

Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19

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Summary: *On 27 August 2010 Kenyans celebrated the promulgation of a new Constitution. This Constitution aimed at fundamentally transforming the governance framework through far-reaching institutional, administrative, legal and policy reforms. Ten years later this Constitution was put to the test when the government of Kenya reported the first COVID-19 case. In this article the authors argue that even though Kenya put in place a transformative Constitution intended to consolidate the rule of law, democracy, human rights and governance, the government's response to the COVID-19 pandemic questioned the transformative character of the Constitution and exposed inherent contradictions embodied in the Constitution. The article demonstrates that the Constitution is a double-edged sword, a site of tension and contradiction, on the one hand, and a site of hope and transformation, on the other.*

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1 Introduction

August 2020 marks the tenth anniversary of the Constitution of Kenya 2010 (Constitution).¹ The promulgation of the Constitution was a joyous day for most Kenyans as it marked a new beginning with the promise to develop a new political and legal culture that would protect the rights of all Kenyans. The Constitution aimed at fundamentally altering the governance framework through far-reaching institutional and legal reforms and ensuring that all Kenyans would be part of the process of telling a different story about governance. The Constitution was born out of a people-driven process that entailed several stages of civic education, collection, and collation of the views based on what the people said.² After many years of intense negotiation among political parties, organs of the civil society, religious groups, women's rights organisations, the youth and other stakeholders, Kenyans finally agreed upon a new social contract.³ It was hoped that the Constitution would lead to a revolutionary transformation of their society through the consolidation of the rule of law, democracy, human rights and good governance.

Ten years later, Kenya has an elaborate legislative, institutional and administrative legal framework to operationalise the Constitution. The implementation of the laws continues to pose major challenges but never before was the Constitution tested more than when the first COVID-19 case was revealed in Kenya. COVID-19 has ravaged the world, and Kenya is no exception. Since the announcement of Patient Zero in Kenya on 13 March 2020, the government has passed several laws, policies and regulations aimed at mitigating the effects of the COVID-19 pandemic. These interventions include the declaration of COVID-19 as a national pandemic; rules of mandatory quarantine; the disinfection of infected places; the deployment of quasi emergency powers to enforce a nationwide curfew; fiscal incentives; and socio-economic relief for citizens and businesses.

1 Kenyans approved the final Constitution in a referendum on 4 August 2010.

2 See, in general, the Final Report of the Constitution of Kenya Review Commission, 2005 (Constitution of Kenya Review Commission).

3 See N Kabira 'Wanjiku and the wig: Kenya's legal transformation dance' (2020) 3 *AAS Open Res*, <https://aasopenresearch.org/posters/3-20> (accessed 1 October 2020).

When the Constitution encountered the pandemic, its transformative character was questioned as several issues arose. First, the Kenyan government did not invoke the Constitution's state of emergency powers that automatically trigger parliamentary oversight in restricting civil liberties.⁴ Instead, the state utilised public order legislation that empowers Ministers to act without reference to Parliament. Second, the role of Parliament in undertaking oversight over the actions of the executive branch came into question. Third, questions also arose as to whether the government could curtail individual rights and freedoms. The tensions inherent in the Constitution were magnified. The pandemic revealed that the expansive Bill of Rights provisions in the Constitution were based on the idea that the one who claims to have a right may disregard the rights of others. Claims for rights by their very structure are 'trumps' against the claims of others.⁵ The rhetoric of rights is not only a reflection of social division but contemporaneously functions to promote these divisions. Essentially, even though all Kenyans have a right to freedom of association, a right to freedom of movement, a right to freedom of speech and a right to socio-economic rights as embodied in the Constitution in the face of a pandemic, the government can curtail one's rights and freedoms. As far as rights are concerned, it indeed is a zero-sum game.⁶

Kenyans expected that the Constitution would mediate the multiplicities that exist in Kenyan society and in Kenya's legal system.⁷ Consequently, the Constitution expansively captures individual rights, community rights, religious rights, cultural rights, linguistic rights and even environmental rights. As a result, this Constitution embodies tensions inherent in liberalism such as the tension between protecting liberties of individuals versus liberties of the collective, the tension between democracy's focus on prioritising collective rights versus the rights of people to govern themselves. For instance, 'if I have a right to property, I can do whatever I want with it but the police can restrain you when your right infringes on another's individual right to property'.⁸ The Constitution models the contradiction underlying the liberal ideal that the individual is free to pursue his or her self-interest, while the pursuit of freedom demands the restraint of other individuals. In this article, we demonstrate that when the Constitution encountered the pandemic, this classic

4 Art 58 Constitution of Kenya 2010.

5 D Kennedy 'The critique of rights in critical legal studies' in W Brown & J Halley (eds) *Left legalism/left critique* (2002) 216.

