Playing tag with the Rule of Law: Balancing Fundamental Rights and Public Health in Kenya in the shadow of COVID-19

By:

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"We allow only reason, not a human being to be ruler", Aristotle, Nicomachean Ethics, 1134.

The first case of Covid-19 infection within Kenya's borders was reported on 13th March 2019. The global pandemic has brought the Rule of Law in Kenya to a cross-roads as the government attempts to strike a delicate balance between the health and safety of the public, on the one hand, and their economic and social well-being, on the other. The choices have been tough, and the outcomes have been mixed. All of its policies and regulations have been met with mixed reactions as well as political and legal challenges.

Covid-19 has led to many fundamental human rights and freedoms being temporarily stripped by governments and authorities across the globe. Kenya has been no exception. Since 13th March 2020, the fundamental rights to freedom of association, movement, access to justice, access to administrative action, property, assembly, demonstrations, grouping and picketing, have been suspended, impeded and or affected. In Kenya, such restrictions have a constitutional foundation in Kenya's 2010 Constitution. That Constitution provides that individual rights and freedoms may be limited if their exercise and enjoyment are likely to prejudice others.

The National Council for the Administration of Justice has limited the right of Kenyans to access justice in its efforts to limit the spread of Covid-19 within its institutions. The courts and administrative tribunals nationwide have been closed. Except in exceptional circumstances, public hearings in open court have been stopped. Access to the courts and administrative tribunals is limited to digital filings, hearings and rulings. Government registries responsible for records on commercial and corporate transactions are closed.

The Judiciary and government employees in this sector are not economically affected by the closure. As public servants, they will continue to receive their salaries and benefits. The public health benefit for legal practice is as obvious as the ensuing negative economic impact. Closing the courts and government registries means limited legal work and the drying up of income from legal work affected by the closures.

The Law Society of Kenya, the body representing advocates and firms that undertake legal practice, has filed a petition in the same courts challenging the closure. This petition was defeated on a technicality. Nonetheless, to placate the public demands from the Law Society of Kenya for access to justice, the Judiciary has introduced a raft of measures that now allow for electronic filing of documents and delivery of judgments and rulings. These measures seek to strike a balance between continued legal practice and the health and safety of judicial officers and their subordinates.

There is an ongoing public-policy debate on whether Kenya can and should enforce a lockdown. Those who favor a complete lockdown argue that this will help slow down the contagion of Covid-19. Their primary motivation is that of public health. Those against it, point out that many citizens earn a daily wage and a lockdown was likely to lead to a break-down in law by those facing starvation for lack of incomes.

The approach to lockdowns amongst the countries in East Africa is varied. In Rwanda, the government has ordered a total lockdown and is supplying households that require assistance with food. Uganda's government is using the same approach. In Tanzania, the government has kept churches, businesses, markets, government offices and day to day economic and social activities going.

Kenya has taken an approach in between the foregoing ones. At first, it enforced a nationwide night-time curfew . Only essential workers are allowed to move from their places of work or home between 7:00 pm and 5:00 am. After two weeks, orders were issued stopping movements in and out of the 4 counties of the country that have the highest number of confirmed cases of Covid-19. The closure of the 4 county boundaries is meant to stop the spread of infections to the other 43 counties.

The categorization by the government of essential services is not without controversy. Legal and judicial services were left out. Churches, mosques and other religious organizations were ordered to close their doors to members of the public. Several religious leaders have been arrested for defiance of these directives. Two Christian leaders challenged the directive to close. Though the Law Society of Kenya was unsuccessful in its challenge of the nationwide curfew the courts have ordered the government to add lawyers to the list of providers of essential services. Churches have been directed to digitally broadcast their services to members as the courts hear their petition for their services also to be categorized as essential.

It cannot be underscored that the driving force behind the challenge by the Law Society of Kenya to the closure of the courts, and the classification of legal practice as non-essential is the economic well-being of its members. Whilst the Judiciary and the government both agree that public health and safety and legal practice are not mutually exclusive, judicial services can now only be accessed through electronic means.

As noted above, Kenya promulgated a new Constitution after a successful referendum in 2010. One of the biggest changes in the governance of the country under the 2010 Constitution was the devolution of government and the creation of 47 counties with functions independent of the national government. For example, the function of health was removed from the hands of the national government and placed on the shoulders of the 47 counties.

