



Comprehensive Policy and Advocacy Brief

For Civil Society Organizations on Tackling Policing and Judicial Reforms
within Nairobi City County Government

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1.0 Background

Kenyans promulgated the Constitution of Kenya five years ago with a clear promise of establishing more responsive governance frameworks that are accountable to the people, as the legitimate power holders. Further, both National and County governments are obligated to protect, uphold and observe values and principles of governance, part of which human rights, transparency and equality. Part of this promise was to usher in new County Governments, which were to be better managed and people-responsive than the former Local Governments, which were then appendages of the Central Government. This year, being the fifth after the promulgation, Kenyans' expectations about the County Governments are mostly unfulfilled.

Part of the objectives of devolution is to promote social and economic development. These can be achieved through government policies, legislation, or administrative action, but also through personal initiative. It is both avenues that are addressed in the Policy and Advocacy Brief. As the reports hereunder demonstrate, the Nairobi City County Government has attempted to provide avenues, through legislation (by-laws) on how to manage the city. However some of these legislation, have indeed hampered the realization of the same objectives at personal levels, whereby hawkers and small-scale traders have been affected adversely.

The Report by the Independent Medico-Legal Unit (IMLU), *A Cry for Justice: Torture and Ill-Treatment of Hawkers and Small Scale Traders in Nairobi City County*, focuses on the injustices meted out by both 'city askaris' and 'city courts', which respectively are undertaking policing and judicial functions. The main thrust of this publication is to assess the human rights abuses pertaining to Cruel, Inhuman and Degrading Treatment (CIDT). The main evidence that CIDT is rampant include prevalence of rampant shootings, illegal beatings, unfair and illegitimate arrests, forceful incarceration, external and internal body injuries, sexual harassment of women, and general indignity among others.

To buttress this IMLU Report, two other publications are important: first, the publication *Justice at City Hall*, which is a joint report by the International Commission of Jurists (ICJ – Kenya) and also the Transparency International (TI-Kenya).¹ The main issues are on how 'city courts' do not dispense justice, within the context of constitutional principles, and therefore the dire need to institute judicial reforms in these 'city courts' as fast as possible. The second publication is a Master's Thesis, *Actually-Existing Neoliberalism in Nairobi, Kenya: Examining Informal Traders Negotiations over Access to the Entrepreneurial City*.² This Thesis contends that the city is under "urban space contestation" between informal traders and city authorities, and these is manifested in "relocations" or licenses" to keep them off the city.

¹ ICJ-Kenya and TI-Kenya, 2013, <http://www.icj-kenya.org/dmdocuments/reports>, accessed March 23, 2015.

² Glennys Egan, 2014, Master of Arts Thesis, submitted to Faculty of Graduate and Postdoctoral Affairs, Carleton University, Ottawa, Canada.

These publications inform: a) the policy recommendations available to the Nairobi City County Government; and b), the advocacy options available to the Civil Society Organizations (CSOs). Both policy and advocacy approaches are aimed at streamlining both the policing and judicial functions carried out by the County Government, whether directly or indirectly. That is, directly through formulation of by-laws for instance, or indirectly through the deployed magistrates from the judiciary, serving in the ‘city courts’. However, beyond the visible policing and judicial functions are other ‘invisible’ attendant or ancillary matters that the County Government, and other stakeholders, particularly the judiciary and CSOs, should address to stem CIDT among other issues.

2.0 Policy Issues and Gaps: Defining the Problem

It is proper that the County Government of Nairobi City understands and underscores that formulation of policies actually demonstrate the set principles by which the County Government will be guided, and also declares its objectives that it seeks to achieve. On the policing and judicial functions, the following issues and gaps can be summarized:

a) Inspectorate Function

The County Government has a training school that provides in-house capacity building for its inspectorate staff. However, on a closer analysis, the training modules, the trainers and the trainees, are all based on the ‘old school’ model of trampling on people’s rights by authorities. The roles carried out by the staff are ample evidence. The principles of the Constitution of Kenya, particularly on adherence to human rights standards, seem missing in the training school model and curriculum.

b) Policing Role

‘City askaris’ carry out the function of policing, which indeed translates to enforcing County Government legislation. The Reports alluded to above have pint-pointed express violations of human rights standards set forth in the Constitution, including the rights that may not be limited by legislation such as rights to be free from torture, inhuman and degrading treatment. Worse still, the discretionary powers of a ‘pack’ of the ‘city askaris’ to mete out individual and collective punishment, not to mention powers of arrest, which is often abused, is a clear policy and legal issue. Finally, the ‘city askaris’ in partnership with the members of the National Police Service (NPS) seem to operate in unchartered policy and legislative areas, since their joint operations seem not to be sanctioned by law or policy, as they are also discretionary.

