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Article *in* SSRN Electronic Journal · January 2020

DOI: 10.2139/ssrn.3587768

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HUMAN RIGHTS AND COVID-19 (CORONA VIRUS) IN KENYA: IS THE LAW SILENT? PART II

By Joshua Malidzo Nyawa

> Ignore anyone who tells you that during a pandemic, their policy is above criticism, that politics don't apply in a pandemic, or that accountability and transparency need to be suspended for some indefinite period of time. The opposite is true: all the decisions being made right now, whether medical or economic, deserve widespread scrutiny and debate.
>
> Anne Apple Baum

Introduction

Michael Paulsen in his 'the Constitution of necessity'[1] argued that we ought to interpret/ construe the constitution in a manner that would avoid a "constitutional implosion." By this, he meant that the law of self-preservation (the duty of the president/executive to prioritize the preservation of the nation at the expense of a constitutional provision) must always take precedence even if it meant suspending the constitution. Further, that every constitution must contain a self-preservation exemption i.e. a rule of necessity which will allow a violation of the rights. To him, a constitution that lacks such a provision, he calls it a 'suicide pact'. Saikrishna Prakash in his '*The Constitution as Suicide Pact*' summarizes Paulsen's argument by asking a question

> Who favors constitutional suicide? More accurately, who favors a constitution that lacks an emergency provision authorizing the President to suspend some or all of its parts?

As I had indicated in part I, This argument is not new. Schmitt had during the Nazi regime argument that emergencies create what he terms 'the state of exception'. In such a state, the

[1]Michael Stokes Paulsen, *The Constitution of Necessity,* 79 NoTRE DAME L. REV. 1257 (2004).

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president or leader of the executive is allowed to suspend the constitution and whatever he says is the law. In summary, the argument advanced by the two distinguished authors is that the people of Kenya have delegated their authority to the president and in times of emergencies, the president is allowed to do anything which will prevent harm to the nation (The acts of the president during the emergencies are legitimized by the need to preserve the nation).

This argument is not sustainable in Kenya. Although the president is granted 'emergency powers' (Article 58 and 132), the powers are not in Paulsen and Schmitt's theory. Firstly, the powers of the president do not allow a suspension of the constitution. Secondly, even though the powers allow the government to limit the rights of the citizens, the same should be in line with article 24 (the limitation clause). Thirdly, the constitution provides for 'core rights' which are non-derogable (These rights have a historical underpinning. The provision was meant to curb the excesses of the executive during emergencies). Fourthly, even during the emergencies the powers of the president are checked by the parliament and the Supreme Court).

In a bid to curb the spread of Corona virus in Kenya, the government has come up with different measures including statutory instruments. In this paper, I will only consider *The Public Health (Covid-19 Restriction Of Movement Of Persons And Related Measured) Rules , 2020* (herein referred to as the Covid Rules, 2020) which were gazetted on 6th April, 2020. I will divide the paper into four parts;

1. Whether offences can be created in a subsidiary legislation?
2. Constitutionality of the Covid rules, 2020.
3. Constitutionality of Rule 5(4) and 11 of the Covid rules, 2020.
4. Where is the parliament?
5. Conclusion.

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I. Whether offences can be created in a subsidiary legislation?

The constitution grants legislative powers to the legislature (National Legislations, Article 94, 95 and 96) and county assemblies (County legislations). The constitution however allows the parliament to delegate this function. Simply, the constitution allows other people (read the executive) to make laws. This is simply because the parliament are not experts in all fields and since the world is ever changing, the parliament may not be abreast with all changes. However, the catch here is that such a person must be authorized by the parliament.

Article 94 of the Constitution provides for the legislative authority of Parliament as follows:

> *"94. (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.*
>
> *(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.*
>
> *(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.*
>
> *(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.*
>
> ***(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.***
>
> *(6)* ***An Act of Parliament****, or legislation of a county,* ***that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya****, as contemplated in clause (5),* ***shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority."***

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In most of the circumstances, the executive is allowed to make regulations to operationalize the act. Such powers were conferred by the parliament to the Cabinet secretary for health under section 36 of the Public Health act. The provision reads

> **36. Rules for prevention of disease**
>
> Whenever any part of Kenya appears to be threatened by any formidable epidemic, endemic or infectious disease, the Minister may make rules.

