, when dealing with a pandemic, it is important that the upholding, promotion and advancement of human rights should be a central focus of all government endeavours.

⁷² Wangari, “Kenya’s Chaotic COVID-19 Vaccine Roll out Exposes Rich-Poor Divide.”

⁷³ Republic of Kenya, “Nairobi City County Public Nuisance Act” (2021), <https://nairobi.go.ke/nairobi-city-county-public-nuisance-act-2021-signed-law/#:~:text=Kananu%20%E2%80%9CThe%20objective%20of%20this,a%20clean%20and%20sanitary%20condition.%E2%80%9D>.

⁷⁴ Republic of Kenya, Pandemic Response and Management Bill.

Appendix: Stakeholder Participation List

The Stakeholder Engagement Workshop was attended by 25 representatives from the following organisations:

1. Africa Criminal Justice Reform (ACJR)
2. Council of Governors (COG-Kenya)
3. Federation of Women Lawyers (FIDA-Kenya)
4. Haki Naurwiru Afrika
5. Independent Police Oversight Authority (IPOA)
6. Independent Police Oversight Authority - Internal Affairs Unit (IPOA-IAU)
7. International Justice Mission
8. Kenyan Judiciary
9. Kenyan Police Service Head Quarters
10. Kenya Prison Service
11. Kenyan National Commission Human Rights (KNCHR)
12. Kitua Cha Sheria
13. Kenya Law Reform Commission
14. Legal Resource Foundation Trust -Kenya (LRF)
15. Street Hawkers Association
16. The Kenyan Section of The International Commission of Jurists (ICJ-KENYA)
17. Witness Protection Agency (WPA)

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- ["Ad-Hoc Committee on the COVID-19 Situation in Kenya: Third Progress Report."](http://parliament.go.ke/sites/default/files/2020-05/Senate%20Ad%20Hoc%20Committee%20on%20COVID19%20-%203rd%20Progress%20Report.pdf) Kenya Senate Ad-hoc Committee, April 28, 2020. <http://parliament.go.ke/sites/default/files/2020-05/Senate%20Ad%20Hoc%20Committee%20on%20COVID19%20-%203rd%20Progress%20Report.pdf>.
- [Africa News. "Kenya: Protesters Clash with Police in Nairobi over Covid Curfews, Brutality."](https://www.africanews.com/2021/07/07/kenya-protesters-clash-with-police-in-nairobi-over-covid-curfews-and-restrictions/) *Africa News*, July 7, 2021. <https://www.africanews.com/2021/07/07/kenya-protesters-clash-with-police-in-nairobi-over-covid-curfews-and-restrictions/>.
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