c) Judicial Function

The ‘city courts’ have been found problematic by the reports cited above. The Constitution establishes both superior courts of record and also other courts. From the magistracy level downwards, the ‘city courts’ fall in the magistracy as lower courts. The ‘city courts’ have seconded magistrates from the Judiciary, which is governed by the Judicial Service Commission (JSC). However, unlike the ‘mainstream’ judges and magistrates, there is an apparent lack of

policy guiding administration, transfer, deployment and supervision on these magistrates sent to the 'city courts'. The principles set forth in the Constitution regarding the judiciary, particularly on the issue of "justice shall be done to all irrespective of status", seems not to percolate to the 'city courts', since hawkers and small-scale traders are indeed adjudged based on their status, indigent as it is evident.

d) Prosecutorial Role

The role of prosecuting the hawkers and small scale traders is delegated to the city prosecutorial authorities, who are staff of the Nairobi City County, by the Office of the Director of Public Prosecutions (ODPP). However, from the reports and publications relied upon in compilation of this Policy and Advocacy Brief, there does not exist a Memorandum of Understanding nor a policy paper on how the administration and supervision of prosecution is undertaken by the ODPP to ensure constitutional principles such as "the need to prevent and avoid abuse of the legal process". From the findings of these reports, it is evident that hawkers and small-scale traders prosecutorial process is grossly abused, both in process and substance.

e) Legislation through By-Laws

The Nairobi City County Government is split between the executive and the legislature (the County Assembly). It is the latter that has powers to pass, amend, enact, or re-enact by-laws that are to govern private and public transactions within the County. With regard to the by-laws governing small-scale traders and hawkers, it is evident that these by-laws are not only archaic, but in total defiance of the constitutional principles regarding County governance. To illustrate, in dealing with hawkers and the traders, the reports indicate that there is not only impunity but also lack of a conducive policy and legal environment to protect their rights. Indeed, archaic laws are used to lock out Africans just as was during colonialism, and their access to the "entrepreneurial city" of Nairobi is limited therefore.

f) Public Participation

The Constitution is crystal clear on the role of the public in governance. From the onset to the Chapter on Devolved Government and thereafter, it is clear that the public must participate in matters that affect their lives. The County Government of Nairobi City is obligated to ensure that happens. All the above policy gaps and issues arise because of the very nature of how the city is governed. The city authorities, whether in the executive (particularly, the inspectorate and policing functions), judicial or legislative arms of the government should and must appreciate that 'the train left the station' and opaque governance cannot be tolerated. From the five policy areas above, the public was never involved in their origination or subsequent evolution. This therefore bespeaks volumes of why small-scale traders and hawkers are treated with contempt and utter disregard to their rights and place in the managing of County Government affairs.

3.0 Policy Recommendations: Compliance to Human Rights Standards

Compliance to human rights standards by the Nairobi City County Government is a must. All State Organs at national and county level are obligated to ensure that they “make and implement public policy decisions” that pay due regard to constitutional values and principles of governance. In this regard therefore, the following are key policy decisions that the Nairobi City County Government should make; in the short-, medium- and long-term, phased out in batches of six months to three years.

a) Inspectorate Overhaul

The overhaul of the inspectorate department is long overdue. Part of this overhaul is informed not just by the research in CIDT conducted by IMLU, or the other publications, but also due to the conflicting role of this department to constitutional principles. Non-derogable human rights have been violated with impunity and so is the inspection of business premises or such other localities in an in-dignifying manner, constant and continuous harassment, and impromptu abuse of discretionary powers. Therefore, for the County Government to overhaul the inspectorate, the Governor should undertake the following:

- (i) Develop and implement a new Inspectorate Policy, within six months;
- (ii) Develop and implement a new Training Module for the City Inspectorate School, within one year; and,
- (iii) Establish and equip the Office of the City Ombudsperson to provide oversight on inspections and policing roles, modelled on the Office of the Ombudsperson’s within the Judiciary, within one year.