The parliament therefore mandated the Cabinet secretary to make rules to deal with any pandemic. The Covid-19 rules are meant to operationalize section 36 of the parent act. When the rules were gazette, what captured the eyes of many citizens is that fact that the Cabinet secretary provided for punishment for anyone who violated the rules (A penalty of a penalty not exceeding Kshs. 20,000 or to imprisonment for a period not exceeding six months or both). On whether, a regulation can provide for an offence, **the answer is yes**. The constitution does not limit the contents of a delegated (Subsidiary) legislation. In other words, the constitution does not prevent a cabinet secretary from providing a penalty (The constitution does not prevent the creation of offences in a subsidiary legislation). Further, the ***Statutory Instruments Act No. 23 of 2013***, section 24(5) provides:

> ***There may be annexed to the breach of statutory instrument a penalty, not exceeding twenty thousand shillings or such term of imprisonment not exceeding six months, or both, which the regulation making authority may think fit.***

What this means is that, although the legislature allowed the cabinet secretaries to create offences. The parliament limited the powers of the Cabinet secretaries (They can only create offences which are punishable by a penalty, not exceeding twenty thousand shillings or such term of imprisonment not exceeding six months, or both) **.**

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Although, the current law in Kenya allows a Cs to create offences, I would add that the same must be taken to parliament for scrutinize the subsidiary legislation for constitutionality and ultra vires. I believe this is why the parliament (section 10-13 of the statutory instruments act) require the same to be tabled before parliament. Most importantly a law that seeks to limit the bill of rights must be taken to parliament, this is to prevent a rule by executive decrees. It should not be forgotten that the duty to protect the constitution is not only on the judiciary but also the parliament. The transformative constitution can only suspend if also the parliament takes an active role.

II. Constitutionality of Covid rules, 2020.

The transformative nature of the constitution of Kenya revolutionizes all aspects of governance in Kenya. The revolutionary nature of the constitution leaves footsteps in the executive, judiciary and legislative functions. The constitution changes the way things were being done in pre-2010. Of importance to this commentary is article 10 and 94 of the constitution. Article 10 provides values and principles that run through the constitution. The values bind everyone (including the executive, washing away the aspect of imperial presidency). Article 94 on the other hands vests the legislative authority on the legislature and retains power on the executive to check the subsidiary legislations. The mantra therefore is simple, things must change!

Even where the Cabinet secretary has been granted powers to make a subsidiary legislation, the same must be done in accordance with the constitution and the statutory Instruments Act. I access the constitutionality of the Covid rules, 2020 on three grounds:

i. Lack of consultation/ public participation.
ii. Violation of the right to a fair administrative action.
iii. Failure to lay the rules before the parliament.

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i. Lack of consultation / public participation

The import of public participation during the legislative process has already received enough ink, both in the academia and the judiciary. Not to be accused of reinventing the wheel, I will quote a few judicial pronouncements on the same. In the South African case of *Doctors for Life International v Speaker of the National Assembly and Others*[2] the court stated that:

> "*According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore means taking steps to ensure that the public participate in the legislative process."*

In the case of *Nairobi Metropolitan PSV Saccos Union Limited &25 others*[3], the court stated that:

> "*The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, Article 174 (c) of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation*."

[2] *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006]ZACC11;2006 (12)BCLR 1399(CC); 2006(6)SA 416(CC)

[3] *Nairobi Metropolitan PSV Saccos Union Limited &25 others v County of Nairobi Government & 3 others* [2013] eKLR,

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On whether or not there have been public participation, the test was formulated in the *Minister of Health and Another v New Clicks South Africa (Pty) Ltd. and Others* [4]where the court held that

> "*The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*

In summary on this point, public participation is mandatory requirement of making a legislation including subsidiary legislation. The high court has expressed itself on the mandatory nature of public participation in subsidiary legislations. In *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health*[5], the court stated as follows:

