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# Policing in Kenya during Covid-19: Between humanity and status-quoism

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The very motto of the Kenyan police, *Utumishi kwa wote* ('service to all'), depicts not only the aspiration of these uniformed forces, but also the very basis of their self-view, and even more so, their self-perceived entitlements to that view... - Sipalla and Lewela<sup>1</sup>

## Abstract

*Kenya's policing history has for the longest time been partisan to the ruling regime. This has created a culture of brutality and disdain among members of the Kenya Police, towards members of the public whom they ought to protect and serve. Although the National Police Service Standing Orders provide that police officers shall be committed to the welfare of the public and shall maintain the highest professional and ethical standards in providing service to members of the public, recent practices and especially events that followed the Covid-19 containment measures prove the contrary. While the law makers may have been well intentioned, brutality cases on the part of the police in enforcing containment measures were recorded in several*

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<sup>1</sup> Humphrey Sipalla, Karest Lewela, 'Policed perceptions, masked realities: Human rights and law enforcement in Kenyan popular art' in Frans Viljoen (ed), *Beyond the law: Multi-disciplinary perspectives on human rights*, Pretoria University Law Press, 2012, 209 and 220.

*instances leading to injuries and deaths among many Kenyans, not least of which was the death in custody of our classmate Emmanuel Mutura and his brother Benson Ndwiga in Kianjakoma, Embu. Thus, this article argues that while Kenya boasts of an egalitarian transformative constitution, the most crucial entity that maintains law and order has maintained a retrogressive, non-egalitarian policing culture. Further, it advances the argument that in the long term, the police have to be trained in an egalitarian manner in order to achieve the true purpose of the Constitution of Kenya (2010).*

**Keywords:** policing culture; brutal policing; transformative constitution; Covid-19 containment measures; curfews; excessive force; rule of law

## Introduction

The use of excessive force by the police in colonised states, especially those in the Global South,<sup>2</sup> is as a result of the colonialists' way of gaining control instead of 'maintaining law and order'.<sup>3</sup> The colonial powers found colonial laws disadvantageous to their 'Mosaic aim'<sup>4</sup> which was to civilise their subjects; thus, they resorted to use of force by uniformed forces to meet their true aim which was to gain economic and political mileage.<sup>5</sup> Over time, excessive use of force has become systemic<sup>6</sup> and rooted in the policing culture in Kenya. Since independence from the British in 1963, the police force has had a history of being used by authoritarian regimes to entrench power.<sup>7</sup> These historical injustices have characterised the negative perceptions of people, real or perceived towards the police.<sup>8</sup>

While the use of force is legal under the National Police Service (NPS) Act (No 11A),<sup>9</sup> there are principles laid down under its Sixth

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<sup>2</sup> For purposes of this article, Global South means underdeveloped countries in contrast with Global North that means developed countries. For a clearer analysis of this dichotomy, see Obijiofor Aginam, 'Global village, divided world: South-North gap and global health challenges at century's dawn' 7(2) *Indiana Journal of Global Legal Studies* (2000) 603, 607.

<sup>3</sup> In *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service and 4 Others; Kenya National Commission on Human Rights and 3 Others (interested parties)* Petition no 120 of 2020 (Covid 025) Judgment of the High Court, 16 April 2022 eKLR. The Court at paragraph 137 furthers this argument as it identifies that for a long time, the role of the police has been believed to be maintenance of law and order. This case is discussed in part I of this paper in detail.

<sup>4</sup> Drawn from Biblical teachings, 'Mosaic aim' is used in this article to refer to the colonial goal of advancing uncivilised people (their subjects) from their 'backwardness' to civilisation.

<sup>5</sup> Thomas Martin, *Violence and colonial order: Police, workers and protest in the European colonial empires, 1918-1940*, Cambridge University Press, Cambridge, 2012, 23.

<sup>6</sup> Martin, *Violence and colonial order*, 41.

<sup>7</sup> Martin Mavenjina, 'Police brutality in Kenya' *Kenya Human Rights Commission*, 26 May 2017.

<sup>8</sup> David Throup, 'Crime, politics and the police in Kenya, 1939-65' in David Anderson, David Killingray (eds) *Policing and decolonisation: Politics, nationalism and the police, 1917-65*, Manchester University Press, 1992, 127.

