COVID-19 and the State of Socio-economic Rights in Kenya: Why We Must Take these Rights Seriously

By:

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The wake of the novel Coronavirus Disease (COVID-19), which has since been declared a pandemic by the World Health Organization (WHO), has seen countries around the world put in place measures, to curb the spread of this highly contagious disease. These measures aimed at limiting human movement and physical interactions include containment orders, curfew orders and lockdowns in various parts of the world. Since the confirmation of the first COVID-19 case in Kenya on the 12th of March 2020, the government of Kenya has introduced various measures to curb the spread of this disease. These measures began with an advisory to Kenyans to stay at home as much as possible by working from home, apart from those who fall within the category of essential service providers. With the rise in the number of infections, the Government further, through the Public Order (state curfew) Order (*Legal Notice No. 36 of 2020*), imposed a countrywide thirty days dusk to dawn

curfew, from 7:00pm to 5:00am, effective from the 27th of March 2020. Further, on the 6th of March 2020, the Government issued a containment Order restricting travel to and from the Nairobi Metropolitan, as well as the Mombasa and Kilifi Counties.

This limited movement has led to loss of jobs, especially for people within the informal sector and even the formal sector due to the decline of business, the slowed down economy and limited available work hours. Some employers have laid off their employees. Most wage workers can no longer go seeking daily jobs because most people are staying at home. From such a situation, the question of the strength of socio-economic rights in Kenya is inevitable. Questions of how these Kenyans who are no longer able to fend for themselves, or afford housing by virtue of the Government‘s measures to curb this pandemic will survive are concerns we cannot ignore. To cushion Kenyans from the harsh economic times, the Government has introduced tax reliefs through The Tax Laws Amendment Act, 2020, which has come into effect roughly a month after the curfew Order. Notable are the reduction of the Value Added Tax (VAT) from 16% to 14% and increase of the ‘pay as you earn’ bracket, exempting Kenyans earning Kshs. 24,000 per a month from paying income tax. Although these are good measures from the government intended to reduce the cost of living, the reality remains harsh as low income families struggle to meet their most basic human needs. Below I will discuss the state of socio-economic rights in Kenya, with the aim of raising awareness towards the need to take these basic human rights seriously.

Socio-economic rights have for long been regarded as secondary to civil and political rights, dating back to the first international instrument on human rights, the 1948 Universal Declaration of Human Rights (UDHR), which covers only civil and political rights. Even with the growing agitation for the provision of socio-economic rights internationally, states were reluctant to commit because of the nature of obligations imposed by these rights. Eventually, the International Convention on Social Economic and Cultural Rights (ICESCR) was adopted in 1966. The persistent strained international goodwill is evident in the structure of the organisations. Out of the nine core human rights international conventions, the ICESCR remains the only one with no treaty body established directly under the Convention. Although there was a shift in this paradigm

during the 1993 Vienna Conference on Human rights, national state practices are yet to catch up. Article 5 of Part I of the 1993 Vienna Declaration and Action Plan provides that all human rights are universal, indivisible and interdependent and interrelated, and should be treated equally, on the same footing with the same emphasis. Despite this international human rights law's position, the limiting nature of Kenya's Constitution on their enforcement implies otherwise.[1] In addition, the international enforcement mechanisms for socio-economic rights are not as stringent as the mechanisms for civil and political rights. Enforcement only requires periodic State reporting.

The State of Socio-Economic Rights in Kenya

Socio-economic rights place a positive obligation on a State to set aside resources towards their realization. Because allocation of State resources is the purview of the executive and the legislature, at least in the Kenyan context, and while enforcement of these rights is the mandate of the judiciary, an inevitable conflict on their enforcement arises. Thus, these rights remain just a beautiful painting on the wall that Kenyans can only look at. Article 43 (1) of the Constitution of Kenya provides that:

> *1) Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education.*

Nevertheless, the promise of these provisions is yet to be felt by most Kenyans because the same Constitution leaves their enforcement vague. Despite implying immediate realization of the rights under the Bill of Rights, the Constitution, under Article 21 (2) exempts socio-economic rights, whose realization shall be progressive. The progressive realization principle as regards socio-economic rights is widespread among various Constitutions with socio-economic rights, such as the Constitution of South Africa. Appreciating the fact that 'progressive realization' has to be qualified somehow to hold governments accountable, some jurisdictions, have developed requirements that their governments should meet for it to be said that they are fulfilling their

obligations on progressive realization of socio-economic rights. Jurisprudence developed by the Constitutional Court of South Africa establishes the reasonability test.[2] Further, drawing its powers from 172 (1) (b) of the Constitution which allows it grant any orders that are just and equitable, the Constitutional Court of South Africa employs the use of structural interdicts, which are orders under which a court controls compliance with its orders, as a form of constitutional specific performance.