> "*From these decisions and others that were cited before us by the parties' advocates, it is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted."*

The statutory instruments act provides for a two-level public participation (Pre-gazettement and post-gazettement) in the enactment of the subsidiary legislation (Section 5 and 13). In summary The Statutory Instruments Act requires:- **(a)** Consultation with stakeholders, **(b)** preparation of

[4] *Minister of Health and Another v New Clicks South Africa(Pty) Ltd. and Others* [2006](2)SA 311(CC)
[5] *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR

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regulatory Impact Statement, preparation of explanation memorandum, tabling of statutory instrument in the House, consideration of the statutory instrument by the National Assembly Committee on Delegated Legislation.

A subsidiary legislation that is enacted without public participation or consultation with those whom it is likely to affect (in this case, the rules affect the businesses of public vehicles and generally all citizens) suffers only one consequence, such a legislation is null and void (read unconstitutional). This is a position that was reiterated in *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [6] where the court correctly held that

> 115. It is trite that Regulations or policy guidelines must conform to the Constitution and the statute in terms of both their content and the manner in which they are adopted. Failure to comply with manner and form requirements in enacting Regulations or policy guidelines renders the same invalid. Courts have the power to declare such Regulations or policy guidelines invalid. This Court not only has a right but also has a duty to ensure that the Regulation or guideline making processes prescribed by the Constitution and the Statute(s) is observed. And if the conditions for Regulation-making processes have not been complied with, it has the duty to say so and declare the resulting statute, regulation, policy or guideline invalid.
>
> 116. I find and hold that the Regulation or policy guidelines introducing the DMS system were adopted in a manner inconsistent with the constitutional and statutory requirements. The provisions of the statutory instruments act were not complied with, hence, the regulation, or policy guideline lack legal basis to stand on. Courts are enjoined by the Constitution to uphold the rights of all and to ensure compliance with constitutional values and principles, a duty this court cannot shy away from.

[6] *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [2018] eKLR, Constitutional Petition 53 of 2017

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Simply, a subsidiary legislation which violates the procedural safeguards. In *Anthony Otiende Otiende v Public Service Commission & 2 others* [2016] Eklr, the court noted that

> 42. *A fortiori*, where statute confers power upon the executive to legislate then the manner and form provided for the making of such subsidiary legislation is to be complied with. The statutory provisions must be complied with,

It does not matter the purpose that the subsidiary legislation is intended to serve, the legislation is unconstitutional. This is the long held position as demonstrated *in Macfay vs. United Africa Co. Ltd* [1963] 3 All E.R. 1169 that:

> "If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Lest we forget the words of Nyamu, J (as he then was) in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240:

"One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by **sufficient procedural safeguards that ensure certainty and regularity of law.** This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law."

ii. Covid rules, 2020 violate the right to fair administrative action.

Article 47 of the constitution lays a constitutional foundation for control of the powers of state organs and other administrative bodies and entrenches the right to fair administrative action in the

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Bill of Rights[7] (words borrowed from the court of appeal in *Judicial Service Commission vs. Mbalu Mutava & Another*[8]). Section 2 of the Fair Administration Actions Act defines - "administrative action" to include- *"(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.*

In *Republic of South Africa v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC)**,** the constitutional court construed an administrative action in the following terms

This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

When taking an act or a decision which will affect the legal rights of a person the same will amount to an administrative decision even where one was performing a legislative function. For instance, Rule 5 (3) of the Covid Rules, 2020 requires that public transport vehicles shall not carry more than 50% of their licensed capacity and motorcycles shall only carry one passenger. Although contained in a legislation, this is an administrative action by the cabinet secretary.