6 As above.

7 N Kabira 'Constitutionalising travelling feminisms in Kenya' (2019) 52 *Cornell International Law Journal Special Issue on Gender* 137.

8 Kennedy (n 5) 215.

contradiction in rights rhetoric was magnified. This contradicts the idea that African socio-political contexts such as that of Kenya are premised on the maxim coined by John Mbiti, 'I am because we are and since we are therefore I am'.⁹ This article demonstrates that the way in which we implement rights during pandemics must consider context-specific realities as there is a tension between individual rights as enshrined in the Constitution and the interconnectedness between individual and community rights.

The article is divided into four main parts. The first part defines the soul of an African constitution. The second part examines what happens when the soul of the constitution encounters the COVID-19 pandemic. The third part uses two specific examples, one on public order regulations and one on the public health regulations to illustrate the tensions between the regulations and the Constitution. This part argues that even though Kenya put in place a transformative Constitution intended to consolidate the rule of law, democracy, human rights and governance, the government's response to the COVID-19 pandemic questions the transformative character of the Constitution and exposes the inherent contradictions embodied in the Constitution. This part explores the idea that the Constitution is a double-edged sword, a site of tension and contradiction, on the one hand, and a site of transformation and hope, on the other. The article concludes with some lessons relating to Kenya's experience with constitutionalism.

2 The soul of an African constitution

The 2010 Constitution was a negotiated document.¹⁰ The 'soul' of the Constitution was expected to capture the interests and views of all Kenyans and above all to be responsive to *Wanjiku* (the common man/woman), her realities, her hopes and dreams.¹¹ It was expected to represent the aspirations of all Kenyans from all walks of life. This is evident in the Preamble which recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution consolidates the views of Kenyans during the constitution-making process in various aspects such as culture;¹² the

9 I Menkiti 'The person and community in African political thought' in RA Wright (ed) *African philosophy: An introduction* (1984) 171.

10 Final Report of the Committee of Experts on Constitutional Review, October 2010. See chs 8 & 9 on the political and parliamentary negotiation process.

11 N Kabira & P Kameri-Mbote 'Woman of law: Women's triumph in Kenya's Constitution of Kenya 2010' in N Kabira (ed) *Changing the mainstream: Celebrating women's resilience* (2018) 31.

12 Art 11 Constitution of Kenya 2010.

legal system;¹³ the state and political system;¹⁴ devolution;¹⁵ land and environment;¹⁶ affirmative action;¹⁷ the Bill of Rights;¹⁸ participatory governance;¹⁹ and security.²⁰ In essence, the Constitution embodied the negotiated views of Kenyans during the constitution-making process.²¹ At the core of the Constitution is the 'soul' of the Constitution, the overarching principles, the guiding philosophy, the values of the nation – *the soul of the African constitution*. These values are stipulated in article 10 of the Constitution which sets out the values and principles of governance and stipulates that these provisions are mandatory for the government and the governed. These values and principles are:

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

The Constitution's provisions in their totality, the context and history that drove the clamour for constitutional change, the aspirations of the Kenyan people and the values promoted by the Constitution, including its interpretation rules, could, arguably, be called the 'soul'. From the foregoing it is clear that this constitutional soul, and the reforms contained in the 2010 Constitution, were intended to provide for transformative governance towards a common prosperity, such as the national development goals elucidated in Kenya's Vision 2030.²² It is this transformative governance of which the utility and strength is being examined by this article in the context of governmental actions taken during the COVID-9 pandemic.

