



# Constitutionality of Criminal Procedure and Prison Laws in Africa

# Kenya

Report following the project's template

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

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

# Introduction

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

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

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

## 1. General information

### 1.1. Recent constitution-making history

In the 1990s, demands by civil society for good governance in response to illiberal politics and corruption-serving economic liberalisation eventually led to agitation for constitution-making,<sup>1</sup> which resulted in the Constitution of Kenya Review Act 1997. This legislation provided for the collection of public views on constitutional review, the drafting of constitutional proposals,<sup>2</sup> their consideration at

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<sup>1</sup> Willy Mutunga *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya 1992-1997* (SAREAT/Mwengo 1999).

<sup>2</sup> The Constitution of Kenya Review Commission tasked to draft the proposals published its report and proposed draft constitution in 2002.

a national constitutional conference,<sup>3</sup> followed by parliamentary enactment and presidential promulgation of a new constitution. This phase of constitution-making ended with rejection of a constitutional proposal in 2005.<sup>4</sup>

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

## 1.2. Judicial system and constitutional review

Judicial power is directly vested to the courts<sup>5</sup> under provisions that cement the judiciary's personal, institutional and financial independence.<sup>6</sup> The major institutional innovation is the apex Supreme Court, composed of seven judges.<sup>7</sup> The Chief Justice, who heads the system of courts, also presides in the Supreme Court, whose decisions are constitutionally binding on all other courts.<sup>8</sup> Judicial review remedies lie with the High Court which has original jurisdiction to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom guaranteed in the Bill of Rights.<sup>9</sup> The Court may make any order it deems fit for the fair administration of justice,<sup>10</sup> with appeals to the Court of Appeal and to the Supreme Court at the last resort. Institutional reform required by the 2010 Constitution has increased the number of judges<sup>11</sup> and dispersed court services.

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

To support the approach in which the rights and freedoms of citizens are fought for in the courts, article 22 protects the right of every person to institute High Court proceedings claiming a right has been infringed. This provision covers the rights of arrested and accused persons relevant to this study.

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<sup>3</sup> The national conference, popularly known as the 'Bomas conference', was convened during 2003 and 2004, with some 604 delegates.

<sup>4</sup> Fifty-nine per cent of voters rejected the proposal in a referendum held by the defunct Electoral Commission of Kenya.

<sup>5</sup> Art. 159(1).

<sup>6</sup> Art. 160(1).

<sup>7</sup> Art. 160(7).

<sup>8</sup> Art. 163(7)

<sup>9</sup> Art. 165.

<sup>10</sup> Art. 165.

<sup>11</sup> The Court of Appeal shall have not more than 30 judges and High Court not more than 150 judges. See section 3 of Judicature (Amendment) Act No. 10A of 2012, Kenya Gazette Supplement, 15<sup>th</sup> June 2012.

The 2010 Constitution grants standing to institute proceedings to any person or group acting on behalf of other persons, in their own interests or in the public interest.<sup>12</sup> If it finds an unjustified infringement of a right, the Court may grant any appropriate remedy, which adds teeth to the potential impact of article 22. It should be remembered that the courts have power to develop statutes to conform to the Constitution and they are not bound by any law other than the Constitution.

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

### 1.3. Overview of law enforcement

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

### 1.4. Relevant criminal justice system legislation

The following legislation is evaluated in the study:

- Criminal Procedure Code, Cap 75 Revised 2011;
- Evidence Act, Cap. 80 of 1963;
- National Police Service Act, Cap. 84 of 2011;
- Penal Code, Cap. 63;
- Prevention of Terrorism Act, No. 30 of 202; and
- Security Law (Amendment) Law, 2014.

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<sup>12</sup> Art. 22(2).

<sup>13</sup> Constitution 2010, art. 2(5) and (6).

<sup>14</sup> Constitution 2010, art. 163(7).

<sup>15</sup> Arts. 157 and 158.

<sup>16</sup> Arts. 243, 244 and 245.

## 2. Constitutionality of provisions relating to arrest

### 2.1. Policies leading to arrest

Potential constitutional background:

- **Non-discrimination:** Articles 24 and 49 of the 2010 Constitution prohibit discriminatory processes in relation to the enjoyment of rights of arrested persons. Since 2012, security related operations under legislation to prevent terrorism has led to the occasional arrests en masse of members of the Somalian community. The targeting is not specified by law; this is also the major ethnic group associated with the Al-Shabab armed group against which the Kenyan military has been engaged in armed conflict since 2012.
- **Principle of legality:** The act or omission must constitute a criminal offence at the time of the commission/omission; the principle is enshrined in article 50 of the 2010 Constitution.
- **Right to privacy:** The right is enshrined in the 2010 Constitution.

Potential legislative (non-)compliance:

- **Outdated offences:** The 2010 Constitution would invalidate political offences such as sedition, which at any rate have been removed from the statute books. The Penal Code continues to criminalise certain sexual acts between persons of the same sex and so-called acts against nature, which would be considered as outdated in other jurisdictions. There are very few actual trials in relation to such offences.
- **Provisions targeting the poor, mentally ill, immigrants or other vulnerable groups:** Illegal aliens are subject to arrest under the Penal Code and to expulsion if convicted. These provisions are used to harass members of the Nubia community in Nairobi and suspected alien Somalis and Ethiopians, through targeted arrest operations in neighbourhoods where they are known to reside.
- **Provisions on state surveillance:** State surveillance of communications is legalised under the Prevention of Terrorism Act. The statute has been justified under the limitation clause in article 24 of the 2010 Constitution. This law would exclude surveillance of individuals not engaged in criminal acts specified under terrorism legislation.

### 2.2. Rights during arrest

#### 2.2.1. Prohibition of arbitrary or unlawful arrest

Potential constitutional background: covered in narrative above.

Potential legislative (non-)compliance: covered in narrative above.