<sup>9</sup> National Police Service Act (No 11A of 2011), Sections 49(5) and 61.

Schedule that limit such use of force.<sup>10</sup> These principles – necessity, proportionality, legality, dignity, accountability, transparency and individual responsibility – ensure that the police do not, at their own will, use force on individuals under any circumstance.<sup>11</sup> In essence, the police are mandated under the Sixth Schedule of the NPS Act to ensure that they employ non-violent means that are proportional to the intended objective prescribed under law.<sup>12</sup> The legal underpinning regulating the use of force by the police is the NPS Act, the NPS Standing Orders and primarily, Article 49 of the Constitution touching on the rights of arrested persons. These provisions, in my view, are pleasing to the eye, even though the drafters of the Constitution and the laws regulating the use of force by the police have had the best intentions. However, the implementation of these provisions has truly become an uphill task for the state, even post-2010 when the transformative Constitution and its constitutive elements await implementation.<sup>13</sup>

With the emergence of the coronavirus (Covid-19) pandemic, the world was in a race to mitigate its effects, further creating a disparity between the Global North and the Global South.<sup>14</sup> Increased casualties necessitated imposition of stringent measures in order to curb the disease, measures which were developed globally by the World Health Organisation (WHO).<sup>15</sup> After the first case in Kenya being recorded on 12 March 2020, the state put in place a dusk to dawn curfew from 27 March

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<sup>10</sup> National Police Service Act, Sixth Schedule, Section 61(2).

<sup>11</sup> Probert Thomas, Kimari Brian and Ruteere Mutuma, 'Strengthening of police oversight and investigations in Kenya: Study of IPOA investigations into deaths resulting from police action' *Centre for Human Rights and Policy Studies* October 2020, 14.

<sup>12</sup> Thomas, Kimari, Mutuma, 'Strengthening of police oversight and investigations in Kenya' 14.

<sup>13</sup> Willy Mutunga, 'In search and defence of radical legal education: A personal footnote', 1(1) *Kabarak Law School Occasional Paper Series*, Kabarak University Press, 2022, 40.

<sup>14</sup> Kunle Ola, 'COVID-19 Strategic global North-South divide: Access to knowledge quadrants imperatives for granting the WTO waiver' *European Intellectual Property Review* (2021) 1, 2.

<sup>15</sup> World Health Organisation, 'Covid-19 transmission and protective measures' <<https://www.who.int/westernpacific/emergencies/covid-19/information/transmission-protective-measures>> on 27 April 2022.

2022.<sup>16</sup> Movement was allowed only with the permission of the police in charge of a division or county in writing.<sup>17</sup> The Order exempted certain personnel, including healthcare professionals and other ‘important’ stakeholders from various sectors.<sup>18</sup> Various rules and regulations followed this Order, some which were subjected to judicial scrutiny to determine their constitutionality. These shall be discussed further in detail in the subsequent sections of this article. As will be seen, several instances of excessive use of force towards the citizenry were revealed during the enforcement of these measures. While the intention of the government could have been to curb the adverse effects of the pandemic, negative policing practices usurped this motive.

This paper is divided into five parts. Part I of this article shall evaluate the legality of enforcement of Covid-19 measures that the government of Kenya adopted. Part II shall render an account of the numerous violations of human rights and fundamental freedoms arising from the police officers’ use of excessive and brutal force. Part III of this paper shall engage in a discussion of the use of force by the police during the pandemic in South Africa. Essentially this part aims to compare the situation in Kenya with that of South Africa. Part IV shall recommend the way forward whereas Part V shall lay the conclusion. In conceptualising the way forward, Part IV argues that Kenya has long relied on the police to implement policies that could essentially be bestowed upon other state and non-state agencies. In essence, this continued heavy reliance on the police to enforce social preventive measures of Covid-19 has deepened the disconnect between the people and the uniformed forces. Therefore this entrenches a sense of status-quoism among the police insofar as their entrenched retrogressive policing practices were allowed.

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<sup>16</sup> Public Order (State Curfew Order, 2020), Section 3.

<sup>17</sup> Public Order (State Curfew Order, 2020), Section 4.

<sup>18</sup> Public Order (State Curfew Order, 2020), Section 5.