Article 47 of the constitution and the fair administrative action act provide for procedural fairness. Section 5 of the Act provides that

[7] See also Moses Kiarie Kairuri & 4 others v Attorney General & 3 others, Petition No. 280 of 2013 in H.C at Nairobi [2014] eKLR
[8] {2015} eKLR, Civil Appeal 52 of 2014

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5. (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice-

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within the which such appeal shall be lodged

Justice Mativo interpreted this requirement in **Kenya National Commission on Human Rights & another v Attorney General & 3 others, Constitutional Petition 227 of 2016** as follows :

*"In order to give meaning to the notion of procedural fairness to the public, a number of concepts need to be explained. In order to identify the administrative action affecting the public, the following test may be applied:- the administrative action must **(a)** have a general effect; **(b)** the general effect must have a significant public effect; and **(c)** constitutional, statutory (i.e. by means of enabling legislation), or common-law rights of members of the public must be at issue.*

The rights of the public must be affected. These rights are interpreted widely to include constitutional, statutory and common-law rights. These are the rights held collectively by the public as members of a group or class.

The effect of the administrative action on the rights of the public must be material and adverse. The material effect seems necessary to ensure that matters of a trivial nature (that are fundamentally insignificant in their effect on rights) escape the application of the procedures for fairness to the public. The adverse effect seems to indicate that the rights of the public must have been negatively affected by the administrative action. Since the requirements of procedural fairness to the public are set in motion by administrative action adversely affecting the public, it is important to establish who constitutes the public. The word "public" is defined as including any group or class of the public. The reference to "group or class" may imply a link between the individuals to constitute a definable group

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or class of persons. Any administrative action which affects the public (generally, impersonally and non-specifically) as opposed to individuals must satisfy the requirements of Section 4 for procedural fairness. To ensure that administrative action affecting the public is procedurally fair (i.e. before the implementation of a particular decision), the public official must strictly adhere to the provisions laid down under the Act." [9]

An administrative action which violates the procedural fairness requirement similarly suffers only one consequence, it is unconstitutional. In **Garissa County Government v National Land Commission & 3 others, Petition No. 401 of 2014 [2016] eKLR** Justice Lenaola held thus in this respect:

Guided thereby, I resolve that the impugned decision having been undertaken and executed unilaterally, without requisite consultation or co-operation and not being clear on how information considered was obtained, the administrative action in question was neither infused with good governance nor transparency."

Having failed to issue a notice to the Matatu sector operators and boda bodas and the failure to consult them, the Covid-19 Rules are clouded in secrecy and hence violate article 10 and 47 of the constitution.

iii. **Failure to take the subsidiary legislation to parliament**.

Section 11 of Statutory Instruments Act requires the subsidiary legislation to be taken within sitting 7 days after its publishing in the gazette. If the legislation is not taken to parliament within the stipulated period, it becomes unconstitutional. There is a litany of case law on this position. In *Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel*

[9] See In Geothermal Development Company Limited v Attorney General & 3 others Petition 352 of 2012 [2013] eKLR Majanja J. observed thus:
"Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including "(c) responsive, prompt, effective, impartial and equitable provision of services" and *"(f) transparency and provision to the public of timely, accurate information."*

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Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary For Transport & Infrastructure & 5 others , the court concluded by noting that

> 110. Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory. ……Therefore if the Regulations were not laid before Parliament within seven (7) sitting days after the publication, the same would on the 8th day have become void although the voidance of the Regulations would not nullify the acts which were done thereunder before the said 8th day.

However, section 11 of the act also provides that the acts done within the seven days would be valid. This is to mean that within the 7 days before the Covid-19 Rules are taken to parliament, the citizens would be required to observe the rules and the imposition of the penalty would be valid.

Secondly, the act uses the term sitting days. This is to mean that where the parliament is on recess, the stipulated period does not run. This point was canvassed in *Kenya Country Bus Owners' Association* (*Supra*) where the court held that the period when the parliament was in recess was excluded from computation of time and that the ground had been prematurely taken. The holding might apply on this case since the national assembly has been on recess since the first case of Covid-19 was confirmed in Kenya. Although that is the case, it can also be argued that rule were made under the Public health act and the rules in furtherance of the health docket, the rules could also be tabled before the senate. This is because health is devolved function and any legislation touching on counties must be tabled in the senate.