- **Who can arrest and for which acts or omissions?** Under the CPC, any person can conduct an arrest of any persons caught *in flagrante delicto* in relation to an offence under the Penal Code. A police officer can conduct a similar arrest. Only police officers and the mandated officers of specified legislative bodies such as the Anti-Corruption Commission may conduct arrests with warrants. So-called administrative *askaris* (local police) may be empowered to conduct arrests without warrants under the regulations of devolved counties for petty crimes under their jurisdiction, for example trading without licences or in non-designated markets. The courts may order police to arrest any individual for purposes of enforcing contempt of court orders.
- **Distinction between arrest with or without a warrant:** The CPC makes the distinction based on the severity of offences. Mostly, *in flagrante* suspects can be arrested on the spot for any offence without a warrant. Arrests made after policing investigations for serious crimes must be executed under warrant issued by the courts and specified ranks of the senior police. A police officer may have statutory authority to arrest a person without a warrant for a non-*in flagrante delicto* offence, for example under section 29 of the Children’s Act of 2010.
- **Distinction between flagrant and non-flagrant commission:** The distinction is made in the CPC. *In flagrante delicto* offences are acts that are observable in action. The CPC, however, permits the police to arrest an individual on reasonable suspicion that the individual is about to commit a crime, as a preventive measure.

### 2.2.2. Obligation of law enforcement to use reasonable force

Potential constitutional background: covered in narrative above.

- Right to be free from torture;
- right to life; and
- specific provisions as yet undiscovered.

Potential legislative (non-)compliance: covered in narrative above.

- **Legal regime on the use of (reasonable) force in general:** The National Police Service Act and its subsidiary regulations.
- **Use of force during public protest:** Under the National Police Service Act, police may use reasonable force to disperse and control crowds. Moreover, the same statute obligates organisers of meetings where a large number of people may assemble to obtain prior licenses for such meetings.
- **Use of drones:** This issue has not been regulated as such. However, the National Police Service Act permits the police to use weapons to secure arrests and prevent escape, and drones may qualify as weapons for this purpose. This is a speculative reading of the provisions regarding the use of force.

### 2.2.3. Right to be promptly informed of the reasons for arrest

Potential constitutional and legislative (non-)compliance may include provisions on the language used (a language the arrestee understands).

- **The information provided:** Article 49 stipulates the information regarding reasons for the arrest as well as information on rights, including the right to remain silent.
- **The time-frame within which the information must be provided:** The wording in article 49 is 'promptly' but this includes a reasonable delay (judicial test). This provision omits the wording 'at the time of arrest' in article 9 of the ICCPR.
- **The wording used:** The wording should be in a language the arrested person understands but the precise words used are not specified. This is a gap in the statutory or regulatory follow-up.
- **The person providing the information:** The CPC only specifies a person (namely, the police officer in charge of station) to provide information when an arrested person is detained at a police station.

Article 49 of the 2010 Constitution has provided for informational rights in accordance with the ICCPR. Recent changes to the CPC have failed to elaborate on entitlements regarding when and where an arrested person may be informed and of the reasons for arrest and in which language. So far, there is still no authoritative judicial decision on the consequence of breaching informational rights during arrest.

#### 2.2.4. Right to conditional release before being brought into police custody

Right to be warned, to bond or to bail: covered in the narrative above.

Includes the analysis of spot fines:

- **Does it amount to a legal admission of guilt?** 'Spot fines' are not provided for by law. A person arrested *in flagrante delicto* is not obliged to pay any 'on the spot fine'. A payment may be made to secure release on bail or bond after arrest, but this is not equivalent to a penalty fine. 'Spot fines' are likely to be abused for corruption and are regulated as such in the regulations of the police.
- **If it amounts to a penalty, can it constitutionally only be imposed by a judge?** A judicial proceeding can only result in a penalty at the end of a hearing in which an arrested person is accused, charged and convicted. There is no provision in law for spot fines under the supervision of courts.
- **Right to appeal?** Anyone convicted of a crime has a right of appeal against the conviction or sentence or both.

#### 2.2.5. Right to remain silent

Covered in the narrative above.

#### 2.2.6. Privilege against self-incrimination

Covered in the narrative above.

### 2.2.7. Right to privacy

With specific reference to search powers (on person and premises), the police regulations that provide for personal searches to be gender- and age-sensitive precede the 2010 constitutional guarantee of privacy; such procedural rules also guarantee the integrity and security of the person and prohibition of degrading treatment (article 29). An arrested person has an article 49 right to communicate with his or her advocate and that communication is privileged under the Evidence Act. Note that privacy is not spelt out in the statutory framework for arrested persons, many of whom often are held together in overcrowded police cells. There is no explicit rule that guarantees a right of privacy within police stations.

### 2.2.8. Right to be informed of one's rights

Covered in the narrative above.

## 2.3. Right to redress following rights violations

The focus here remains exclusively on arrests.

Article 49 of the Constitution does not explicitly recognise a right to compensation for wrongful arrest and detention, even though it domesticates the ICCPR, which recognises this right in article 9(5). Article 22 of the Constitution provides for remedies for violations of all the rights guaranteed in the Constitution. A claim for violation of article 49 rights can be pursued under article 22. The Bill is bringing on all persons and all organs of states.

The National Police Service Act provides for the compensation of persons injured as a result of unreasonable, excessive and disproportionate use of force during arrest. This also covers compensation of claimants where the force results in fatality. The cases are reviewed by an administrative body and claimants may seek compensation in ordinary civil suit.

## 2.4. Regime applicable to children

Potential constitutional background: covered in article 52 of the Constitution.

- Children's rights in the CJS: The Children's Act qualifies the CPC in relation to arrest and prosecution of minors (those under 18). All criminal offences involving minors, save for murder and offences committed jointly with an adult, are within the criminal jurisdiction of children's courts (section 184).
- **Age of criminal capacity:** This is not provided for in the Constitution.