3 The soul encounters the COVID-19 pandemic

On 13 March 2020 the soul of the Constitution encountered the COVID-19 pandemic when the Ministry of Health announced the

13 Art 159 Constitution of Kenya 2010.

14 Art 1 Constitution of Kenya 2010.

15 Art 174 Constitution of Kenya 2010.

16 Art 60 Constitution of Kenya 2010.

17 Art 27 Constitution of Kenya 2010.

18 Art 19 Constitution of Kenya 2010.

19 Art 1 Constitution of Kenya 2010.

20 Art 238 Constitution of Kenya 2010.

21 See, in general, Final Report of the Committee of Experts on Constitutional Review, October 2010.

22 See Sessional Paper 10 of 2020 on Vision 2030.

existence of Patient Zero, the first person to test positive for COVID-19. This would lead to months of legal, administrative, social, economic, political and public health interventions by the government. Kenya's constitutional fabric and governing structure continued to be tested for its ability to backstop responses to a rapidly-evolving situation.²³

The strategies adopted by the Kenyan government may be categorised as follows: first, public order measures such as the curfew, lockdown, and controlled movement between counties; second, public health measures such as quarantine, hand washing and sanitising, the wearing of face masks, burial procedures, and so forth; and, third, socio-economic measures such as fiscal incentives for businesses and individuals. The discussion in this article is limited to the first two and, more specifically, to the curfew order (public order) and the burial procedures (public health).

3.1 Public order rules

During the pandemic the government applied the Public Order Act to restrict the movement of people. The Public Order Act is an old law and order legislation enacted in June 1950, while Kenya was still a colony.²⁴ On 25 March 2020 the President announced that the National Security Council (NSC) had approved the imposition of a nationwide curfew by the Cabinet Secretary for the Interior. The curfew would apply daily between 19:00 and 05:00 from 27 March 2020 and would remain in force for a period of 30 days.²⁵ In explaining the rationale for the curfew, the President stated:²⁶

It is incumbent on every Kenyan to support the efforts of our medical professionals, health workers, critical and essential services providers, and the government as a whole by reducing movement and congregating in large groups.

The rationale for the curfew was that socialisation patterns and cultural practices present opportunities for the spread of the virus. Three constitutional questions arose from this curfew order, and its

23 Ministry of Health 'First case of Coronavirus confirmed in Kenya' 13 March 2020, <https://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/> (accessed 22 July 2020).

24 See Public Order Act, Cap 50 Laws of Kenya, commenced application on 13 June 1950.

25 See Public Order (State Curfew) Order 2020 and Legal Notice 36 of 25 March 2020.

26 Government of Kenya 'Presidential address on the state interventions to cushion Kenyans against economic effects of COVID-19 pandemic' 25 March 2020, para 13 <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020> (accessed 21 July 2020).

various subsequent variations. The first was the police brutality that accompanied the enforcement of the curfew order in the immediate aftermath. The second was the question of who qualified as essential service providers. The third was the fact that, even with the involvement of the NSC, the curfew order was based on a colonial era law and was meant to restrict fundamental rights under the 2010 Constitution. In this part we examine the first and third questions.

In the immediate aftermath of the curfew order, namely, on its first day in place, reports indicated that many people who relied on public transport could not make it home by 19:00. One news report observed that while most Kenyans travel in privately-owned taxis (*matatus*), these are also required to cease service at the commencement of the curfew, and in apprehension most operators either stayed home or raised their fares, creating artificial scarcity.²⁷ Many reasons have been given in local discourse at community level. The first was that this being the first such nationwide curfew order in decades, citizens did not take it seriously. The second, and just as plausible, was that in apprehension of police harassment, most (privately-owned) public service vehicle operators had ceased business early to avoid breaching the curfew. Consequently, the conventional and social media abounded with news coverage and stories of people being brutalised by the excessive use of force by police officers. News reports carried headlines such as 'Traffic jams, police brutality mark the first night of curfew';²⁸ 'Editors Guild condemns police brutality as curfew kicks off';²⁹ 'Coronavirus: Stop bludgeoning Kenyans during curfew, leaders tell police';³⁰ 'Police or Coronavirus: What will kill more Kenyans?'³¹ On Twitter that day, the trending topic of discussion, demonstrating concern were #CurfewKenya #Police and #Policebrutality.³² From 16:30 on 27 March 2020 the two trending topics of discussion were under #CurfewKenya from

27 'Coronavirus begins with wave of police crackdowns' *Washington Post*, https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51_story.html (accessed 21 July 2020).

