

Chapter 10

Adjudication of Corporal Punishment and the Implementation of Sustainable Development Goal 16.2: An evaluation of the Kenyan Experience

By

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Abstract

Under the laws of Kenya, the best interests' principle is a key consideration in all matters affecting children. A topical issue is its' report on the realization of the SDG Agenda. Closely related to the same is Kenya's adoption of the Sustainable Development Goals in 2015 – including target 16.2 concerning abuse, exploitation, trafficking and all forms of violence against and torture of children. This chapter evaluates Kenya's approach to dealing with corporal punishment by the executive, legislature and judiciary in the context of SDG 16.2. The chapter uses three sub-claims to evaluate this argument. First, it situates SDGs in Kenya's legislative framework. Secondly, it analyses the implementation of SDG 16.2 by the government. Thirdly, the chapter revisits the decision in *Isaac Mwangi Wachira v Republic* to showcase the courts' approach to corporal punishment. A conclusion and recommendations follow. The Chapter adopts a desktop approach to evaluate available literature, legislation, policies, case law and similar sources. It is hoped that this law ignites academic debate on the efficacy of dealing with corporal punishment in Kenya.

Key words: Agenda 2040, Agenda 2063, children, corporal punishment, Kenya, SDGs.

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Introduction

The United Nations Development Programme states that in 83 countries, approximately 8 out of 10 children between the ages of 1 to 14 years of age have suffered psychological aggression and/or physical punishment at home, as a form of a disciplinary method (UNDP, 2019). A similar report indicates that globally, over 1.7 billion children have experienced violence which corporal punishment affecting over 80 per cent of the children (KVIC, 2017). In Kenya, the forms of corporal punishment include denial of food and education, child labor, physical, emotional and sexual abuse, female genital mutilation, abortion, early marriages and the lack of family planning (Save the Children, 2005).

Table 1: Forms of Abuse in Kenya

| Forms | Frequency | Percentage |
|--------------------------------------------------------------|------------|------------|
| Denial of food and education | 63 | 10.75 |
| Child labour | 23 | 3.92 |
| Physical abuse (hitting, beating, slapping, kicking, biting) | 92 | 15.70 |
| Emotional abuse (neglect, sending away) | 276 | 47.10 |
| Sexual abuse | 34 | 5.80 |
| Female genital mutilation (FGM) | 17 | 2.90 |
| Abortion | 8 | 1.37 |
| Early marriages | 67 | 11.43 |
| Lack of family planning (too many children to care for) | 6 | 1.02 |
| Total | 586 | 100 |

Source: Save the Children, 2005. p 11.

A recent report by the UNICEF indicates that most children in Kenya have suffered from lack of food and water and access to education and health services. This does not, however, speak corporal punishment as a problem (UNICEF, 2017). In a minimal attempt, this report shows that children especial girls are subjected to harmful and negative practices like female genital mutilation (FGM) and child marriage. The lack of an emphasis on corporal punishment in the recent national study validates the need to question it in the Kenyan setting.

To this end, Kenya's adoption of the Sustainable Development Goals in 2015, includes Goal 16.2 that speaks to abuse, exploitation, trafficking and all forms of violence against and torture of children. There is a need to evaluate whether Kenya's approach to corporal punishment by the executive, legislature and judiciary and its consistency with international and regional law principles on dealing with corporal punishment. The Chapter evaluates the sufficiency of

Kenya's engagement with SDG 16.2 by; situating SDGs in Kenya's legislative framework, analyzing the implementation of SDG 16.2 and reviewing the decision in *Isaac Mwangi Wachira v Republic*. A conclusion and recommendations follow.

Statement of the Problem

Kenya has a developed approach in dealing with corporal punishment that engages the executive, legislature and judiciary. This approach, however does not speak to the statistical approach that the SDG Agenda adopts as part of the developmental approach. The need to engage a holistic approach that embraces both the executive and the judiciary is crucial to taking steps that do not leave anyone behind. If this study is not done, an informed conversation that questions the silence of Kenya's reports and the challenges that are unlinked to SDG16.2 will continued. This study evaluates the approaches by the executive and the judiciary in engaging the SDG Agenda.