Potential legislative (non-)compliance:

- **Specific regime on the arrest of children:** The Children's Act of 2010 (ss. 184-193) and subsidiary regulations under section 194. Amendments are pending under a 2014 Bill.

- **Age of criminal capacity:** There is no criminal responsibility whatsoever below the age of eight years and no criminal responsibility below the age of 12, unless it is proved the child had capacity to know he or she ought not to conduct the act or omission (s. 14 Penal Code).
- **Alternatives to arrest prior to age of criminal capacity:** Children below eight years cannot be arrested. Children between eight and 12 may be arrested, but the statute does not stipulate any arrest procedures. It contains procedures related to criminal trials of minors under 18 years of age.
- No alternatives to arrest are provided for children who are beyond the age of criminal capacity.

### 3. Constitutionality of provisions relating to custody prior to first court appearance

This section refers to all forms of deprivation of liberty.

#### 3.1. Outline of the different places of custody prior to first court appearance: police, secret services, special units, etc.

Under the CPC, arrested persons can only be detained at a gazetted police station, which includes a police post and an administration police post normally situated in remote localities.

The National Intelligence Service Act authorises secret-service officers to detain an arrested person temporarily in their offices. Detention of arrested persons for offences under the Penal Code must always be under the supervision and jurisdiction of a police officer designated by law.

#### 3.2. Rights in custody prior to first court appearance

##### 3.2.1. Prohibition of arbitrary or unlawful detention

This relates to the right to be detained in an official place of detention. It is covered by article 49 of the Constitution and by the CPC. The place of detention is a police station. An arrested person must be taken promptly to the nearest police station with jurisdiction.

##### 3.2.2. Right to be presumed innocent until proven guilty

Covered in article 49 and in the Evidence Act.

##### 3.2.3. Right to be promptly charged or released

Who has the power to charge?

The Director of Public Prosecutions (DPP) has jurisdiction to prosecute. To facilitate that power, the DPP can direct the police to investigate cases and conduct arrests. The police charge suspects only with the prior authorisation of the DPP.

A private citizen has power to charge a person and to prosecute, by way of the private prosecution right surviving in common law. The Constitution empowers the DPP to take over any private prosecution and continue or discontinue it.

### 3.2.4. Right to conditional release

Covered in the narrative above. An arrested person has a right to police bond. Elaborate procedures for payment and security of police bonds are provided in the CPC. The Constitution emphasises the liberty of the arrested person unless there are compelling circumstances for custodial detention, but the CPC is more focused on securing the strength of police bonds.

### 3.2.5. Right to be promptly brought before a judge

**Ordinary length of custody:** The Constitution provides for first court appearance within 24 hours (article 49 and 50) or on the next immediate working day if there is an intervening weekend or public holiday.

**Possible extension (on what ground, by whom, which procedural guarantees, etc.):** Extension is granted by the court on the date of first appearance. (The courts have made different rulings on extension prior to first arraignment, with these rulings wavering between strict adherence to limit and ratification of reasonable delays.

**Special circumstances and regimes (terrorism offences, serious crimes, etc.):** Special extensions for terrorism-related offences are provided for in the Prevention of Terrorism Act (covered in narrative above). This was amended to 30 days, with renewed extensions by court order under a miscellaneous amendment act of 2014 (covered in the narrative above).

### 3.2.6. Right to remain silent

This is provided for in articles 49 and 50 of the Constitution. The Evidence Act does not specifically exclude evidence where the right to silence was not communicated, but an accused person can contest such evidence.

### 3.2.7. Privilege against self-incrimination

This is provided for in articles 49 and 50. Certain self-incriminating email correspondence may still be admissible as evidence after amendments to the Prevention of Terrorism Act (covered in the narrative above).

### 3.2.8. Right to communicate

**Right to communicate with legal representative and with family.** Article 49 guarantees the right of arrested persons to communicate with family and legal representatives.

**Does the law stipulate anything on how the family is notified?** No.

### 3.2.9. Right to legal representation

**Includes the right to access an ‘intermediary’.** Yes, under article 49. The CPC is silent on access to an ‘intermediary’ – the term is general enough to include legal assistance.

**Including legal aid at State’s expense – how is legal aid understood and under which conditions is it made available?** A new statute was enacted in 2015 providing for legal aid based on means testing. Legal aid will be provided through a scheme for state-funded legal representation in criminal and civil cases.

### 3.2.10. Right to an interpreter

Article 49 does not guarantee a right to an interpreter as such, but its wording can include an interpreter in terms of the right to communicate with ‘any person whose assistance is required’. However, there is as yet no authoritative judicial interpretation of article 49 to include an interpreter. The right to an interpreter is explicitly guaranteed in article 50 (fair hearing). There is no statutory right to an interpreter in police custody prior to first court appearance.

### 3.2.11. Right to be separated from different categories of arrested persons

This is guaranteed under article 49 and operationalised for detained arrested persons prior to first hearing – they are held in police custody. After first hearing, accused persons are detained separately from convicted detainees under the Prisons Act.

### 3.2.12. Right to safe custody

The Constitution does not explicitly guarantee a right to safe custody. Such a right is implied in the general guarantee of article 29 (liberty of person, prohibition of violence and inhumane treatment). A police station is considered under statute to be a security zone, subject to various restrictions to secure its location, to prevent escapes, to secure weapons and ammunition, and so on. The CPC specifically requires arrested persons to be detained in (safe) police custody.

### 3.2.13. Right to humane conditions of detention

Conditions of detention prior to first court appearance primarily refer to access to food and health care (and who provides this).

### 3.2.14. Right to be informed of one’s rights

A person arrested and detained in police custody has a right to be informed of article 49 and article 50 rights. These informational rights are only partially elaborated in the CPC, which only requires a police

officer in charge of the station to inform the arrested person of conditions of police bond or bail, the timing of the first court appearance and the charges to be answered at that appearance.