## I. Legality and enforcement of Covid-19 measures

At the onset of the Covid-19 pandemic and following its first case in Kenya, several laws were put in place to enforce measures that were intended to curb the spread of the disease. The Public Order (State Curfew) Order, 2020 was the first legal notice that introduced the dusk to dawn state curfew. On 2 March 2020, Covid-19 was declared an epidemic by the Cabinet Secretary for Health.<sup>19</sup> Following the Public Health Order, there was the Public Order (State Curfew) Variation Order 2020 that mandated employers whose employees did not fall in the category of essential workers to leave their various work places before 4pm so they may be home by 7pm.<sup>20</sup> Several rules were put in place pursuant to the enactment of the Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 that provided the procedure on how to handle persons infected with the virus (or suspected to be infected). Breach of the rules provided for imposition of monetary fine or imprisonment for six months against an individual.<sup>21</sup> Through a series of rules and regulations, the State was in a race to impose these measures instead of actually preventing the spread of Covid-19.<sup>22</sup>

The constitutionality and enforcement of the curfew orders were then contested in *Law Society of Kenya v Hillary Mutyambai and Others* (Mutyambai case).<sup>23</sup> According to the petitioner, the curfew order was

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<sup>19</sup> Public Health (Declaration of Formidable Epidemic Disease, 2020) Order, Section 2.

<sup>20</sup> Public Order (State Curfew Variation Order 2020), Section 2(a).

<sup>21</sup> Public Health (Prevention, Citation. Control and Suppression of COVID-19 Rules, 2020), Section 15.

<sup>22</sup> Public Health (COVID-19 Restriction of Movement of Persons and Related Measures Rules, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Nairobi Metropolitan Area Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Mombasa County, Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Kilifi County, Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Kwale County, Order, 2020); Public Health (COVID-19 Restriction of Movement of Persons and Related Measures, Variation Rules, 2020); Public Order (State Curfew Variation Order, 2020); and Public Health (COVID-19 Restriction of Movement of Persons and Related Measures Variation Rules, No 2 of 2020).

<sup>23</sup> *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service and 4*

made in reliance of Section 8 of the Public Order Act Cap 50 yet public health emergencies such as the Covid-19 were to be governed by Section 36 of the Public Health Act Cap 242.<sup>24</sup> In the petitioner's words, the underlying objective of a curfew is to enable security officers move into an area affected by criminal acts leading to public disorder, and thus a tool for fighting crime which should not be employed in health pandemics.<sup>25</sup> The Law Society of Kenya (LSK) also contended that Article 24 which allows for limitation of fundamental rights and freedoms should be reasonable and done in an open and democratic society based on human dignity, equality and freedom.

The petitioner further posited that the curfew order was abused since police officers used it as a ground to: violently assault vulnerable persons like pregnant women; bludgeon providers of exempted services such as watchmen, supermarket workers, food truck drivers and medical personnel who were on the way from or to work; and recklessly congregated large crowds contrary to the advice by the WHO on the need for social distancing in order to prevent the spread of the coronavirus.<sup>26</sup> The LSK also brought to the attention of the court, the teargassing, beating and use of unreasonable force and added that those acts violated the rights to human dignity under Article 28 of the Constitution, the right to freedom and security of the person, and freedom from cruel and degrading treatment under Article 29(f) of the Constitution.<sup>27</sup>

While determining the matter the Court first appreciated the fact that a curfew is a tool for fighting crime, but went ahead to provide that a curfew may not be limited to purposes of combating crime since its purpose is to bring law and order to areas visited by turmoil that is generally caused by man.<sup>28</sup> Additionally, the Court added that although some statutes cannot be applied to situations other than what they were

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*Others; Kenya National Commission on Human Rights and 3 Others (Interested Parties), Petition 120 of 2020 (Covid 025) eKLR.*

<sup>24</sup> *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

<sup>25</sup> *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

<sup>26</sup> *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

<sup>27</sup> *Law Society of Kenya v Inspector General National Police Service and 4 Others.*

<sup>28</sup> *Law Society of Kenya v Inspector General National Police Service and 4 Others.*



enacted for, there are laws which are multipurpose in nature since they fit all situations, and can thus be invoked to address various circumstances. As such the court pronounced itself that section 16 of the Public Health Act indeed allows application of other laws to health matters as long as there are no conflicts between the laws.<sup>29</sup> The Court therefore agreed with the respondents that the Public Order Act which provided for the curfew is applicable to health emergencies such as the one posed by the Covid-19 pandemic.