Situating SDGs in Kenya's Legislative Framework

No law directly provides that SDGs shall be applied in Kenya. From their adoption, various countries sought to engage them as part of the development process in various aspects of the country (Osborn, Cutter & Ullah, 2015). Some research entities have gone ahead to show the links between the SDGs and human rights in international and regional law through the use of a user-friendly approach called the SDG Temple (Danish Institute, 2018a). It is thus advised that this SDG Temple of Justice uses human rights-based and business-friendly approaches to enable policymakers and implementers to empower the poor and disadvantaged groups (Danish Institute, 2018b).

For instance, where one wishes to establish the human rights approach to SDG 16.2, one clicks SDG 16 in the top right corner, followed by a click on the link to the SDG. The next page that opens enables you to type in the target (16.2) and the international instrument, like the African Charter on the Rights and Welfare of the Child. The results page then displays the rights under the human rights instrument that specific SDG (Danish Institute, 2018). Some of the identified rights include Article 16 (on the protection of a child from all forms torture, inhuman or degrading treatment) and Articles 27, 28 and 29 (calling on States, parents and caregivers to prevent the violation of the rights of children). As will be shown, Kenya's recognition of the application of international law informs the application of the SDG Agenda in part.

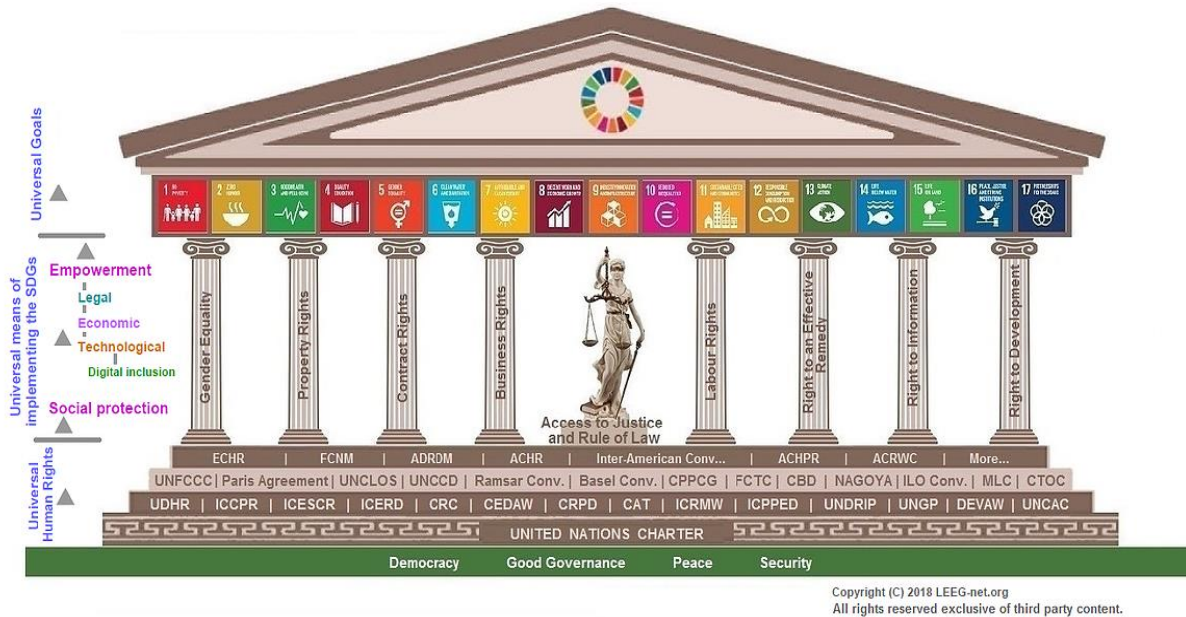


Figure 1: The SDG Temple

Source: The Danish Institute, 2018a.

In addition to this situating of the SDG Agenda, it is important to make the connection to the Kenyan context through an evaluation of the normative position of corporal punishment in Kenya.