28 'Police brutality marks the first night of curfew' *Daily Nation*, <https://www.nation.co.ke/kenya/news/traffic-jams-police-brutality-mark-the-first-night-of-curfew-282662> (accessed 21 July 2020).

29 'Police brutality prevails as Kenyans rush to beat curfew' *The Standard*, <https://www.standardmedia.co.ke/article/2001365937/police-brutality-prevails-as-kenyans-rush-to-beat-curfew> (accessed 21 July 2020).

30 'Stop brutalising Kenyans during curfew leaders tells police' *The Standard*, <https://www.standardmedia.co.ke/article/2001365989/stop-brutalising-kenyans-during-curfew-leaders-tell-police> (accessed 21 July 2020).

31 'Police or Coronavirus: What will kill more Kenyans?' *The Standard*, <https://www.standardmedia.co.ke/entertainment/local-news/2001366620/police-or-coronavirus-what-will-kill-more-kenyans> (accessed 21 July 2020).

32 'Trending in Kenya' Twitter, <https://archive.twitter-trending.com/kenya/27-03-2020> (accessed 21 August 2020).

16:30 to 23:30, measured at 30-minute intervals among the top ten. This was also the case with #Likoni and #Ferry to signify the extensive crowding and panic at the main ferry crossing in Mombasa city, across the Kilindini channel entry to the port of Mombasa in Kenya.³³ This excerpt from the Daily Nation newspaper on 30 March 2020 is instructive of the situation at the Likoni ferry crossing:³⁴

The police officers also went on another brutality spree, beating up hundreds of ferry users who were lining up to get into the ferries at the Likoni channel. The officers who were armed with batons beat the commuters after they crowded and tried to force themselves towards the Likoni channel. The commuters complained they were getting late as the curfew time was approaching. The officers hurled teargas canisters at the crowd as they mercilessly beat up the people seriously injuring them. Women who were caught in the melee were left with tears after they were beaten and frogged and marched by the irate officers. A stampede occurred as the hundreds of the pedestrians were forced back to the line.

The tension between the Constitution's guarantee of the rights and freedoms of all Kenyans and the manner in which the police implemented the curfew order regulations was evident when on 28 March 2020, #PoliceBrutality was the trending topic of discussion on Twitter the whole day.³⁵ The Kenya National Commission on Human Rights (KNCHR), an independent body established under article 59 of the Constitution to promote human rights observance and investigate violations in the country, published a report on 30 June 2020 titled 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' covering the period between 17 March and 30 June 2020.³⁶ In the period between 15 March and 6 June 2020 KNCHR reported having received 222 complaints related to the COVID-19 situation.³⁷ The majority of the complaints were against state agents with 91 complaints (40 per cent) against the Ministry of Interior and Coordination of National Government, out of which 54 complaints were against the Kenya police service; 23 against administration police; eight against the general service unit; four against area chiefs and one levelled against an assistant county commissioner.³⁸ Another 49,5 per cent of the

33 As above.

34 'Dozens injured as police brutality marks start of curfew' *Daily Nation*, <https://www.nation.co.ke/kenya/news/dozens-injured-as-police-brutality-marks-start-of-curfew-282622> (accessed 21 August 2020).

35 Twitter (n 32).

36 Kenya National Commission on Human Rights 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' 30 June 2020, <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic> (accessed 1 October 2020).

37 See Kenya National Commission on Human Rights (n 36) 9.

38 See Kenya National Commission on Human Rights (n 36) 10.

complaints related to civil and political rights, which included ten complaints related to the right to life; 87 related to violations against freedom and security of the person; seven on access to justice; and five on fair administrative action.³⁹