However, the Court added that a curfew order should contain a specified period of applicability, failure to which the order will be illegal since an instrument that restricts rights and freedoms should be clear as to how long the limitation will last.<sup>30</sup> The Court added that the challenged curfew order met the constitutionality and statutory thresholds and that the government cannot be faulted for enforcing precautionary and restrictive measures which were aimed at protecting Kenyans from the spread of the fatal virus.<sup>31</sup> On this, the Court further opined that the unconstitutional and illegal acts which occur in the implementation of a legal instrument cannot not render the instrument unconstitutional.<sup>32</sup>

Against the foregoing, the Court however noted with concern that the main problem with the curfew was the manner in which it was implemented since while implementing it, members of the police service put the law-and-order mentality at the fore even in the midst of a pandemic. The Court also reiterated and made it clear that diseases or pandemics cannot be contained through visiting violence on the members of the public. In addition, the Court contended that one cannot suppress or contain a virus by mercilessly beating people. As such it called upon the National Police Service and went ahead to state that it must be held responsible and accountable for the numerous violations of the rights to life, dignity and other rights of members of the public.

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<sup>29</sup> *Law Society of Kenya v Inspector General National Police Service and 4 others.*

<sup>30</sup> *Law Society of Kenya v Inspector General National Police Service and 4 others.*

<sup>31</sup> *Law Society of Kenya v Inspector General National Police Service and 4 others.*

<sup>32</sup> *Law Society of Kenya v Inspector General National Police Service and 4 others.*

## II. Violations of fundamental human rights and freedoms during the pandemic in Kenya

Pandemics, as *Mutahi* and *Wanjiru* note, 'reproduce the power inequalities that already exist' and engender divides between social classes.<sup>33</sup> This assertion is affirmed by CJ emeritus Prof Willy Mutunga who notes that the excessive use of force towards the citizenry, during a pandemic, violates several human rights under international law and under Kenya's transformative 2010 Constitution.<sup>34</sup> Indeed as will be noted, the deployment of extreme force by police officers when dealing with members of the public has caused members of the public to view the police as a problem as opposed to being a solution.<sup>35</sup>

According to Human Rights Watch, at least 10 people died from police violence during the first days of the dusk to dawn curfew imposed by the government on 27 March 2020 following the pandemic.<sup>36</sup> Police were reported to have beaten and shot at members of the public who were returning home from work before the start of the curfew with no apparent reason or justification.<sup>37</sup>

Amnesty International Kenya notes that, the pandemic provided the perfect storm for indiscriminate mass violence by the police.<sup>38</sup> In some areas such Nairobi, it is reported that police officers forced members of the public who were walking home to kneel, then brutally

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<sup>33</sup> Patrick Mutahi, Kate Wanjiru, 'Police brutality and solidarity during the COVID-19 pandemic in Mathare' 17(6) *Mambo!* (2020).

<sup>34</sup> Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' 8 *Transnational Human Rights Review* (2021), 30. See also, *In the Matter of the Speaker of the Senate and Another*, Advisory Opinion no 2 of 2013 Advisory Opinion of the Supreme Court, 18 November 2013 eKLR.

<sup>35</sup> Mutahi, Wanjiru, 'Police brutality and solidarity during the COVID-19 pandemic in Mathare', 4.

<sup>36</sup> Human Rights Watch 'Kenya: Police brutality during curfew' 22 April 2020 21 July 2022.

<sup>37</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>38</sup> John Allan Namu, Tess Riley, 'Nine weeks of bloodshed: How brutal policing of Kenya's Covid curfew left 15 dead' *The Guardian*, 23 October 2020.

whipped and kicked them.<sup>39</sup> This was also the case in Mombasa where the police threw teargas canisters at passengers lining up to board a ferry on their way home from work and went ahead to unleash a barrage of kicks, blows, slaps, lashings and beatings from batons and gun butts.<sup>40</sup>

In the Mombasa incident, huge crowds had built up as they tried to get into the limited ferries which were running at lower capacities due to the social distancing rules.<sup>41</sup> In total disregard of the state of affairs, the officers went ahead to force members of the public to huddle together and even lie on top of each other in spite of the distancing requirements which were put in place to curb the spread of Covid-19.<sup>42</sup> It is interesting to note that these officers were not wearing masks or other protective clothing when they mercilessly beat members of the public for failing to complying with the same.<sup>43</sup>