The Legal Framework to Corporal Punishment in Kenya

One of the prominent laws was the 1972 Education (School Discipline) Regulations that governed the administration of corporal punishment. The rules stated that corporal punishment would be inflicted in cases of continued or grave neglect of work, lying, bullying, gross insubordination, indecency, truancy or the like (School Discipline, 1972). Corporal punishment was banned in Kenya in 2001 following the enactment of the Children’s Act (Government of Kenya, 2001). The requisite section provides that:

- (1) A child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including the sale, trafficking or abduction by any person.
- (2) Any child who becomes the victim of abuse, in the terms of subsection (1), shall be accorded appropriate treatment and rehabilitation under such regulations as the Minister may make.’ (Children’s Act, 2001, section 18).

This is an indication that the protection of children from physical, psychological and emotional abuse (Calzada & Kerr, 2003) extended to the prohibition of corporal punishment in

schools (Mweru, 2010). This provision reiterates the domestication of the UN Convention of the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (UNGA, 1989; OAU, 1990). It has been argued that this expands the applicability of the best interests' principle in all matters concerning a child in both the public and private spheres (Odongo, 2004; Odongo, 2005). The Act goes ahead to create a criminal offence where any person subjects a child to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty (Children's Act, 2001).

Furthermore, the Kenyan Constitution of 2010 underscores the prohibition of corporal punishment in all settings, when it states that every person "has the right to freedom and security of the person, which includes the right not to be subjected to corporal punishment (Constitution, 2010, Article 29(2) (3), HRW, 2010). The Bill of Rights is binding on all State organs and all persons and re-affirms the protection of the child from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor (Constitution, 2010). Other legislation like the Protection against Domestic Violence Act (2015) protects children and adults from violence and the threat of it, from direct violence as well as witnessing violence between adults, and from single as well as repeated acts of violence. It can be adequately stated that there are safeguards in the legislature that underpin a criminal law, and human rights approach any subsisting pockets of corporal punishment. The question to which the contribution turns is the relevance of international law.

SDGs: Part of International Law

The SDGs provide for the use of a development approach in dealing with matters affecting communities (Osborn, et al., 2015). As earlier noted, these matters are recognized under 17 goals that include engaging hunger, poverty, education, health, gender equality and use of strong institutions among others (SDG, 2020). Besides, the Kenyan Constitution allows the application of international law. Under Article 2(5) and (6) the general rules of international law form part of the law of Kenya. This is an indication that any treaty or convention ratified by Kenya forms part of the law of Kenya. This poses the question whether SDGs are part of the international law. It should be reiterated in passing that there are duly ratified international laws that speak to the rights of children that are applicable in Kenya. These include the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (UN, 1989; OAU, 1990; Nanima, 2017).

Concerning the position of SDGs in international law, some scholars argue that SDGs are simply policy documents that attempt to place international obligations on State Parties (De Beco, 2013). The opposite position to this view indicates that in the course of adoption of the SDGs, the States failed to re-affirm their indivisibility from human rights, which would be a cornerstone to the laying of international obligations (Tascioni, 2016). This chapter diverts from this position and argues that SDGs are grounded in international law due to their consistency with existing commitments expressed in various international legal instruments. This is confirmed by the trend in the development of these goals since the 1980s, where sustainable development has gradually emerged as a collective global or international goal that requires implementation that is consistent with the rights and obligations of States under international law (Kim, 2016). As such, while SDGs may not stand alone as international law, the fact that Kenya committed to their implementation is important in getting a working framework for their operation. To this end, there is a national, regional and international framework that can be used to ensure the realization of the SDG Agenda in Kenya.

Kenya is among the various countries that adopted the SDG Agenda in January 2016 to as a mode of embracing a way of improving the holistic development of the country (SDG, 2020). It took on a “whole of government” and “whole of society” approach that sought to institutionalize the implementation, monitoring and awareness-raising of the SDG Agenda (SDG, 2020). Some of the stakeholders that have been involved in this process, leading to the subsequent preparation of the first Voluntary National Review (VNR) Report include the Parliamentary Caucus on SDGs and Business, Kenya Private Sector Alliance, Council of Governors for the sub-national governments and National Youth Council (SDG, 2020). However before an analysis of the realization of the SDGs is done, it is important to situate their position in Kenya’s normative framework. This will aid the identification of a framework that can be engaged in this development process.