The KNCHR report documents various incidents in different parts of the country. For instance, in Kakamega, one of Kenya's most populous counties, one complaint indicated that a market trader died after police had lobbed tear gas canisters at him in a market area to enforce a social distancing directive. He took refuge in a stall and was later found dead inside the stall.⁴⁰ In Nairobi county, a complaint to KNCHR was that a 27 year-old man sustained injuries after being assaulted by police officers enforcing curfew orders. He was then abandoned by the officers by the roadside and his family members picked him up while in serious pain. He succumbed to the injuries a day after the assault.⁴¹ In Busia county, another complaint to KNCHR alleged that police officers without any justifiable cause entered a private homestead and indiscriminately assaulted all family members and destroyed properties.⁴² One particular complaint from Kisii county alleged that a *boda boda* (motorcycle taxi) rider was requested by a police officer to drop him at his work place in a police station in order to get there on time. On his way back from the station heading to his home, he was stopped and assaulted by other police officers at 19.30, arrested and detained for the night while continuously being assaulted. He was released without any charges being preferred. He sustained serious physical and mental injuries as a result of the ordeal.⁴³ These examples illustrate the enduring tension between the law as written in the Constitution versus the reality on the ground.

3.1.1 Public order case law and its implications for the rule of law and human rights in Kenya

Soon after the government put in place curfew measures to prevent the spread of the virus, the Law Society of Kenya (LSK) went to court to contest the validity of the curfew order in *Law Society of Kenya*.⁴⁴ In this case the LSK sought a court order to declare that the curfew order and the use of the police in enforcing the curfew

39 See Kenya National Commission on Human Rights (n 36) 11-12.

40 See Kenya National Commission on Human Rights (n 36) 23.

41 As above.

42 See Kenya National Commission on Human Rights (n 36) 23-24.

43 As above.

44 *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties)* 2020 eKLR.

were unconstitutional. The LSK argued that the government's use of the Public Order Act (POA) to enforce the curfew did not meet the constitutional standards for restricting fundamental rights and freedoms stipulated in the Constitution of Kenya.⁴⁵ The LSK further relied on the Constitution to argue that the curfew order violated the rights of arrested persons⁴⁶ and the right to a fair hearing⁴⁷ as it excluded legal representation from the list of exempted services even though persons arrested or detained had no access to legal representation. The main legal issues that the Court addressed were whether the curfew order was constitutional and legal; whether the national police service violated the Constitution in the enforcement of the curfew order; whether the Cabinet Secretary for Health should have been ordered to issue guidelines under section 36(m) of the Public Health Act; and whether the judiciary had abdicated its constitutional mandate.

On the question of whether the curfew order was constitutional and legal, the LSK argued that the curfew order was 'illegal, illegitimate and unproportionate' as it was 'blanket in scope and indefinite in length'.⁴⁸ The LSK also contended that the curfew order contained no reasons or rationale for the curfew; that the legal notice limited rights and ascribed penal consequences without any legitimate aim; and that the failure by the second respondent to provide the period of the curfew order contravened section 8 of the POA. The LSK contended that a curfew order under section 8 of the POA could not be open-ended considering that where a state of emergency is declared under articles 58 and 132 of the Constitution, time limits are imposed. The respondents held the view that the instrument published as Legal Notice 36 of 2020 was fully compliant with the requirements of the Constitution and section 8 of the POA. They argued that the LSK failed to appreciate that the aim of the curfew order was to minimise and mitigate the spread of the virus, thereby protecting human lives, which is a legitimate constitutional responsibility of the government. They further contended that the engagement of the POA in the fight against the COVID-19 pandemic was meant to complement the provisions of the Public Health Act (PHA). In responding to this issue, the Court held that it should not address the issue of the constitutionality of section 8 of the POA because from the submissions of the parties there was unanimity on the constitutionality of the provision. The Court also held the view that the constitutionality of the provision had been upheld by the

45 Art 24(1) Constitution of Kenya.

46 Art 49 Constitution of Kenya.

47 Art 50 Constitution of Kenya.

48 *Law Society of Kenya* (n 44).

Court (per Kamau J) in *National Super Alliance (NASA) Kenya*⁴⁹ and that it was not necessary to reopen the issue.

The LSK argued that the POA is a law that is specifically tailored for combating criminal activities. The Court agreed with the petitioners and argued that the purpose of the POA was to bring law and order to areas visited by turmoil caused by human beings. However, the Court held that this did not answer the question as to whether the POA can be applied to other disasters and emergencies including the containment of disease.⁵⁰ The Court deduced that the question then was whether the PHA is self-sufficient to the extent that no other Act of Parliament needs to be engaged in health matters. The Court observed that the POA may be used to complement other laws since section 16 of the PHA creates room for the application of other laws to health matters. Thus, the Court deduced that it cannot be said that the POA is not applicable to health emergencies such as the one posed by the COVID-19 pandemic because it was possible that the provisions of the PHA may need to be supplemented by those of the POA. The Court took note of the fact that panic and fear sometimes may lead to disorder and a curfew may be needed to reinforce the provisions of the PHA. Therefore, the Court declined to agree with the LSK that a curfew order cannot be used to address a public health emergency. Therefore, the Court held the order was legal as it specified the period during which the curfew would last and specified the person to grant permission.