### 3.3. Right to have one's case summarily decided upon before the first court appearance

**Which judicial oversight is exercised over this process? Can it be appealed?**

The 2010 Constitution does not provide for summary proceedings, but guarantees fair administrative and judicial procedures and the right to speedy trial. Summary proceedings are mostly regulated in judicial rules of procedure.

The CPC permits plea bargain agreements in which arrested persons negotiate penalties in exchange for various forms of cooperation with the prosecution. It is possible in the CPC for plea-bargain agreements to be entered prior to the first court appearance. As discussed above, plea agreements are subject to the acquiescence of the courts but they are supervised by the DPP rather than the courts.

### 3.4. Rights of foreigners

These include the right to access consular assistance, the right to extradition, and the right to refuse extradition. The Constitution is silent on such rights, but they are covered under relevant statutes concerning diplomatic and consular law, aliens law, and extradition.

### 3.5. Right to redress following rights violations

The focus here remains exclusively on custody prior to the first court appearance.

The Constitution is silent in article 49 on compensation in the event of unlawful custodial detention following arrest and before arraignment. However, violations of all the guaranteed rights are remediable under article 22.

### 3.6. Complaints and oversight mechanisms

The 2010 Constitution spells out the role of the police and its civilian oversight and accountability mechanisms. All police conduct during and after arrest, including during any custodial detention of arrested persons, is subject to the oversight of the Inspector General of Police and his or her oversight board. The provisions have been effected by statute, namely the National Police Service Act and the National Police Oversight Act. Any aggrieved person or relation of such a person can file a complaint to the internal review mechanisms provided in the police statutes.

The external oversight is provided by the courts and the constitutional national human rights commissions.



### 3.7. Regime applicable to children

Article 49 of the Constitution does not explicitly deal with this specific question.

The detention in custody of arrested children is addressed by the Children's Act in terms of alternative custody under the care or supervision of court-appointed person(s).

## 4. Constitutionality of trial-related provisions

### 4.1. Universal trial-related rights

#### 4.1.1. Principle of legality

The act/omission for which the accused is tried must constitute a criminal offence at the time of commission/omission.

The following is covered in article 50 of the Constitution and the provisions of the Penal Code. A crime can only be defined under a written law, ie, statute. The common law crime of contempt of court, however, is undefined in statute, but arrests and prosecutions for contempt are only possible if ordered by the court.

#### 4.1.2. Right to be presumed innocent until proven guilty

This right is covered in article 50 and the presumption of innocence in the Evidence Act. It is the burden of the prosecution to prove guilt.

Certain amendments of the terrorism statute have partially transferred the burden of proof to accused persons as well as reducing the weight to the burden borne by the prosecution in relation to specific types of evidence (such as evidence obtained through spying).

#### 4.1.3. Right to be promptly charged or released

- **In a language that one understands (language and wording used):** Article 50 of the CPC requires formal charges to be in official court languages but the accused person has the right to a court interpreter.
- **In sufficient detail:** Article 50 does not provide the detail, but is provided in a 'charge sheet' in the schedules to the CPC. There is elaborate jurisprudence on the detail needed in charge sheets.
- **Timing of, and possible delay in, charge:** Article 50 provides for trial to commence 'without unreasonable delay', phrasing it is for the courts to interpret. The CPC does not specify the time-frame regarding when a person should be charged, except for summary trials under section 219, where, for offences not punishable by imprisonment longer than six months, the charge and trial should be within 12 months of the matter contributing to the charge. In practice, the duration taken by prosecution after the first charge and before trial is fixed by the court.

- **Transfer to prison possible only once charged:** Article 50 requires separate custodial detention for accused and convicted persons. Once arraigned, an accused is entitled to bail unless compelling reasons permit detention, in which case an accused is transferred into the custody of prisons commissioner under the Prisons Act.

#### 4.1.4. Right to challenge custody

##### **Under which conditions (non-bailable offences)?**

Article 50 guarantees a right to bail and to challenge reasons provided by the state to support of an application for custodial detention. There are no longer statutory non-bailable offences in Kenya.

#### 4.1.5. Right to remain silent

This right is provided for in article 50 of the Constitution.

The CPC recognises an option for a person to maintain silence when the charge is read out and after the prosecution closes its case. The Evidence Act recognises a presumption against adverse inference being drawn by the court from the exercise of a right to remain silent, but in some cases, the courts have permitted adverse inference to be made, provided nobody would be convicted solely on this inference.

#### 4.1.6. Privilege against self-incrimination

Article 50 of the Constitution guarantees privilege against self-incrimination.

The CPC disallows compulsion of accused persons to give testimony to the police, while the Evidence Act maintains an option to rebut and reject self-incriminating testimony provided by the arrested person where compulsion can be proved. However, CPC provisions on plea-bargain agreements leave the door open to self-incrimination as a bargaining chip in exchange for more lenient penalties.

The new 2014 prevention of terrorism rules permit self-incriminating communications to be adduced as evidence.

#### 4.1.7. Right to equality before the courts

This right includes the right to equality of arms and the right to trial by jury.

Technically, the Constitution does not guarantee equality of arms. It guarantees the presumption of innocence and sufficient, reasonable opportunities to prepare a defence. The Constitution has not provided for trial by jury.

The CPC is oriented towards facilitating police power in criminal proceedings. There is no statutory procedure for trial by jury. (Assessors may assist the judge in proceedings at the High Court for murder, but this is a limited court practice rather than an entitlement of right.)

#### 4.1.8. Right to be declared not competent to stand trial

There is no such right under the Constitution.

The presumption in the law is in favour of competence to stand trial unless the contrary can be proved. The Penal Code allows criminal responsibility to be evaluated in terms of mental capacity and waived if a person is unable to understand that his conduct is unlawful on account of mental health or tender age.

The CPC has provisions to conduct assessments of competence through medical examination (ss. 162-167). The court can declare a person incompetent to stand trial based on the expert evidence.