A few days after the first Covid-19 case was confirmed, Nairobi, the county in charge of the capital city of Kenya, handed over its functions to the National Government. A new authority, Nairobi Metropolitan Services, took over the functions of the County Government at the same time that the government was developing a response to the Covid-19. Since the national government is responsible for the running of Nairobi County, there has been little criticism of its efforts to curb and contain the spread of Covid-19 within the capital city.

The approach in the remaining 46 counties have been different, depending on the economic capability of each county, and the capacity and measures taken by their respective governors. One governor has received national acclaim for distributing food to county residents, equipping county hospitals with ventilators and more beds, and installing open air public sanitizer tents for residents on the move. Another governor dismissed the county secretary in charge of health and personally took over his functions, office and duties. Several counties do not have any ICU beds.

It is not the Corona Virus that brought troubles to and exposed the inadequacies of county public health services. Before Covid-19, county governments were widely criticized for their lack of hospital beds capacity, quality of health care and the treatment of healthcare workers. Discouraged by poor conditions of work and remuneration, and after a prolonged nationwide strike, healthcare givers left county public healthcare service in droves. The result, a push for the Constitution to be changed and the health sector to be reverted and placed under the familiar wings of the national government.

As the country puts in place measures to contain the spread and to treat those who are infected, it is beyond debate that the level of care patients receive will vary from county to county. This is by no way ideal; indeed, it is discriminatory of citizens based on the counties they reside in. Can and will counties voluntarily, like Nairobi county did, surrender healthcare services to the national government? Will it be too late?

The government introduced a raft of measures to mitigate added tax and turn over tax rates were reduced by 2%. The reduction in the turnover tax rate will reduce the tax burden of micro, small and medium size enterprises that constitute over 95% of all businesses in Kenya. There has been no opposition to these fiscal measures. The reduction in income tax, coupled with the increase in the threshold for income tax, will increase the amount of disposable income of employees. However, employees covered by the zero-tax income tax bracket will likely decrease as a large number of employees in this category have and will continue to lose their jobs if the economic downturn continues. One of the areas of concern for many businesses will be the health and safety of their employees as well as the cost of retaining them on the payroll. No economic measures have been introduced to incentivize employers and businesses not to downsize their workforce.

Employers have a statutory duty to ensure the safety, health and welfare of all persons at the workplace. Employers must also avoid overcrowding in the workplace. Every employer must provide washing and clean, sanitary facilities. The workplace must also be clean and well ventilated. Any organization with more than 25 employees is required to have a written safety and health policy, and to establish a safety and health committee. The government has reinforced these statutory measures by publishing Public Health Rules that require employers to provide hand sanitizers at their workplace and ensure that a distance of 1 meter between persons at the workplace is maintained. Employees who have worked for at least two consecutive months are entitled to 7 days’ sick leave with full pay and an additional 3 days’ sick leave on half pay. Employers are mandated to provide medicine and medical care for employees who fall ill while working unless there is available free health care provided by the government or medical insurance taken out for the employees. The result is that the cost of labour has escalated without a corresponding rise in turnover, cashflows and income. As a result, several big corporate organizations have requested their workforce to take a pay cut, in some cases of up to 25%. Other organizations, for example, the upmarket Dusit D2 hotel, have simply closed shop, terminated contracts with its suppliers and customers, and retrenched its entire workforce.

Kenya's government, faced with high debt repayments and reduced revenue collections, is likely to be short on the resources. According to a report published by Kenya's National Treasury, at the end of 2019, Kenya's debt-service to revenue ratio stood at 33.4%. The recommended threshold is 30%. Before Covid-19, the government had a growing fiscal deficit, bloated expenditure, shrinking revenue despite aggressive collection methods, and rising debt repayments. To compound this fiscal crunch, the government continued domestic and international borrowing. Long before Covid-19, the economy was, to put it mildly, stumbling.

Nonetheless, the government, to sustain law and order, must do more to mitigate the economic impact of the global pandemic. So far, Cyntons Investment Ltd seems to be ahead of the crowd in their proposals of what government can do. Their proposals, while merited, will not be adequate or fully achievable. Creative novel thinking and ideas tailor-made to the country's circumstances is required.

According to Acemoglu D. and Robinson J.A. in their acclaimed book "Why Nations Fail", North Korea and South Korea were at par economic wise in 1938. In the decades to come, South Korea soared well above and beyond North Korea. South Korea stood apart from North Korea because of the public policies it adopted and applied to its economic, social and legal institutions. Will Kenya rise to the challenge? Time will tell.

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