On the issue of limitation of rights, the Court was of the view that the curfew order can only be deemed constitutional if it passes the article 24(1) test. The Court reiterated the four-step test elaborated in the *Kosovo* case.⁵¹ The Court emphasised that the four-step test stipulates that the limitation of a right or freedom (i) may be done only by 'law' of the Assembly; (ii) there should be a 'legitimate aim'; (iii) it should be 'necessary and proportional'; (iv) it should be 'necessary in a democratic society'. The Court in this case was of the view that the curfew order passed this test. In addition, the Court stated that the challenge with the application of the proportionality test in this case was that the objective the curfew order intended

49 *National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Coordination of National Government & 3 Others* [2017] eKLR.

50 The Court appreciated the fact that the judges in *Law Society of Kenya v Inspector General Kenya National Police Service & 3 Others* [2015] eKLR (*Lamu Curfew* case) and *Muslims for Human Rights (MUHURI) & 4 Others v Inspector General of Police & 2 Others* [2014] eKLR were not invited to consider the applicability of the POA to circumstances other than the restoration of law and order.

51 *Constitutional Court of the Republic of Kosovo in Case KO54/2020 President of the Republic of Kosovo (Applicant) – Constitutional Review of the Decision [Government]* 15/01, 23 March 2020.

to achieve was unmeasurable. The Court noted that although the main objective of the curfew was to reduce the transmission of the Coronavirus, no evidence was adduced by either side to show how the curfew will achieve this objective and whether the reduced transmissions, if any, outweigh the hardship visited on the populace by the curfew. It was appreciated that because of the novelty of the virus, statistics are not yet available. Thus, the Court held that in a crisis such as the one facing the country, it can be presumed that the second respondent issued the curfew order in line with the 'precautionary principle' as was elucidated in the *Kennedy Amdany Langat* case.⁵² The Court thus held that the government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle.

On the question of whether the national police service violated the Constitution in the enforcement of the curfew order, the Court observed that the curfew was imposed for a public health purpose and not to fight crime or disorder. The Court argued that the main problem with the curfew order was the manner in which it was implemented. However, the Court observed that unconstitutional and illegal acts that occur in the implementation of a legal instrument did not render that instrument unconstitutional. On the question of whether the Cabinet Secretary for Health should be ordered to issue guidelines under section 36(m) of the Public Health Act, the Court failed to address itself on the issue of whether the Cabinet Secretary for Health should be ordered to issue such guidelines because in the course of the hearing of the petition, the fifth respondent answered the LSK's request for rules under section 36 of the PHA by enacting rules for the COVID-19 pandemic.⁵³ On the question of whether the judiciary had abdicated its constitutional mandate, the Court held that insufficient evidence was brought by the LSK to prove the alleged abdication by the judiciary.

The Court found that despite being a law and order statute, the Public Order Act could still be used to enforce a public health emergency.⁵⁴ The Court found that the curfew order passed the test of article 24(1) which declares that a fundamental right or freedom shall not be limited except by law, but also held that the main problem was the manner of its implementation which, while

52 *Republic v Ministry & 3 Others Ex-parte Kennedy Amdany Langat & 27 Others* [2018] eKLR.

53 The rules were found in Legal Notice 46: The Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020, published on 3 April 2020 in Kenya Gazette Supplement 39.

54 *Law Society of Kenya* (n 44) paras 113 & 115.

unconstitutional, does not render the curfew order itself to be so.⁵⁵ The judge observed:⁵⁶

It appears that in confronting the Coronavirus, which is by all means a faceless enemy, the police brought the law and order mentality to the fore. Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights.