#### 4.1.9. Right not to be tried in absentia

Article 50 of the Constitution guarantees a right of the accused person and his or her legal representative to be present during trial, but its wording includes an exception that may be triggered by the accused person where the person's own conduct requires proceeding with trial in his or her absence. Moreover, article 50 guarantees the right of an accused to confront witnesses, to see the evidence prior to trial and to a record of the proceedings. Vindicating these constitutional guarantees would rule out trials in absentia where the accused's conduct is not the contributing factor.

The CPC authorises trial in absentia where the conduct of the accused necessitates it, so it is compliant with the letter of article 50. Section 203 of the CPC requires the appearance of both parties during plea-taking for trial in subordinate courts. Ordinarily, trial in absentia is not conducted for an accused person who has escaped the jurisdiction to avoid prosecution. Section 323 of the CPC entitles a convicted accused person to be heard before sentencing, requiring the person's appearance for this purpose, though an omission to grant audience does not invalidate sentencing proceedings.

#### 4.1.10. Right to be tried and sentenced in a public and open court

Article 50 guarantees a public trial before a court established by the Constitution. Article 50(8) permits a limitation of the right to a public hearing as is necessary to protect security, morality, public order and witnesses.

**Any general limitations (children, state security, etc.)?** There are permissible limitations (under art. 24 Constitution) in the statute books (Children's Act, Evidence Act) to protect the victim and witnesses and in the CPC itself (to disbar the media, and so on). Even then, the trial must be in a court established under the Constitution.

Trials related to offences under the Prevention of Terrorism Act may be partially closed to the media and public, with court approval, in order to protect witnesses and investigation methods and to

prevent accused persons sending out communications to real and potential accomplices. Closed trials in secret courts are not permitted by the Constitution nor by any statute.

In relation to both the trial provision and the sentencing provision, article 50 refers to a public 'trial' but does not define the term. The CPC provides that trial commences with the entry of a not guilty plea (s. 282) and ends with sentencing (s. 322). Both hearings and sentencing are part of 'trial', which should meet article 50 requirements for a public trial in a court of law.

The CPC used to distinguish procedures for trial and sentencing before the High Court and subordinate courts (part VI CPC) until amendments of 2007. Procedures for trials for murder before the High Court were repealed only in 2003. Any substantive differences in court procedures before the High Court are attributable to rules of procedures for appeals which are now the domain of the latter. Such rules are issued by the Chief Justice (for example, in s. 201 CPC) or the president of the High Court, but these judicial rules cannot contravene statute or negate constitutional guarantees.

#### 4.1.11. Right to an individualised trial

The right to an individualised sentence is excluded (see section 5.4.2. of this chapter).

The guarantees of article 50 of the 2010 Constitution are individual entitlements. They remain so when any individual is prosecuted as part of a group in common cause. The Constitution does not explicitly disbar joint trials, and the decision to try individuals jointly or singly is made by the constitutionally mandated DPP. Nothing in article 50 implies that a joint trial is ipso facto a denial of guaranteed rights to public hearing and fair trial before a court of law.

The CPC authorises joint trials only under section 136, which defines the instances in which joinder of charges and trial procedures is warranted. Thereafter it addresses hearings as an individualised procedure, including in relation to the prosecution's case, the defence and the submission of evidence in chief, defence evidence, evidence in reply and closing arguments. There are not separate and parallel procedures for joint trials, so the requirement is that each of the procedural rules are observed in respect of each of the accused persons in a joint charge and trial.

The CPC addresses conviction and sentencing as an individualised procedure.

#### 4.1.12. Right to legal representation

This includes the right to access an 'intermediary'.

Article 50 guarantees a right to legal representation, including at state expense.

Under section 193 of the CPC an accused person may be represented by an advocate of choice as of right. It makes no mention of legal aid. Legal representation at state expense is the subject of a new statutory scheme proposed under the Legal Aid Bill 2015.

#### 4.1.13. Right to an interpreter

Article 50 guarantees the right to an interpreter and to have one provided to indigent accused persons who do not understand the trial language.

The CPC is compatible. It requires an interpreter to be provided in open court under section 198, including to the legal representative if needed. However, interpretation of documents submitted as formal proof is at the court's discretion.

Section 167 of the CPC distinguishes instances where an accused person who is not insane does not understand proceedings, as distinct from their language, and provides for necessary protective measures.

#### 4.1.14. Evidence-related rights

These rights include:

- **Right to access evidence:** Protected in article 50. The CPC is compatible. Some barriers to evidence are now imposed by the Prevention of Terrorism Act.
- **Right to have access to adequate facilities to prepare one's defence:** Article 50 guarantee. In section 275, the court may on its own volition delay start of trial to permit an accused person to prepare for joint counts in the charge. During trial, the CPC is silent on access to facilities for preparation of one's defence.
- **Right to suppress evidence collected by means that violate fundamental rights or other illegally obtained evidence:** Article 50 protects an accused person from such evidence which may be excluded on a proviso that its use would prejudice fair trial. It seems prejudicial impact has to be proven to support exclusion. The Prevention of Terrorism Act waives the exclusion to some extent to protect surveillance methods.
- **Right to access record of trial:** Article 50 guarantee. The CPC is compatible – the statutory limitation is imposed where an accused pleaded guilty since an appeal is only permissible in this case to question the legality of sentencing.
- **Right to examine (and cross-examine) witnesses and evidence:** Article 50 guarantee. The CPC is compatible. There are some limitations under terrorism charges to protect the identity of certain witnesses.

#### 4.1.15. Right to privacy

Article 50 guarantees the right to a public hearing. There is no expectation of privacy within the public hearing. Article 50(8) permits closed hearings but does not list privacy as one of the grounds. Privacy, however, may be cited to shield victims and witnesses in certain cases, for instance under the Witness Protection Act and in trials involving minors. Court rules traditionally prohibit photography when court is in session.