b) Accountable Policing

To re-create the policing function, this Policy and Advocacy Brief recommends radical restructuring of the ‘city askaris’ to enhance accountability, who are commonly the ‘door’ into the injustice system of the County Government, since they carry out inspections to an extent, arrest, beat-up, lock-up, sexually-harass women, and also commit all manner of ills. Since the ‘city askaris’ are placed within the County Executive Committee, the Governor should undertake the following:

- (i) Abolish the ‘city askaris’ unit as currently structured, and particularly abolish the powers of arrest, within six months;
- (ii) Establish, through by-laws, a pilot County Policing Service (CPS) that is modelled from the Municipal Policing Services (MPS) of the Republic of South Africa (RSA), within 2 years;³

³ This could be piloted within the City, and thereafter be recreated within the Constitution of Kenya, where Article 247, provides for creation of other policing services in accordance with the Constitution. The role of the MPS largely remain traffic management and also enforcing by-laws, but this differs from Region to Region. Their powers

- (iii) Develop a Code of Conduct for the CPS, that is based on human rights standards, within one year;
- (iv) Formulate the regulations governing the County Policing Authority (CPA), within the Framework of the National Police Service Act (2014), within six months; and,
- (v) Develop a Memorandum of Understanding with the National Police Service (NPS) within six months, as part of filling gaps of securitizing the City, and enforcing re-enacted by-laws.

c) Judicial Oversight

The judiciary and the JSC are creatures of the Constitution. To enable the ‘city courts’ dispense justice within the framework of the Constitution, it is imperative the Chief Justice, as the Head of the Judiciary, Chair of the JSC and President of the Supreme Court, interrogate the role of these ‘city courts’. Since the magistracy is part of the lower courts, the ‘city courts’ cannot be in conflict with the ‘mainstream’ judiciary or constitutional principles. Thus, this the policy options include the following:

- (i) The Chief Registrar, in liaison with the Chief Justice, the Resident Magistrate, and the JSC, provide policy guidelines on the administration, transfer, deployment and supervision of ‘city courts’, within six months;
- (ii) Overhaul and vet all employees of the registry of the ‘city courts’, within one year, to deal with abuse of court processes and procedures and promote professionalism;
- (iii) The Bail and Bond Policy Guidelines, by the Judiciary, exists. It was launched in March 2015 by the Chief Justice, which should ensure the training of the magistracy in ‘city courts’, by the Chief Registrar, within one year, on what this policy provides and ensure enforcement;⁴
- (iv) There be established a special Court-Users-Committee in the ‘city courts’, within six months, by relevant stakeholders, key among them the judiciary under the leadership of the presiding Resident Magistrate; and,
- (v) The Judges and Magistrates Vetting Board (JMVB), in liaison with the JSC, hastens the vetting of all magistrates of the ‘city courts’, within one year.

of arrest are provided for but are accountable to other State organs in RSA. For purposes of enactment of a formal County Police Services Act, a National Legislation by Parliament is required.

⁴ Government of Kenya, National Council for the Administration of Justice, *Bail and Bond: Policy Guidelines*, 2015. The Chief Justice appointed a Taskforce in May 2014 to review bail and bond issues and this Taskforce in March 2015, presented its findings and recommendations in form of a policy. <http://www.judiciary.go.ke/portal/assets>, accessed April 19, 2015.

d) Prosecution Counsel

Prosecution is guided by the pillar that all persons are presumed innocent until proven guilty. But in 'city courts', the prosecution authorities are evidently operating in the reverse. Even before taking plea, the hawkers and small-scale traders are tortured, subjected to degrading treatment, and are also coerced to make incriminating statements, contrary to rule of natural justice and the constitutional ethos. In such a set-up, prosecution should be nullified *ab initio*. To ensure that such prosecutorial powers are not abused in future, the following are policy recommendations to the Resident Magistrate, in liaison with the Governor and the ODPP:

- (i) Develop and implement a memorandum of understanding with the ODPP, within six months, to provide for the deployment, administration and supervision of prosecution counsel to the 'city courts';
- (ii) Overhaul the prosecutorial and investigation organs within the city through vetting of current personnel, and training on ODPP prosecution and investigation guidelines, within two years; and,
- (iii) The Resident Magistrate, establishes guidelines on prosecutions of insignificant offences through a 'petty sessions' policy, within one year, which provide for a plea taking process, defense mechanisms, and also the sentencing guidelines.