Members of the public in other areas of the country were also not spared from extreme violence by police officers.<sup>44</sup> In Busia and Kakamega counties, police were recorded beating and shooting at people who were found outside during curfew hours.<sup>45</sup> In one recorded incident in Kakamega, police officers arrived at an open-air market in trucks and began beating, kicking and shooting at persons engaging in business in the market. As a result of the incident two traders were killed by officers who fired bullets at them.<sup>46</sup>

A more distressing and sorrowful incident in Embu county shocked the country, was the death of two brothers in the hands of police officers as a result of the excessive force and violence that was metered upon them.<sup>47</sup> Benson Njiru Ndwiga and Emmanuel Ndwiga were university

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<sup>39</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>40</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>41</sup> Namu, Riley 'Nine weeks of bloodshed: How brutal policing of Kenya's Covid curfew left 15 dead'.

<sup>42</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>43</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>44</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>45</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>46</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>47</sup> Rasna Warah, 'A brutal pandemic: Kenya Police under fire for the death of two broth-

students aged 22 and 19 years respectively at the time of their death. Emmanuel Ndwiga was a promising law student at Kabarak University, whereas his brother Benson pursued an engineering course at Embu University.<sup>48</sup>

According to media reports, the two were arrested by officers attached to Manyatta Police Station in Kianjokoma shopping centre for defying the curfew orders and were not found until the family filed a missing persons claim.<sup>49</sup> After being referred to Runyenjes Police Station by officers at Manyatta, the family was notified that their two sons had jumped from a moving police car and died on the same day.<sup>50</sup> The officers' report given to the family was however contradicted by eye witness reports which indicated that the two were met with extremely violent force from the officers before they were put into the police vehicle.<sup>51</sup> An autopsy conducted revealed that the two promising brothers died as a result of broken ribs and head injuries.<sup>52</sup>

It is important to note that even before the pandemic, the Human Rights Watch reported that the Kenya Police shot dead more than 100 civilians who were engaged in opposition protests that followed the 2017 General Elections.<sup>53</sup> Furthermore in 2016 police officers were also recorded unleashing violent force on protesters leading to the death of five civilians whereas 60 civilians were brutally wounded.<sup>54</sup>

Such cases not only show how terribly members of the public suffer at the hands of police officers, but also indicate how the use of violent force is deeply entrenched among members of the police service

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ers' *One Campaign*, 16 August 2021.

<sup>48</sup> Warah, 'A brutal pandemic: Kenya Police under fire for the death of two brothers'.

<sup>49</sup> Susan Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody' *International Commission of Jurists Kenyan Section*, 17 August 2021.

<sup>50</sup> Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody'.

<sup>51</sup> Kendi, 'Police officers involved in the death of Kianjokoma brothers to remain in custody'.

<sup>52</sup> Warah, 'A brutal pandemic: Kenya Police under fire for the death of two brothers'.

<sup>53</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

<sup>54</sup> Human Rights Watch, 'Kenya: Police brutality during curfew'.

resulting in numerous violations of the rights to life, dignity, security and freedom of members of the public.

### III. South Africa: Brutality a colonial legacy in the Global South?

At the confirmation of the first case of Covid-19 on 5 March 2020 by a report of the National Institute of Communicable Diseases,<sup>55</sup> South Africa like other countries put in place a series of regulations and guidelines that have been since in force.<sup>56</sup> The South African Disaster Management Act (DMA)<sup>57</sup> provides for a policy of disaster management which focuses on: 'preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centres; disaster management volunteers; and any matters incidental thereto'.<sup>58</sup> Covid-19 was declared a national disaster by the head of the National Disaster Management Centre on 15 March 2020, in line with Section 23 (1) (b) of the DMA after assessment as to its severity and magnitude of the disease.<sup>59</sup>

South Africa came up with an 'Alert System' whose aim was to manage the gradual adjustment of the lockdown that was put in place.<sup>60</sup>

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<sup>55</sup> Ciara Staunton, Carmel Swanepoel, Melodie Labuschaigne, 'Between a rock and a hard place: COVID-19 and South Africa's response' 7(1) *Journal of Law and the Biosciences* (2020), 1.