#### 4.1.16. Right to be informed of one's rights

This right is addressed in article 50. The CPC is entirely silent on information of rights. It requires that an accused person is informed of the charge and the material facts as well as the evidence to give full opportunity to mount a defence.

### 4.2. Rights of foreigners

These include the right to access consular assistance, the right to extradition, and the right to refuse extradition. Article 50 is silent in this respect. The Constitution does not protect citizens and non-citizens from extradition. The rights are guarantees to all persons, which would include citizens and non-citizens. Similarly, the CPC refers to an accused person, presumably of any nationality. Aspects of criminal law enforcement may be dealt with under the separate law related to diplomatic and consular immunities.

### 4.3. Rights specific to the trial

#### 4.3.1. Right to a speedy trial

Article 50 requires trial to commence and end without unreasonable delay but does not impose any limitations on time. The CPC imposes a limitation on time – 12 months – with respect to offences that qualify for summary trials. There is a limitation concerning time to file appeals (s. 349).

#### 4.3.2. Protection against double jeopardy (non bis in idem)

This is guaranteed in article 50(2)(o) of the Constitution. The CPC permits this defence to be raised during the charge in the pre-trial stage.

#### 4.3.3. Right to compensation for malicious prosecution

Article 50 is silent on compensation for malicious prosecution, which would be a tortious liability claim. However, a victim of a violation of article 50 can seek recourse under article 24.

The CPC does provide for compensation through payment of costs in cases where an accused person is discharged or acquitted after trial on charges filed by a private prosecutor, in which case the costs are paid by the private prosecutor to the accused (s. 171(2)).

### 4.4. Rights specific to sentencing proceedings

Possible constitutional background: right to life, right to liberty and security of the person, prohibition of torture and other ill-treatment, prohibition of slavery and forced labour.

#### 4.4.1. Right to submit evidence in mitigation of sentence

A right to mitigate is not addressed in article 50, which does give an entitlement to a lesser sentence if the law has elevated punishment during the course of the trial.

Mitigation is addressed in the CPC but it is not a right. Omission to extend an opportunity for the accused person to address the court before sentencing does not invalidate the sentence.

#### 4.4.2. Right to an individualised sentence

Article 50 does not express this right, but it should flow logically from the individual guarantee to a fair trial, which ends with sentencing.

#### 4.4.3. Right to life

- **Is the death penalty allowed/mandatory and for which offences?** Articles 26 and 50 of the Constitution do not abolish the death penalty. Statutes permit the death penalty for treason, murder and robbery with violence at the discretion of the court, and statutes define how the penalty is carried out. There is no longer a statutory mandatory death penalty.
- **Can a sentence of life without the option of parole be imposed?** Article 50 does not address this issue; the Constitution grants the president a prerogative of mercy to remit sentences. The CPC does not address what sentencing review should be permitted. Life sentences are imposed, but conditions regarding review and remission are stipulated under the Prisons Act.

#### 4.4.4. Right not to impose unusual or degrading punishment as a sentence

This includes the prohibition of corporal punishment as a sentence (see section 10.2. for corporal punishment used in prison) and the right not to be imprisoned if the sentence was a fine only that was not paid.

Article 29 of the Constitution provides that no person may be punished in a cruel, inhuman and degrading manner. The terms are not defined. Article 51 provides that a person who is detained or imprisoned retains his or her constitutional rights, except to the extent a right is incompatible with the fact of detention and imprisonment. This imprecise language leaves the practices to be tested ad hoc.

Corporal punishment is not at all permitted. The imposition of a fine is always accompanied with an option of imprisonment in default of payment, and for some offences both fine and imprisonment may be imposed. The position is that Kenya's Constitution is too imprecise in its language to assess the validity of sentencing practices related to imprisonment and fines. For instance, a practice of imposing bail and fines at levels accused persons cannot possibly pay could be criticised as unfair in the context of fair trial, but there is no authoritative decision as such.



#### 4.4.5. Right to be sentenced to an appropriate facility, including a psychiatric hospital

This right is not guaranteed in the Constitution.

#### 4.4.6. Right to review or appeal one's sentence

Article 50 guarantees the right to review and to appeal, and muscles it up with a right to obtain a record of trial proceedings. The CPC is compatible, addressing procedures for review and appeal right up to the apex court.

#### 4.4.7. Right to a non-custodial sentence

There is no constitutional right to a non-custodial sentence. There is statutory provision for non-custodial sentences – communal service orders – in relation to defined minor offences.

### 4.5. Regime applicable to children

Article 52 of the Constitution and the Children's Act frame the application of criminal law and procedure on minors.

### 4.6. Right to redress following rights violations

This includes a right to compensation.

The focus here remains exclusively on the different stages of the trial: lengthy trial, malicious prosecution, and so on.

There is no right to compensation that is defined in terms of the different stages of trial. The generic remedy under article 24 applies to violation of all rights, including their specified entitlements.

### 4.7. Impartiality and independence of the courts

See section 2.3.

### 4.8. Jurisdiction/competence of courts

See section 2.3.

The Constitution entitles a person to a fair trial in a court established under the Constitution. The Judicature Act establishes the hierarchical competence of courts in the criminal justice system. For the CPC, hearings in the first instance are the jurisdiction of subordinate courts, which have three tiers.

Appeals are heard from the highest subordinate court to the High Court and the Court of Appeal. The Supreme Court Act regulates the apex court's appellate criminal jurisdiction (on questions of law).

## 5. Constitutionality of detention-related provisions

### 5.1. Universal detention-related rights

#### 5.1.1. Right not to be arbitrarily or unlawfully detained

Specific provisions addressing the unlawful detention of sentenced prisoners are dealt with in section 6.5.1.