e) By-Laws Revision and Re-enactment

The city by-laws are archaic. They require an overhaul, to not only make them conform to constitutional standards, but also to incorporate the new existing issues such as balancing the needs of formal business owners *via-a-vis* those of hawkers and small-scale traders. For purposes of clarity, there seems to be "contestations" between those with ownership status of medium- and large-scale businesses in what has been referred to the "entrepreneurial city". The two somehow must co-exist; since both should not be treated differently because of their status. Worthy mentioning, is what Glennys terms as "contestation of urban spaces" by "informal traders", where tools such as "licensing" or "relocation" are methods of "social control."⁵ Thus, the Governor, should:

- (i) Through the County executive member in charge of security, the Governor should move a Bill in the County Assembly, seeking thorough revision of the by-laws, particularly those touching on policing and prosecution, within one year to two years;
- (ii) Within two years, working with the Kenya Law Reform Commission (KLRC) and the Commission for the Implementation of the Constitution (CIC), the Governor moves an Omnibus Bill to revise all by-laws touching on general

⁵Glennys, 2014, *ibid*.

- urban governance of the city and particularly those that affect human rights realization, including socio-economic rights; and,
- (iii) Publish and publicize the new city by-laws, in both Kiswahili and English languages, within one year, following their revision.

f) Public Participation Standards

The Constitutions places public participation as a key principle of governance, without which even jurisprudence emerging from the judiciary has quashed many decisions made by Governors or Members of the County Assembly. Noting the above concerns on what reforms that are required to reduce if not eliminate the CIDT and other ills made by the officers of the County Government, then meaningful public involvement is urgent and important. To realize this, the County Government under the leadership of the Governor should embark on the following:

- (i) To develop basic guidelines, within six months, on what changes are envisaged for the executive, judiciary and legislature within the set out priority areas set out in this Policy and Advocacy Brief;
- (ii) To facilitate the realization of the Right to Access Information by members of the public residing in the County through establishing a County Citizen Information Office (CCIO), within six months; and,
- (iii) Provide for a meaningful feedback processes and procedures from the Ward level to the Office of the Governor through CCIO or through social and traditional media, or such other fora, within six months.

4.0 Advocacy Options for Civil Society Organizations

For the above to be realized, CSOs should ‘step up to the plate’. Each and every action requires a concerted effort by CSOs, or organizational ingenuity, to ensure that the actions points above are realized. To enable civil society undertake their cardinal role of oversight on governance bodies, including all arms of government at National and County levels, this Part proposes the following:

a) Research and Documentation

From the reports and publications quoted in this Brief, there are attendant future research and documentation needed. That is, while CIDT was recorded by IMLU, and juridical function documented by ICJ-K and TI-K, these publications have a limited scope and hence further inquiries into the operations of some departments are needed. These include: the prosecutorial arm; the investigations unit; and the inspectorate training processes and courses. Second, there is need to develop policy concepts on some of the areas highlighted above, such as research into the operations and workings of the MPS of South Africa, developing City Ombudsperson’s

Office, a legal audit of the current by-laws and their effect on human rights, and such research areas. The advocacy envisaged between CSOs and the County Government should be evidence-based, where there are policy prescriptions are put forward, such as a policy to renew the inspectorate department, not just combative approaches to urban governance.

b) Monitoring Human Rights Compliance

Continuous observation of the perverse trends, patterns, and analyses of the policing, prosecutorial, investigative, and magistracy functions, are an important element in ensuring there is adherence to human rights standards. Therefore, CSOs should devise quarterly monitoring mechanisms to not only document, but also raise the findings and recommendations to the public sphere. These abuses happen daily, but once cases are documented in 'city courts' they remain but a number. CSOs could document who these people are, from which socio-economic quintile, political opinions or affiliations, which race, religion or such other status, and so on. Monitoring in the long-term is helpful to civil society to use the same to advocate requisite changes to the County Government. To assist in these monitoring exercise, the CSOs could develop a domesticated template, borrowing from the Huridocs template.

c) Psycho-Social Support

Part of what IMLU exists is to undertake rehabilitation programmes to all the victims of CIDT violations, and these happen, in this context, to the hawkers and also small-scale traders. A clear advocacy programme around rehabilitation and reintegration back to society for those who have suffered indignity through trauma counselling and such other psycho-social support would make CSOs heal the wounds caused by 'city askaris', the investigative arm, the prosecutorial organ and the 'city courts'. A comprehensive programme, integrating referral hospitals, such as the Kenyatta National Hospital or Nairobi Women's Hospital, could aid in bringing temporal and long-term relief to victims of human rights abuses.