<sup>56</sup> South African Government, 'Regulations and guidelines - Coronavirus Covid-19' <[https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19?gclid=CjwKCAjwhaaKBhBcEiwA8acsHDOXp5z7-kgONTyC1Z-f2OUKSZKdFdZ7bAyOUgylehiNusn0IDqrRghoClcUQAvd\\_BwE](https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19?gclid=CjwKCAjwhaaKBhBcEiwA8acsHDOXp5z7-kgONTyC1Z-f2OUKSZKdFdZ7bAyOUgylehiNusn0IDqrRghoClcUQAvd_BwE)> on 22 September 2021.

<sup>57</sup> Disaster Management Act, (Act No 57 of 2002).

<sup>58</sup> Centre for Human Rights University of Pretoria, 'South Africa - Nature and description of emergency COVID-19 measures' <<https://www.chr.up.ac.za/covid19-database/south-africa?start=1>> on 22 September 2021.

<sup>59</sup> Centre for Human Rights, 'South Africa - Nature and description of emergency COVID-19 measures'.

<sup>60</sup> South African Government, 'About alert system' <<https://www.gov.za/covid-19/>>

The Alert System is divided into five levels: Level one, that shows a low spread of Covid-19 with a high preparedness; Level two indicates that moderate spread of the disease with high preparedness; Level three demonstrates moderation both in spread of disease and preparedness; Level four is indicative of the fact that there is a moderate to high spread of Covid-19 while there is a low to moderate readiness; and Level five shows that there is high spread of the disease and a low preparedness of the healthcare systems.<sup>61</sup>

Subsequently, measures such as social distancing, isolation and limitation of movement were put in place by the government to curb Covid-19.<sup>62</sup> However, the enforcement of these measures bred contempt from the populace instead of being appreciated.<sup>63</sup> Violence against citizens existed even before the introduction of the regulations.<sup>64</sup> In policing, the police used masculinity, race and class to perpetrate violence and abuse.<sup>65</sup> Langa and Leopeng contend that there was heightened brutality towards black men in South Africa by law enforcement.<sup>66</sup> One notable incident is the murder of Collins Khosa, by South African National Defence Force (SANDF), who had been deployed to police the Covid-19 containment measures.<sup>67</sup> Khosa's death was attributed members of the SANDF who violently forced themselves into his home and inflicted blunt force trauma on his head.<sup>68</sup> Reports from the family indicated that Khosa was strangled, slammed against a cement wall and hit

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about/about-alert-system> on 22 September 2021.

<sup>61</sup> Disaster Management Act of South Africa (No 57 of 2002); Directions regarding the criteria to guide the determination of alert levels.

<sup>62</sup> Staunton, Swanepoel, Labuschaigne, 'Between a rock and a hard place' 5.

<sup>63</sup> Staunton, Swanepoel, Labuschaigne, 'Between a rock and a hard place' 7.

<sup>64</sup> Langa Malose, Leopeng Bandile, 'COVID-19: Violent policing of Black men during lockdown regulations in South Africa' 8(2) *African Journals Online* (2020), 118.

<sup>65</sup> Malose, Bandile, 'COVID-19: Violent policing of Black men during lockdown regulations in South Africa' 119.

<sup>66</sup> Malose, Bandile, 'COVID-19: Violent policing of Black men during lockdown regulations in South Africa' 121.

<sup>67</sup> Katie Trippe 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality' *Atlantic Council: Africa Source*, 24 June 2020.

<sup>68</sup> Trippe, 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality'.

on the head with the butt of a machine gun.<sup>69</sup> Following his death his family contested the nature of the force that was being used by the police before the South African High Court. In *Khosa and others v Minister of Defence and Military Defence and Military Veterans and others (Khosa Case)*<sup>70</sup> it was held that the law enforcement officers ought not to use force unless there is need and if there is, the force ought to be minimum.<sup>71</sup>

Other reported South African cases include the use of violent force, water cannons and rubber bullets by law enforcement officers in areas such as Alexandra to disperse members of the public who had queued outside food shops to replenish their food supplies.<sup>72</sup> It is further reported that the use of extreme force by the police and other law enforcers was rampant across South Africa leading to the death of at least 10 members of the public.<sup>73</sup>

#### IV. The way forward

Kenya and South Africa are similar in two ways; first, they are African states and secondly, South Africa's history of an apartheid regime and Kenya's history of being under an authoritarian regime gave birth to the Constitution of South Africa 1996 and the Constitution of Kenya 2010 respectively that have both been termed as transformative. However, one would ask, what does it take to truly transform society if the legal culture remains the same and status quo is maintained? I attempt to give an answer by making two broad arguments: one, that transformative constitutionalism has to be advocated for not just in the civilian

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<sup>69</sup> Trippe, 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality'.