Enforcement of socio-economic rights in Kenya, with minimal success rate, has proven quite problematic. In almost all petitions on socio-economic rights, the government always pleads progressive realization, inadequate resources and the doctrine of separation of powers. Enforcement of socio-economic rights such as the right to adequate housing requires allocation of resources for their realization. In Kenya, allocation of resources is not the mandate of the judiciary but the executive, with approval from the legislature.[3] This presents a situation where courts are faced with the reality of unenforceability of their decrees on socio-economic rights. Article 20 (3) of the Constitution of Kenya, gives the High Court leeway to develop the law to the extent that it protects a given right under the Bill of Rights. The most recent attempt by the High Court to execute this was in the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*. In this case on the right to adequate housing, Honourable Justice Mumbi Ngugi applied the structural interdict remedy popular with the Constitutional court of South Africa, despite the remedy not being provided for by the Constitution of Kenya. The Honourable Justice used the 'reporting back to court' and the 'expert remedial formulation' models of the remedy requiring the respondents to, in consultation with experts who were not party to the petition, develop a remedial plan on how the respondents would remedy the violation of the petitioners' right to housing. I must commend the Honourable Justice for this boldness. However, seeing how unpopular such an order was, before any compliance, the respondent appealed against it in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others***.** The Court of Appeal allowed the appeal, taking judicial enforcement of socio-economic rights back to miasma of uncertainty.

Further, Article 23 (3) of the Constitution of Kenya provides for remedies available for constitutional petitions to include: *a declaration of rights; an*

injunction; a conservatory order; a declaration of invalidity of any law that violates the Bill of Rights unjustifiably; an order for compensation; and an order for judicial review. This set of remedies, however perfect for civil and political rights, is regrettably insufficient for the enforcement of socio-economic rights. For instance, a declaration that the a State organ has violated a petitioner's right to nutritious food or adequate housing will not be very beneficial to the petitioner if courts do not decree on the way forward and direct the state on how to remedy that violation. Declarations of violations of rights are nice, but they achieve very little to remedy the petitioner's situation in the absence of a certain mode of enforcement of these rights. At this point, take time to consider the plight of the petitioners in the above *Mitu-Bell case*, whose informal settlement establishments were demolished and they were evicted. Despite the High Court having ruled that their rights were violated, an attempt by Hon. Justice Mumbi Ngugi to direct the State on a way forward were shunned when an appeal against the judgment was allowed. How would you say has a declaration of violation of the right to housing made a situational positive impact to the petitioners?

This however, is not to completely discredit the Government of Kenya's efforts towards realization of socio-economic rights. The current government has, through policy formulation outlined its implementation of what is now popularly known as the Big 4 Agenda which is aimed at enhancing manufacturing, food security and nutrition, universal health coverage, and affordable housing. The sustainability of such is however questionable firstly as these are usually political manifestos, which sadly are likely to die with the founding regime. Secondly, these are completely at the mercy of the executive as there is no accountability mechanism set either by parliament, the judiciary or the Constitution. Article 20 (5)(c) of Kenya's 2010Constitution provides that in applying any right under Article 43, *the Court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion*. This essentially ties the hands of the judiciary regarding allocation of resources in implementation of socio-economic rights.

Conclusion

From the ongoing discussion, one can draw a picture of the state of socio-economic rights in Kenya, and arguably in many African states. Pandemics have a way to drawing a country back to the basic human needs, as it is being witnessed now all over the world. In a span of roughly two months, many Kenyans have lost their sources of income, with the one option of turning to the Government for their basic human needs. Due to lack of specific permanent measures to promote socio-economic rights, the capacity of the Government to cushion Kenyans against the economic harshness of COVID-19 is being put into test. Despite the government having formulated some measures especially in form of tax reliefs, basic needs of most vulnerable families are being met through donations from the corporate Kenya as philanthropy. For human dignity, in the bare minimum, a country's people should be able to meet their basic human needs, which include shelter and food. Also noting the Government's efforts through the Big 4 Agenda, the biggest question remains the executive's accountability in its implementation. As long as the hands of the judiciary on enforcement of socio-economic rights remain tied, socio-economic rights remain a dream for many Kenyans especially in times of disasters. If we are to take anything home from COVID-19, is that socio-economic rights are basic human needs and we must take them seriously.

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[1] Article 20 (5)(c) of the Constitution of Kenya, 2010

[2] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) para 42-45

[3] Article 220, Constitution of Kenya, 2010

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