d) Policy Implementation

Beyond monitoring abuses, CSOs should be able to grade policy enactment and compliance. The policy implementation forms part of strategic advocacy since policy implementers could cite challenges in implementing policy options. CSOs should thus advocate for policy re-alignment so that all the above recommended policies are drafted, enacted, reviewed, re-enacted and others so that strategic outcomes are realized. Governing the city and the County particularly through policy formulation, is a difficult ball game as policies are not just passed by the County Government, but Nairobi is also the seat of the National Government. A policy audit of what kinds of policies exist, how they could be harmonized and who are the agents implementing the same. This should be able to provide evidence on where issues for advocacy are.

e) Legislative Revision

Reviewing the current by-laws is crucial. Indeed, it is at the heart of realizing human rights and stemming CIDT. As the other publications have suggested, in their recommendations, there is need for CSOs to embark on a clear path of identifying all by-laws that are contrary to the Constitution. A legal audit is recommended. The Constitution provides for two opportunities: first that all laws before enactment or promulgation shall be read with the requisite modifications and adaptations to make them conform to the Constitution. Second, where there is a by-law that is in contradiction with the National Laws, the latter shall supersede that by-law. These two should guide the commencement of the legal audit.

f) Public Interest Litigation

Due to the number of cases handled by the policing and judicial function, most bordering on petty offences, the CSOs should take advantage of the provisions of the Constitution which eliminated *locus standi* for human rights applications and move the courts through a judicial review or petition to declare some by-laws, practices by the County Government officials and such agents, as contrary to the Constitution. For this area of advocacy, a lot has been documented including a February 2015 publication by Africa Centre for Open Governance (AfriCoG) and Katiba Institute (KI), which provides for guidelines in public interest litigation.

Beyond declaration of by-laws and enforcement agents, as contrary to the Constitution the civil society should seek to quash the powers of policing assigned to 'city askaris', since this where 'all troubles' with the County Government begin. Indeed, looking at the investigation and prosecutorial files, not to mention jurisprudence emerging from the magistrates, there is clear evidence of miscarriage of justice. The CSOs should not just move the courts on these matters, and quash proceedings thereof, but also some sort of compensation or restitution for all those that have suffered from these atrocities by the County Government, as a lesson for future.

g) Media and Public Awareness

The public should be engaged. This can be done directly through traditional and social media, but also through town-hall meetings. Meaningful public participation where issues are discussed openly, victims and witness of 'city askaris' abuses, families of those who have suffered, and such other public should take place. This calls for CSOs to devise and institute mechanisms of public outreach, set for documentation but also for reconciliatory processes for minor offenses.

Outreach programmes, either through radio or television, which have a higher likelihood of reaching the public need to be rolled out alongside other advocacy efforts cited above. As a value of the Constitution, public participation through various media, will enable the public to engage their County Government, for the objectives of the Constitution to be realized.

5.0 Final Word: Claiming Spaces, Making Changes

This Policy and Advocacy Brief has highlighted various policy gaps or issues, which are well documented by various reports or publications. Second, this Brief has cited various policy recommendations, which if implemented by various actors particularly the Nairobi City County Government and the Judiciary, would lead to transformation of urban governance in Nairobi. Finally, there are advocacy options for civil society to consider, and these call for a concerted effort from these organizations if accountable governance is to take root in the County. Indeed, the County can be a pilot on how to transform governance, if stakeholders converge ideas and implement the same.

The opportunities are enormous. So are the challenges. Small-scale traders and hawkers need to belong. Indeed, they need to claim spaces and make changes, in this “contested” city. This County is a “contested” urban area since Kenya’s independence: even before. The county Government has an obligation to respect and protect their rights, as well as the rights of others. To deal with this “contested urban space”, the words of Glennys are instructive:

“...the common goal of a more secure Nairobi for both urban authorities as well as hawkers themselves could provide an impetus for better cooperation. Moreover, the country’s continuing journey towards the putative goal of institutional democratization can only be made possible through more substantively inclusive strategies. As an urban population that has long been in the forefront of struggles over access to space – and indeed, citizenship – in Nairobi, the inclusion of informal traders in urban development strategies would be a positive step towards a more equitable and just restructuring of the urban order.”⁶

Nothing else can sum up the way forward than the above statement.

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⁶Glennys, 2014, Ibid, P 130