Agendas 2063 and 2040: Aid to the SDGs

As a State Party to the African Union, Kenya is mandated to use the regional bodies’ policies and laws of the African Union. Currently, the AU is following up on the application of Agenda 2063, which calls for a concerted effort by States to transform Africa into a global powerhouse of the future, to spur economic growth, improve the standard of living holistically for all persons on the African continent (Agenda 2063, 2020). This Agenda seeks to refocus and reprioritize Africa’s agenda from the struggle against colonialism and apartheid to the need for economic growth (AU, 2020). At the national level, Kenya should implement the key activities under the coordination role of the East African Community all under the monitoring and evaluation at the AU level (AU, 2020).

The question that should be answered is where corporal punishment fits in. Before engaging this question in detail it should be noted that the AU has an organ that is mandated to promote and protect the rights of the children (ACERWC, 2018). The African Committee on the Rights Rights and Welfare of the Child is mandated to promote and protect the rights of the child (ACERWC, 1999). It has also adopted Agenda 2020 to ensure that a child-centered approach is retained in all development aspects that speak to the person of the Child (ACERWC, 1999). While Agenda 2063 runs for 50 years since 2013, Agenda 2040 runs for 25 years from 2015 (ACERWC, 2016). Agenda 2040 is aligned to the Aspiration 6 of Agenda 2063 that calls for a focus on children and the youth as the drivers of Africa's Renaissance (ACERWC, 2016). To this end, Aspiration 2 of Agenda 2040 calls on States Parties to establish an effective child-friendly national legislative, policy and institutional framework in all Member States (ACERWC, 2016). The link that Agenda 2063 has with Agenda 2040 offers the insight into the application of the SDGs. Agenda 2063 generally calls for an engagement of issues of gender inequalities, the right to education and the right to health (Agenda 2063, 2016). This reiterates into a direct application of SDGs 3, 4, and 5 on health, education and gender inequalities. It ought to be noted however, that children are vulnerable by their status as children and all crises affect them (Benyam, 2020). As such, it is critical to unpack SDG 16.2 on corporal to establish the human rights implications that arise and how Kenya’s duty to deal with the vice emanates.

Analysis of the Implementation of SDG 16.2

The SDG 16 provides for the promotion of peaceful and inclusive societies for sustainable development provide access to justice for all and build effective accountable and inclusive institutions at all levels. Corporal punishment is provided for in target 16.2 that calls for an end to abuse, exploitation, trafficking and all forms of violence against and torture of children (SDG,

2020). Emphasis is placed on target 16.2.1; where States are required to identify the proportion of children aged 1-17 who have experienced any physical punishment and or psychological aggression by caregivers in the past month (SDG, 2020). It has been proven that there is a correlation between; the slow social progression of a child due to violence, the high economic costs attached to it, and how it hinders sustainable development (SDG Goals, 2020).

Kenya has an obligation to report on its progress in the implementation and realization of SDG 16.2. To this end, it is expected to file a VNR Report that mentions how Kenya has; mentioned SDG 16.2 in its report, attached budgetary allocation to the SDG, indicated political commitments to dealing with abuse of children, and how it has engaged with other stakeholders in the preparation of the report. The desegregation of the data for the indicator 16.2.1 has to be by sex, age group and form of abuse for children aged 1-17 (SDG Goals, 2020).

A look at the VNR Report establishes the following. First, Kenya clearly shows political commitment to the SDG Agenda from a general perspective. As earlier indicated, one can vouch in its use of the “whole of government” and “whole of society” approach that institutionalizes, implements, monitors and raises awareness on the SDG Agenda (SDG, 2020). Secondly, it is evident that it has also engaged various stakeholders within and beyond the government circles. This is evident in the engagements with the Parliamentary Caucus on SDGs and Business, the private sector, the Kenya Private Sector Alliance, use of sub-national governments, Council of Governors for the sub-national governments and National Youth Council (SDG, 2020). However before an analysis of the realization of the SDGs is done, it is important to situate their position in Kenya’s normative framework. However, there is no mention of corporal punishment in the analysis of SDG 16. This silence is evident in the text and the annexure to the report (Kenya VNR, 2017, pp. 44-45 and 74-75). The same silence extends to the lack of any budgetary provisions for the same. It worth noting that Kenya offers some challenges to the implementation of SDG 16 as follows:

- “i. Local, regional and international terrorism threats;
- ii. Inadequate resources;
- iii. High number of refugees due to regional conflicts;
- iv. Radicalization of the youth;
- v. Cyber-crime;
- vi. High youth unemployment breeding crime; and
- vii. Transnational and trans-border crime and networks” (Kenya VNR, 2017, p. 45)

The foregoing challenges are, however not qualified in the context of SDG 16.2 and it becomes an uphill task to qualify their authenticity concerning corporal punishment. Besides, the only semblance of the matters under 16.2 is the mention of trafficking in the region, but as a challenge to the realization of SDG 11 on the need for equality within and among other countries. It would appear in the interim that while Corporal punishment is prohibited by legislation in all settings, the practice seems to continue in schools and homes (Mweru, 2010). This disconnects between the law and the perpetrators in the family and education setting is rather worrying by the subsequential silence of the government on SDG 16.2. As such, the development approach that is envisaged in the SDG Agenda has not been engaged by the Kenyan government. An evaluation of the Court’s approach in this vein is essential.

The Court's Approach to Corporal Punishment

Kenya provides an example of jurisdictions where there is case law that has stated that corporal punishment in all settings, including the home setting is unconstitutional and a violation of children's rights (Benyam, 2019). However, the question is whether its approach is sufficient on its own to deal with corporal punishment. It should be noted from the onset that there are a few cases reported on corporal punishment in Kenya. A search on the eKLR website provided one case that is very instructive on corporal punishment. The author uses this case to showcase the approach of the Court. Because of the failure to obtain more cases, it is argued that this position is simply an insight and not comprehensive.

The most prominent case on corporal punishment was decided in 2004. In *Isaac Mwangi Wachira v Republic* (2004), an accused was convicted for subjecting his toddler- daughter to torture under the contrary to section 20 of the Children's Act. The facts reveal that the father severely and beat and pinched the young child- a situation which was beyond the reasonable chastisement of a child. He then appealed against the sentence on grounds that his chastisement of his child was not considered as a mitigating factor. The Court stated that under the children's Act, children were protected from torture and cruel, inhuman and degrading treatment including a parent's mal-behavior under the guise of discipline. Also, the Court reiterated its role in the examination of the status of corporal punishment in the home. To this end, the Court balanced the facts before it as follows: First, a parent's discipline of a child is not considered in the mitigation of a sentence. Secondly, a parent has no justification to meet down injuries on a three-year-old child under the guise of discipline. Thirdly it was irreconcilable that a child would be at fault and deserving such punishment.

The Court used a higher child-effect approach that places the child at the centre of the torture, cruel inhuman and degrading treatment (Effects' approach). This is different from a situation where the child would be placed at the centered of corporal punishment as a thematic issue (qualification approach). This follows that the placement of the child at the centre of the cruel and inhuman treatment approaches the problem from an absolutist perspective that looks at torture as bad and non-negotiable issue that is not in the best interest of the child. It is also argued that the court used the best interest of the child as a gap-filling provision to ensure that the child's protection is underscored. It would be different if the court placed a child at the centre of a corporal punishment assessment to qualify it as reasonable chastisement or corporal punishment. Such a position would lead the court to venture into the subjective evaluation of abuses against a child. to this end, it is argued that the effect's approach was in line with the position in both national and international law. While this approach is commended, it does little to aid the SDG's development approach that requires that the country reports on statistics on the cases of corporal punishment ad show ways that it has taken to mitigate them. The contribution now turns to the way forward on engaging the continued use of corporal punishment in Kenya.

Conclusion

Despite the prohibition of corporal punishment in Kenya, inconsistencies across the arms of government in dealing with the vice continue to thrive. While the executive should engage the SDG Agenda and present a VNR Report on the realization of the same, it adopted a silent stance on SDG 16.2 and failed to qualify how the identified challenges spoke to this target. The legislature has been instructive in qualifying corporal punishment as torture, inhuman or degrading treatment. The Court has taken on this position and used an effect's approach that

looks at corporal punishment as torture or inhuman treatment. This has envisaged the use of an objective standard of dealing with corporal punishment as torture, inhuman or degrading treatment.