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In conclusion as I have noted above, laws that seeks limit the bill of rights must be taken to parliament for scrutiny or rather these laws should only be made by parliament. Where such a law cannot be taken to parliament due to the urgency of the matter, at least there should be a stakeholder consultation. This was reiterated in *Edward Mureithi in SDV Transami Kenya Limited and 19 others v Attorney General & 2 others & another* [2016] eKLR where the court held as follows

> Where exigencies of the particular matter does not allow, in view say of the urgency of the matter, detail and length of the content, or other sufficient reason, subsidiary law may be used subject to strict compliance with the provisions on law making by delegated authority under Articles 24 (2) and 94 (5) and (6) of the Constitution and with stakeholder consultations, in accordance with the right of people participation under Article 10 (2) of the Constitution.

III. Constitutionality of Rule 5(4), (5) and Rule 11 of the Covid rules, 2020.

Rule 5 (4) requires users of public or private transport and operators of public operators to wear mask that must cover the mouth and face. While Sub-section 5 makes it an offence for anyone who contravenes sub-section 4. Rule 11 on the other hand provides for a penalty for anyone convicted of the offence (A penalty of a fine not exceeding Kshs. 20,000 or to imprisonment for a period not exceeding six months or both).

I hold the view these rules in particular violate the anti-discriminatory / equality clause in the constitution (Article 27) as shown below. Article 27 identifies forbids two types of discrimination i.e. direct and indirect discrimination. Whereas the provisions appear as neutral, their enforcement and implementation is discriminatory (indirect discrimination). The constitutionalisation of the prohibition of indirect discrimination is the realisation that the neutral and non-discriminatory

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clauses may result in discrimination. Indirect discrimination[10], otherwise called disparate impact discrimination,[11] occurs when a neutral law, practice or requirement has a disproportionate effect or impact upon a protected group of people.[12] When such a law is challenged as Justice Langa noted in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), the applicant does not have to show that the law was intended to discriminate.

The test when considering unfair discrimination was summarized in *Harksen* [13] where it was summarised it as follows:

'Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to

[10] See William Aseka and Arlene S Kanter, the basic education act of 2013: why it is one step forward and two steps back for children with disabilities in kenya 15 *(2014) 2 African Disability Rights Yearbook*
[11] Disparate impact is the American version of indirect discrimination. See generally T Loenen 'Indirect discrimination: Oscillating between containment and revolution' in T Loenen & P Rodrigues (Eds) *Non-discrimination law: Comparative perspectives* (1999) 196-197.
[12] Interights *Non-discrimination in international law: A handbook for practitioners* (2011) 18
[13] Harksen at para 54(b).

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be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'

Whereas the provisions appear neutral, the have the effect of unfairly discriminating the poor people. The law requires that all people should wear masks without an exception. A cheap mask retails at around Kshs. 150 in a local chemist (These are required to be used only once). I will use the example of those citizens living in slums (e.g. Kibra, Kwa Njenga etc.) who work in town. These are people who earn around Kshs 500 in a day and use around 200 for fare. Requiring these people to wear masks, pay fare, pay rent and still feed their families would have two effects: firstly, they will either choose to starve at home or go out and get arrested since they cannot afford buying the masks on a daily basis. Therefore whereas the rules appear neutral, they avoid considering the social context of the citizens who will end up in jails. The rules indirectly discriminate against the poor people. In summary the point is that 'the appearance of neutrality is considered deceptive in that it concentrates on differentiation that can be identified based on the mere manifestation or form of a measure, that is, characteristics that are expressly based on protected grounds of discrimination'[14]

Is Poverty a ground under article 27? Whereas poverty is not listed under article 27(4), it is important to note that the provision uses the word *including.* Our courts have interpreted the provision to mean that the list is non-exhaustive. In Eric Gitari 1, both the high court and the court of appeal held that although social orientation has not been listen as a discriminatory ground, the

[14] C Tobler *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (2005) 23.

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word include allowed the addition of other grounds. The test however was summarized by DOLAMO, J in Social *Justice Coalition Vs minister of police and others* in the following terms

> [57] It is with poverty that it must be established whether it qualifies as an unlisted ground in terms of paragraph (b) of the definition of prohibited ground. Since poverty is an unspecified ground the first leg of the inquiry requires considering whether differentiation on this ground constitutes discrimination.[15] Whether poverty qualifies as an unlisted ground of unfair discrimination would have to be tested against what the Act contemplates as *'any other ground.* To qualify as such, poverty must result in undesirable consequences which (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyments of a person's rights and freedoms in a serious manner that is comparable to discrimination on any of the prohibited grounds.