Article 29 of the 2010 Constitution guarantees the right to personal liberty and security so that no person may be deprived of freedom arbitrarily or without just cause (art. 29(a)) or detained without trial (art. 29(b)) except during a state of emergency (subject to article 58). This is a negative obligation on the state and on all persons (the Bill has vertical and horizontal application). Article 29 does not impose any positive duty on anyone concerning lawful detention.

Article 49 guarantees an arrested person non-custodial detention but does not specify the location of a custodial detention or imprisonment. However, the relevant specification is done in the CPC and the Prisons Act and, to a limited extent, the anti-corruption and anti-terrorism statutes.

Article 49 forbids detention of an arrested person where the charge would not result in more than six months' imprisonment in the event of a conviction.

The wording in article 29 forbids detention that is 'arbitrary' and therefore not permitted by any law or ultra vires legal powers.

Article 47 guarantees the right to fair administrative action. Decisions by police and prison authorities concerning conditions in detained persons fall within the remit of this protection.

#### 5.1.2. Right to be informed of the reasons for one's detention

Under article 49 of the Constitution, an arrested person must be informed of the reason for arrest and of his or her rights, including a right to remain silent. The CPC reinforces the right to be informed of the reasons for custodial detention in a police station after arrest. That information must be provided at the relevant police station by the specified police officer.

Article 29, which permits detention without trial during an emergency, refers to article 58, which requires parliamentary and judicial scrutiny of the declaration of emergency and measures thereunder, but does not specify any right of a detainee to be informed of the reasons for detention. The right to *habeas corpus* continues to apply, providing the avenue for reasons to be given.

### 5.1.3. Right to challenge one's detention

The right to be promptly brought before a judge to challenge one's detention is guaranteed through the writ of *habeas corpus* (art. 25) and article 51(2). The CPC provides for procedures related to *habeas corpus* orders.

For sentenced prisoners:

- **Right to suspension of sentence:** This is not a constitutional right under article 51. Sentences are imposed at the discretion of the judicial officers – there are no mandatory sentences, including suspension of sentence.
- **Right to pardon:** This is not a constitutional right but a privilege which may be granted by the president exercising discretionary powers under the prerogative of mercy. A statute regulates the procedure for applications for this discretionary remedy.
- **Right to parole:** This is not a constitutional right under article 51. Convicted prisoners may apply for review and early conditional release through the Prisons Act.

Under article 50, a convicted prisoner has a right to apply for a new trial when new evidence comes to light.

### 5.1.4. Right not to be detained for civil debt

This right is guaranteed by article 50(n) – a person can be tried and convicted only for conduct that was a criminal offence at the time it was committed.

### 5.1.5. Right to family visits

Article 51 requires legislation on rights of sentenced convicts that are humane and consistent with the fact of imprisonment. The Prisons Act allows family visits.

### 5.1.6. Right to legal representation during detention (including post-sentence)

This right is only available under article 50, which is concerned with assistance during hearings that is integral to the fairness of the proceedings. There is no provision for intermediary assistance after sentencing unless the detained person is involved in a new hearing or appeal. The case is similar with legal aid entitlement.

### 5.1.7. Evidence-related rights

- **Right to access one's case files (throughout all stages of detention):** This is a right of an 'accused person' connected only with purposes of appeal. The right may be limited in cases of summary trial for minor offences (art. 50(5))
- **Right to have adequate facilities to prepare one's defence (for PTD and appeal):** The right to fair hearing in article 50 does not distinguish appellate hearings. Rights are enjoyed provided there is a hearing, whatever its nature.

### 5.1.8. Right to be separated from different categories of detainees

Article 50 preserves the right to separation before sentencing. Separation is maintained by the Prisons Act.

### 5.1.9. Right to safe custody

The constitutional basis for this right may be found in the right to be free from torture and other ill-treatment. However, this is a speculative interpretation not supported by any authoritative Kenyan judicial decision.

The right includes:

- **Right of classification, implying detention with 'like-minded' inmates:** This may be regulated under subsidiary regulations in the Prisons Act.
- **Prohibition of corporal punishment as a form of discipline or punishment:** Corporal punishment is prohibited by the Constitution and by statute.
- **Prohibition of extended solitary confinement:** This is regulated by the subsidiary regulations made by the Commissioner of Prisons or responsible minister. 'Extended' here entails an administrative decision, and under article 47 of the Constitution administrative review remedies may be pursued against the decisions of the prison authorities that unfairly infringe on personal rights, particularly if the impairment is arbitrary and discriminatory.

### 5.1.10. Right to humane conditions of detention

The constitutional basis for this may be found in the right to be free from torture and other ill-treatment. The right relates to:

- access to food, health care, choice of clothing (uniform or not);
- access to programmes and services preparing the inmate for release (whether in PTD or as sentenced prisoner); and
- special measures for inmates with mental or physical disabilities.

In general, the Constitution has directed in article 51 that parliament enact provisions dealing with humane treatment. Currently, these provisions are found in the Prisons Act and its subsidiary regulations and in the Persons Deprived of Liberty Act of 2014. Article 51(2) of the Constitution on humane provisions does not itself confer individual rights. The provision in article 51(1) qualifies the enjoyment of constitutional rights to take account of the 'fact' of imprisonment, hence the facts have to be assessed prior to analysis of whether there is an infringement. This provision does not confer an express right to humane prison conditions, but the duty to make such conditions present implies a right to administrative review under article 47.

#### 5.1.11. Right to be informed of one's rights

There is no provision post-sentencing regarding information on rights. The informational right in articles 49 and 50 is pre-sentencing and applies whether a person is detained or not, provided he or she is arrested and subsequently charged. The right to information on reasons for detention (not constitutional rights) applies in article 49 if custodial detention is imperative according to the situation.

### 5.2. Rights of foreigners

There are no constitutional provisions as such.