<sup>70</sup> *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020).

<sup>71</sup> *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*.

<sup>72</sup> Trippe, 'Pandemic policing'.

<sup>73</sup> Trippe, 'Pandemic policing'.

populace but also in the policing environment; and two, that civilians should not to be comfortable and merely say ‘thank God it’s not me’ where the policing system fails.

Karl Klare argues that where there is a disconnect between the transformative aspirations of a constitution and a conservative backward-looking legal culture and education, no true transformation can occur.<sup>74</sup> To put this into context, a long-term solution in the form of transforming the policing culture ought to be fast tracked by ensuring an intentional framework for transformative education is carried out. While these solutions may seem merely aspirational, there is need to challenge status quo since the 2010 Constitution would not exist if legal minds such as Yash Pal Ghai did not put in efforts in it.<sup>75</sup> The scenarios of police brutality during Covid-19 shows the world how hypocritical it is to say on one hand, that the 2010 Constitution is transformative in the egalitarian sense yet on the other hand, the police (who are agents of the state that is mandated to implement the Bill of Rights)<sup>76</sup> blatantly illustrate the backwardness that is contrary to the aspirations of the 2010 Constitution.

Although it has been held that it may be difficult to alter the legal culture of a state since it takes into consideration numerous societal factors including history and context,<sup>77</sup> there is still need to alter and replace retrogressive elements of police training that at the core, inculcate the law-and-order mentality among members of the police force.

Further, in order to change the status quo, there is need to adopt police training that encompasses human rights courses geared at informing and educating members of the service on how to deal with members of the public who are the greatest causalities and victims of

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<sup>74</sup> Karl Klare, ‘Legal culture and transformative constitutionalism’ 14(1) *South African Journal of Human Rights* (1998), 146, 151.

<sup>75</sup> J Osogo Ambani, ‘The Ghai in our Constitution’ in Humphrey Sipalla and J Osogo Ambani (eds) *Furthering constitutions, birthing peace: Liber amicorum Yash Pal Ghai*, Strathmore University Press, 2021, 173.

<sup>76</sup> Constitution of Kenya (2010), Article 21.

<sup>77</sup> Klare, ‘Legal culture and transformative constitutionalism’, 151.



extreme police force. This training should enable police officers appreciate that members of the public are not trophies, and that in discharging their duties they should respect and protect the dignity, life and other rights and freedoms of members of the public.<sup>78</sup>

Finally, as Sipalla and Lewela contend, police officers should be trained to help citizens rather than fight them since this is the very essence of their motto.<sup>79</sup> This will help achieve an egalitarian form of policing in Kenya furthering transformative constitutionalism as Klare puts it.<sup>80</sup>

## V. Conclusion

To this end, the foregoing discussion makes it clear that a culture of violent use of force is deeply entrenched among members of the police service. As evidenced, this culture stretches from Kenya to South Africa, resulting in numerous violations of the rights to; life, dignity and other fundamental rights and freedoms of members of the public in both countries. Although Kenya and South Africa have progressive and transformative constitutions which guarantee fundamental rights and freedoms, there still exists much to be done, especially in the Police Service in both countries so as to ensure that members of the public do not suffer violations of their rights at the hands of police officers. It therefore follows that constant and consistent radical adjustments of operations and training of the police officers should be undertaken so as to change the culture of violent and unreasonable use of force by police officers. This will also ensure that the policing culture becomes egalitarian and stays true to its motto.

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<sup>78</sup> National Police Service Standing Orders, Ethical Standards and Principles.

<sup>79</sup> Sipalla, Lewela, 'Policed perceptions, masked realities', 220.

<sup>80</sup> Klare, 'Legal culture and transformative constitutionalism', 150.