The use of the SDG Agenda offers a chance to use the developmental approach that offers various advantages. First, it engages human rights aspects that are always evident in both international human rights instruments and Kenya's national legislation. Secondly, the SDG Agenda incorporates aspects of Agendas 2063 and 2040, which creates a monitoring role by the AU and its organs, coordination by Regional Economic Communities, and implementation at the national level. At the national level the use of the SDG Agenda to harness the protection of the child who is subjected to torture or inhumane treatment through a consistent and concerted effort by all the arms of government. At the core of this approach, the three arms of government need to avoid working in silos. Concerning the forthcoming 2020 VNR Report, the use of this concerted approach has to inform a detailed process that will emphasize the status of corporal punishment and how Kenya has dealt with the vice.

Recommendations

Children's international law is applicable in Kenya. This is due to the ratification of international treaties and the position of the constitution on the applicability of international law. There are some pointers, though not relayed in the judgment, may be inferred from an analysis of jurisprudence emanating from international human rights monitoring bodies. For instance, article 16 of the African Charter on the Rights and Welfare of the Child calls on States Parties to take appropriate legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of [parent(s), legal guardian(s) or any other person who has the care of the child (OAU, 1990). The responsibility for the upbringing of children is sole on the parents or caregivers who have to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child (OAU, 1990). This certainly requires that there is no torture, cruel, inhuman and degrading treatment. This is in line with a human rights approach that engages a preventative tone to the violation of the rights of the child, just like the provisions of the Constitution of Kenya and the Children's Act that prohibit the use of torture, inhuman and degrading treatment.

Secondly, emerging jurisprudence from the African Committee of Experts on the Rights and Welfare of the Child point to the protection of the child from all forms of torture and inhuman or degrading treatment by parents and caregivers. In its Concluding Observations on the Reports for Malawi (2018), South Africa (2019) the Committee calls on States, to support the eradication of all forms of violence against children (ACERWC, 2020). The Committee has also adopted the General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection (ACERWC, 2018). This General Comment advises States Parties to adopt legislation that prohibits corporal punishment of children in all settings like the home, schools and correctional settings (ACERWC, 2018). This has been replicated in the adoption of legislation like the Children's Act and the Constitution that underscore the protection of the child from torture, cruel, inhuman and degrading treatment. Furthermore, the Committee has continued to recognize corporal punishment as a violation of the rights of the child. This has been evident in *Centre for Human Rights and la Rencontre Africaine pour la Defense des Droits de l'Homme v. Senegal*, and *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and*

Yarg Ould Salem v. the Republic of Mauritania. This is an indication that corporal punishment is envisaged as a practice that may amount to torture, cruel, inhuman and degrading treatment. This is in line with the Kenyan Court's reasoning in *Mwangi Wachira v Republic*. It argued that both the Court and the Committee infer the application of the effects' approach that prohibits the use of torture, cruel, inhuman and degrading treatment on a child.

Following the link between human rights and SDGs, it is imperative to use other regional perspectives like Agendas 2063 and 2040 to serve two purposes. 1) to engage the SDG Agenda to promote the rights of children as they mature into youth, 2) to ensure the protection of the girl child who is usually affected by corporal punishment. This two-pronged- purpose enables the Committee to monitor the implementation of these rights by States Parties (OAU, 1990). The beneficial implementation requires that the States (like Kenya) have a streamlined system across the executive, legislature and judiciary to ensure the use of a human rights approach that blends the development perspective. To this end, the government of Kenya has to deliberately use national statistics reported at the police (SDG, 2020). The desegregation of these statistics on sex and age is instructive in the adequate identification of victims, and the courts use of the effects' approach to maintaining the protection accorded to the child. It is argued that the use of a human rights and effectual approach will enable the executive to enforce the legislature's position evident in the Constitution law. The Court will ensure that all reports are reported to the police station.

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