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COVID-19 AND THE RULE OF LAW IN KENYA

An Assessment of the Resilience of Constitutional and Human Rights Imperatives against the Government's Response to Covid-19

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OVERVIEW

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Introduction to the Study I

- Title of Study – Covid-19 in Kenya: Global Health, Human Rights and the State in a Time of a Pandemic
- Project Partners - KI, APHRC, and Cardiff University
- Funder – Arts and Humanities Research Council (UK)
- Why? – Need to document the impact of the pandemic on ordinary citizens through a human rights lens, and recommend future improvements

Introduction to the Study II

- KI's role in study:
- Examine how far Government complied with the Constitution and statute in its response to pandemic.
- Examine whether government agencies used a human rights-based approach.

Methodology

- i. Desktop review of relevant laws, polices, directives, advisories, case law, media reporting.
- ii. Interviews with stakeholders in the legal, public policy, public health and civil society sectors on opinions on the Covid-19 response measures for their participatory approach, suitability, effectiveness, impact, and lawfulness.

Study: Legal Context I

The Constitution:

- Art. 10 – Rule of law, human dignity, public participation, transparency and accountability
- Art. 21 – Protect, promote, fulfill rights
- Art. 24 – Limitation of rights
- Art. 29 – Arbitrary arrest and violence from public sources
- Art. 32 – Religion
- Art. 35 – Information
- Art. 37 - Assembly, demonstration, and picketing
- Art. 38 – Political rights
- Art. 39 – Movement and residence
- Art. 41 – Fair labour rights
- Art. 43 – Health, Food, education, housing, social security
- Art. 48 – Access to Justice

Study: Legal Context II

Statutory Laws:

- Public Order Act
- Preservation of Public Security Act
- Public Health Act
- Health Act
- Statutory Instruments Act

Study: The Legal Indicators Used I

❖ Rule of law

- Means the supremacy of regular as opposed to arbitrary power; and the principle that every person is subject to the ordinary law of the country. (Bryan A Garner, *Garner's Dictionary of Legal Usage*, 3d ed (2011), p 791)
- Supreme Court: a fundamental principle when examining the propriety of state conduct - a value that should insulate state actors from temptation to act on their own impulses, in their own self-interest, or in response to public opinion. (See *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR and *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR).
- Did provisions of the Constitution substantially inform state action in dealing with the pandemic - to curtail arbitrariness and authoritarianism?

Study Findings: the Legal Indicators II

❖ Human Rights

- Are human rights guarantees effective in guiding and limiting the exercise of coercive public health powers in pandemic situations
- What is the scope of human rights considerations during a public health emergency?
- State's duty to protect and fulfill citizens' social and health needs
- Balance between full enjoyment of rights and preservation of life
- Speediness and efficiency in responding to the Pandemic balanced against the requirement for public participation
- Adequate information to allow people to make informed choices
- Response measures that are reasonable and strictly necessary to address the health crisis

Study Findings: Freedom from Violence from Public Sources

- There was violation of the right to be free from arbitrary arrest and not to be subjected to violence from public sources (Art. 29).
- These violations typically occurred during enforcement of curfew regulations and the directive to wear masks in public.
- Aljazeera news, Kenyan president apologises for police violence during curfew, <https://tinyurl.com/Uhuruapologises>
- See OHCHR and Social Justice Centres Working Group – documenting police violence in informal settlements
- *LSK v IG & 4 others* [2020] eKLR – ‘It was unconstitutional for the police to use unreasonable force in enforcing the Public Order (State Curfew) Order, 2020’.

Study Findings: Right to health

- Balance - Urgency; adequacy; reasonableness; empirical data, science and research.
- Government measures: Creation of the National Emergency Response Committee; closing borders; restricting air travel; restricting entry from certain countries; curfew; health directives; resources to strengthen health capacity of hospitals etc .
- Lack of adequate personal protection equipment for healthcare workers which exposed them, and therefore the public, to the virus.
- Lack of adequate information on Covid-19, to enable informed health decisions. State should have been more proactive in relaying empirical data about the disease in simpler terms; particularly for communities living at the margins.
- There was a police/ public order approach rather than a public health approach in the fight against Covid-19; especially at the margins of society.
- Inadequate capacities of counties to effectively address the pandemic situation. Isolation facilities for Covid-19 patients and intensive care facilities were lacking from the outset, according to a Senate report.

Findings: ATI and ESC Rights

Right to access to information (Article 35)

- Parameters - Degree of access to information on Covid-19 measures and directives; response to ATI requests; and information accessible to the population in a language they understand.
- Information provided mostly focused on new measures and regular updates on prevalence.

'On general prevention knowledge to the public, the government did well and there I can say the minister and the ministry for health has done very well. Because you see, sometimes he says "if you treat this disease normally, it treat you abnormally" wash your hands. Sanitize, put on your masks, social distancing, that message has been received by every Kenyan. There is no single Kenyan in this country who can tell you that they do not know of preventing COVID-19, so that one the government has scored an A plain.'

- Mixed response to ATI requests
- Education – Inequality – private institutions capacity for online learning – low capacity for online learning, if at all for public institutions

Socio-economic rights (Article 43)

- Socio-economic programs meant to cushion against the adverse impacts of covid-19 could not be sustained in the long-term:
 - Opacity in identification of vulnerable populations for welfare payments.
 - Stimulus packages that meant to cushion the affected never reached the targeted people.