While holding that poverty could be a ground for discrimination, the court relied on *Minister of Health and Another v New Clicks Sought Africa (Pty) Ltd and Others*[16] where Moseneke DCJ explained how poverty was at odds with the well-earned and lofty thrust of our Constitution and wrenched dignity out of any life. The Court concluded thus

> According to the applicants discrimination on the basis of poverty clearly imparts on the social and economic rights protected in the Constitution as this adversely affects the equal enjoyment of a person's right and freedom in a serious manner that is comparable to discrimination on a listed ground. Discrimination on the ground of poverty, in my view, and as the applicants have shown, amounts to unfair discrimination.[17]

[15] See Larbi-Osam and Others v MEC for Education (North-West Province) and Another 1998 (1) SA 745 at para [19].
[16] 2006 (2) SA 311 (CC) at para 705.
[17] S Woomans & M Bishop's *Constitutional Law of South* Africa(2nd Ed.), vol 3, Chapter 35 at page 63.

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If the Covid rules were taken to parliament, the parliament would be required to ensure that the considerations under section 13 of the Statutory instruments act which include inter alia observance of rights and fundamental freedoms, maybe the parliament would have seen this indirect discrimination!

IV. Where is the parliament?

The statutory instruments act requires that the subsidiary legislations be tabled in parliament. Section 10 of the Act states that the purpose is to scrutinize these acts. Section 13 further provides for the considerations that the parliament should ensure they are adhered to as follows:

"13. The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument-

> *(a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;*
>
> *(b) infringes on fundamental rights and freedoms of the public;*
>
> *(c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;*
>
> *(d) contains imposition of taxation;*
>
> *(e) directly or indirectly bars the jurisdiction of the Courts;*
>
> *(f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;*
>
> *(g) involves expenditure from the Consolidated Fund or other public revenues;*
>
> *(h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;*
>
> *(i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;*

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(j) appears to have had unjustifiable delay in its publication or laying before Parliament;

(k) makes rights , liberties or obligations unduly dependent upon non-reviewable decisions;

(1) makes rights , liberties or obligations unduly dependent insufficiently defined administrative powers;

(m)inappropriately delegates legislative powers;

(n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

(o) appears for any reason to infringe on the rule of law;

(p) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and

(q) accords to any other reason that the Committee considers fit to examine."

Even though the parliament can delegate the legislative function, it still retains powers to check on the executive, to check if the rules comply with section 13. Surprisingly, the parliament decided to go recess when it was needed most. This is the time to check on the excesses of the government disguised as acts necessary to deal with the pandemic but alas the Parliament has gone AWOL!

Whereas schools, businesses are finding ways to keep going online, the parliament which is meant to executive in check has decided to silent and allowed the executive fiat!.

V. Conclusion

Is there a justification for making unconstitutional subsidiary legislations? , the answer is NO. A good intent but a bad law is unjustifiable. The main reason is that a public body does not have unfettered discretion, for every action, it must be justified by a positive law[18].

Summarily '**It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our**

[18] Keroche Industries Limited vs Kenya Revenue Authority & 5 Others, HCMA No. 743 of 2006 [2007] KLR 240

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law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them'

As I conclude Friends, even in times of emergencies and disasters the law is not silent, the law is not in slumber, the law is here with us, we do not have an imperial president , we have a constitutional democracy,

Again friends, it is during these times of emergencies that countries slide from being a democracy to authoritarian regimes. The high court of Malawi in the midst of this Covid-19 pandemic has reminded us that a declaration of an emergency or a state disaster does not give the executive carte blanche to exercise powers indiscriminately. The substance and procedural limitations imposed by the law have to be observed[19].

[19] *The state (on the application of Lin Xiaoxiao & others) v Attorney general*, Judicial review cause No. 19 of 2020.

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