### 5.3. Right specific to pre-trial detention

#### 5.3.1. Right not to be detained awaiting trial

- **PTD is the exception** rather than the rule; as covered in article 49, bail should be the norm and pre-trial detention requires compelling reasons to convince the court.
- **Grounds for detention** are clearly defined in either law or authoritative jurisprudence; grounds for detention rather than bail have been partly defined in the CPC and *in lex specialis* for specific offences such as terrorism, trafficking and money laundering. (See discussion in the narrative above.)
- **Right to automatic or regular review of PTD:** Detention terms including when to review is within the discretion of the court (CPC as amended by Miscellaneous Amendments Act of 2014 – see the narrative above).
- **Length of PTD** is not specified in the Constitution, but different statutes provide different periods depending on the offence.
- **How has the reasonableness of extended detention been interpreted by the courts?** The test of reasonableness has been substituted in the limitation clause of the 2010 Constitution. Limitations have to be necessary and proportionate. The detention as opposed to bail order is regulated by proportionality. So far there is no authoritative decision on proportionality of detention orders relative to right to bail/bond.

## 5.4. Rights specific to detention while under appeal: Right not to be detained while the case is heard on appeal

- **Detention while waiting outcome of appeal** is the exception rather than the rule; this is not a constitutional guarantee. The CPC provides for bail pending appeal at the discretion of the courts.
- **Grounds for detention are clearly defined in either law or authoritative jurisprudence** are not constitutionally secured, but statutory provisions of the CPC permit bail hearings pending appeal. The Court of Appeal has jurisprudence on bail pending appeal that precedes the 2010 Constitution.
- **The right to automatic or regular review of detention** is not constitutionally guaranteed. A right to administrative review implies discretionary remedies rather than review as of right. Hence, review terms are fixed by judges, not by the parliament via statute. There is a duty on courts (CPC provision) and prison authorities (Prisons Act) to submit sentencing records to the executive (the concerned ministry) for administrative and policy oversight. The executive has no power to overrule sentences outside the presidential prerogative of mercy.
- **The right to bail while on appeal** is not constitutionally guaranteed with specific reference to appeals.
- **Maximum duration of appeal set in law:** No maximum or minimum dates are fixed by law for bail release or custodial detention in relation to appeal. This is left to the courts.

## 5.5. Specific rights of sentenced prisoners: Prohibition of unlawful detention

This includes:

- **Right to be released on the expiry of the sentence or granting of parole:** This is not provided for by the Constitution.
- **Accurate and comprehensive keeping of prison records to guarantee the certainty of one's sentence:** This is not required by the Constitution but by the Prisons Act and the Borstal Institutions Act (concerning juvenile detainees).

The Constitution does not explicitly guarantee a right of release upon the expiry of sentence served or to parole. Presumably the right to *habeas corpus* should cover all cases of unlawful and arbitrary detention. The relevant statutory rights regarding completion of sentence tariffs and parole are provided in the Prisons Act and are subject to administrative and judicial review. The Commission of Prisons commits persons to detention only based on a court order. Magistrates are empowered by the CPC to regularly visit prison stations in their jurisdiction where they may entertain valid complaints *suo moto*.

## 5.6. Right to redress following rights violations

This includes a right to compensation.

The focus here remains exclusively on the different stages of detention: unlawful detention, lengthy PTD, and so on.

The Constitution does not specify the stages of detention against which infringements of rights may be assessed. Any person seeking an article 25 remedy needs only to specify the provision of the Constitution infringed by the facts complained of. Nor are the procedural rules specified in terms of staging complaints in accordance with the iterative phases of criminal justice procedures.

## 5.7. Oversight and complaints mechanisms

The 2010 Constitution mandates the courts (High Court to Supreme Court) to protect constitutional rights by providing effective remedies in cases of unjustifiable infringements. It also creates a human rights commission to independently oversee rights and investigate individual complaints. The Constitution requires parliament to create a legislative framework to give effect to certain rights (for example, rights of children or humane treatment of prisoners) or to operationalise human rights oversight mechanisms (such as courts, the human rights commission, and civilian oversight over police).

Arrested and accused persons can animate courts to vindicate their rights. They may also file complaints before the human rights commission. Sentenced prisoners may move to court for judicial review of administrative decisions of prison authorities.

## 5.8. Regime applicable to children

Regarding the imprisonment of mothers and their babies, article 52 is rather general but the Children's Act defines the applicable regime. The subsidiary regulations of the Prisons Act also respond to the imprisonment of mothers with infant children.

## 5.9. Impact of detention on all other fundamental rights

Constitutional and/or legal provisions on civil disabilities are imposed following sentencing or after sentence was served (and for certain offences). The disabilities relate to the right to vote, exclusion from certain professions, prohibition of access to certain socio-economic rights or services, and so on.

Article 51 has subjected the enjoyment of constitutional rights to the facts of detention. Detention therefore has a negative impact on most rights, save those that are absolute – freedom from torture, *habeas corpus* and the right to fair trial (art. 25).



## 6. Conclusion

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

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

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

## 7. Recommendations

- Legislation which is required under article 50 and article 51 should be enacted, bearing in mind the intention to give effect to the letter and principles of the Constitution regarding the promotion of rights.
- Statutory enforcement of rights of persons in criminal justice should strengthen the payment of compensation for violations as a cost to state organs to incentivise better compliance.
- Legislate procedures to operationalize the right to legal representation where its unavailability would result in substantive injustice.
- Legislation on humane conditions of custodial detention, including for convicted prisoners and incorporating human rights instruments such as UN guidance on minimum standards, should be expedited.
- Given the trend in statutes to obscure rights while invoking limitations on the grounds of national security, more reliance should be placed on courts to develop authoritative interpretation of rights against which statutes could be gauged. Until that stage is reached, assessments of incompatibility must remain highly tentative.
- Amend the arraignment procedures to enable confirmation that an arrested person was informed of his or her rights by authorised arresting officers under a written certification.
- Legislate penalties where courts acquit or dismiss evidence on account of rights violations, not only payment of compensation.

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