Findings: Access to justice

- Parameters – Assessment of delivery of service by the courts
 - Interruption of services in the first few months before adequate measures were put in place
 - Generally judiciary’s directives were clear and provided adequate information on how to access services
 - Directives posted on Judiciary and KenyaLaw websites – but more accessible to lawyers than general public
 - Directives on plea taking; bail and bond rules; downscaling of courts functions; e-filing and online court hearing system; operationalization of the CAJ online complaints system
 - Some difficulty in accessing court records due to limited access to Court buildings (Nairobi)

“[...], the Covid-19 pandemic has caused a public confusion over standards and parameters along which we do things. In this pandemic, new directions emerge almost on a daily basis, and the Court also should not rush to make any orders without hearing parties substantively.” {Muslims for Human Rights (Muhuri) v Attorney General & 2 others}

Findings: Public Participation

- Parameters - Physical meetings beyond a certain number limited – which alternatives were employed?
- Due to limitations on public gatherings, other approaches were used (online platforms /websites to reach the public)
- Perception of government response as knee-jerk, with little or no public participation in the formulation of protection measures. Affected acceptability and disproportionate impact on most marginalized.
- Delay in sending statutory instruments to parliament for deliberation (Senate).

Study Findings: Accountability

Parameters – Oversight by Parliament, commissions, and courts

- Senate Committee created to oversee Covid-19 response
- Courts found violation of rights in a number of cases – Covid issues prioritised for hearing
- Misuse of funds earmarked for Covid response (KEMSA scandal)
- Seemingly lack of accountability for excessive use of force by police
- Unequal enforcement of public gathering directives – public rallies or state events with big numbers; people penalized for meetings
- KNCHR received several complaints on violation of rights during enforcement of Covid-19 directives.
- Commission on Administrative Justice (Ombudsman) received complaints through an online platform created for that purpose

Study Findings: Legality of Measures

- Most response measures were in the form of executive orders or regulations – some made in a manner that raised questions as to their legality, yet they attracted penalty for non-compliance (See *LSK vs. AG & another [2020] eKLR* – Petitioners alleged restriction of movement orders ascribed penal consequences without any legitimate aim).
- Unclear directives – meant state officers interpreted them as they saw fit – resulting in arbitrariness, different treatments to persons in similar situations – inadvertent breaches of the law by the people

Study Findings: Gaps in Policy

- Absence of a national standard for critical infrastructure to Covid-19 policies within county governments, a key factor in the provision of health.
- Lack of critical expertise in composition of the National Emergency Response Committee
- Failure by state agencies to continuously reflect on risk and resilience to inform policy formulation
- Lack of political good-will in bringing accountability on misuse of funds earmarked for Covid-19
- Absence of a pandemic response law to improve coordination of critical resources and personnel between national and county government

Findings: Notable Issues I

- Public through social media made government check its actions. In view of limited public participation, these engagement efforts assisted the government to revise measures adversely affecting the public.
- Pandemic highlighted legal, institutional and public health inadequacies facing the country.
- Inevitable that Covid-19 response would affect livelihoods, and hence socio-economic rights; but State still seems unable to effectively cushion citizens against the effects – same measures employed
- Public pandemic fatigue –obeying measures only when in vicinity of police or in certain spaces - political elite partly to blame for the flouting of Covid-19 rules particularly on masks, and public gathering ban.

Findings: Notable Issues II

- Generally government took measures that were necessary to combat spread of virus
- Exclusion of key actors in developing guidelines and measures
- Blanket orders failed to take the peculiar circumstances of various vulnerable groups into consideration.

“GBV, by its nature brings the different sectors together and there was absolute lack of coordination.”

- County and multi-sectorial approaches: national government Regulations did not factor in unique circumstances of various counties. So, county governments heavily constrained in efforts to combat the pandemic.
- No political goodwill to address existing systemic issues in health and human rights sectors which were exacerbated by Covid-19

Recommendations I

- **To Executive**

- State should ensure policies are responsive to the crisis; effectively implement existing laws, and incorporate human rights approach into enforcement of directives.
- Limitation of rights through Covid-19 measures should be guided by available science and information and be within existing legal structures

- **To Parliament**

- Enact Public Participation law; the Pandemic Response Bill; review the Public Health Act .
- Assess human rights impacts on laws and directives to effectively consider the effect to the people; especially the most vulnerable

- **To Judiciary**

Countrywide roll-out of periodic bar-bench meetings so that court users can share experiences on the Covid-19 measures to improve operations within justice system.

Recommendations II

- **To Ministry of Health**

- Fast-track development of a national emergency plan and national health standardization tools guide county governments in preparation for a public health pandemic.

- Communication and coordination: working with relevant local and international actors including the ICT Ministry, Government Spokesperson, KEMRI, county governments departments of health, WHO, Africa CDC, healthcare workers unions and associations, public health officials and the media to make sure that information shared on the pandemic is **clear, concise and factual** to avoid misinformation that might risk further harm to the public.

- Improve critical care management through investing in infectious disease wards or units and a self-sustaining critical care system throughout the country.

- Economic, social and health support systems should be strengthened as guided by the United Nations and WHO recommendations.



THANK YOU!