Based on this reasoning, the Court declined to declare the curfew order unconstitutional. However, it found that the use of force to enforce the curfew violated the Constitution. The police service is bound by article 10 of the Constitution which makes the rule of law, human dignity, human rights, good governance and integrity mandatory in implementing any law, or making public policy decisions. As part of the Kenyan state, the police are also bound by articles 24(1) and 25 which expressly prohibit any actions to limit the fundamental freedoms from torture and cruel, inhuman or degrading treatment or punishment. Recent conduct by state agents brings about concerns that Kenya may be having ornamental constitutionalism.

The case raises several issues about the transformative character of the Constitution in the face of a pandemic. First, as a negotiated document, the Constitution embodies internal tensions. Some of these tensions include the tension between individual rights and community rights; the tension between tradition and modernity; and the tension between the international and the local. The result is that during the pandemic, the Constitution has proved to be a double-edged sword, a site of tension and contradiction, on the one hand, and a site of hope and transformation, on the other. It is interesting to note that the Kenyan government in all the presidential and ministerial speeches made no reference to the Constitution, but instead relied on regulations.⁵⁷ In contrast, civil society and other organisations used the Constitution to save its 'soul'. For instance, as we have seen in this case, the LSK relied on the Constitution to justify its arguments.⁵⁸ The KNCHR also relied on the Constitution to justify their arguments.⁵⁹ In essence, they argue that their role is to save the soul of the Constitution, even though FIDA-Kenya did not

⁵⁵ *Law Society of Kenya* para 134.

⁵⁶ *Law Society of Kenya* (n 44) para 137.

⁵⁷ Government of Kenya 'President Kenyatta urges Kenyans to observe government directives on Coronavirus 7 April 2020', <https://www.president.go.ke/2020/04/07/president-kenyatta-urges-kenyans-to-observe-government-directives-on-coronavirus/> (accessed 22 July 2020).

⁵⁸ *Law Society of Kenya* (n 44) para 23.

⁵⁹ *Law Society of Kenya* para 31.

explicitly cite the constitutional provisions but relied on constitutional principles to argue for women's and children's rights to dignity during the pandemic.⁶⁰ IPOA cited the Constitution in justifying its interest in the case.⁶¹ The Inspector-General of Police did not cite the Constitution.⁶² The Principal Secretary for the State Department of Interior relied on the Constitution to justify the imposition of a curfew.⁶³ For his part, he argued that section 8 of the POA enjoys a presumption of constitutionality and is *prima facie* legal and effective in Kenya; further, that the constitutionality of the said provision had indeed been determined in the affirmative in a previous case.⁶⁴

Further, the Attorney-General's files did not cite the Constitution but cited constitutional principles and considerations such as public interest and proportionality. The Attorney-General argued that since the curfew order affects constitutional rights and fundamental freedoms, it ought to be premised on a substantive law. He argued that the curfew not only affects the people's way of life but also negatively impacts constitutional rights and freedoms such as freedom of movement, freedom of association and freedom of assembly. He argued that the curfew also limits socio-economic rights especially in the case of vulnerable members of society.⁶⁵

Interestingly, the Constitution continues to be invoked by different actors in different ways, illustrating that the Constitution is a site of tension, on the one hand, and a site of liberation, on the other. The Constitution is a site of tension in the sense that the same Constitution has been used by different actors to assert their rights and at the same time to deprive their rights. While the Constitution of Kenya 2010 provides that everyone has the right to freedom of speech, freedom of movement and freedom of association, the same Constitution allows the government to limit those rights. While the Constitution provides that everyone has the right to socio-economic rights, the same Constitution allows for the declaration of a state of emergency when most rights are suspended.

It is important to note that in spite of the interventions by civil society organisations, the excessive use of force by the police continued. When the petition in *Law Society of Kenya* was filed, the Court issued temporary orders as follows:⁶⁶

60 *Law Society of Kenya* para 39.

61 *Law Society of Kenya* para 43.

62 *Law Society of Kenya* para 51.

63 *Law Society of Kenya* para 56.

64 *National Super Alliance (NASA) Kenya* (n 49).

65 Art 43 Constitution of Kenya 2010.

66 *Law Society of Kenya* (n 44).

An order is hereby issued compelling the 1st Respondent, Hillary Mutyambai, Inspector General of the National Police Service, to within 48 hours herewith, publicise in newspapers of national circulation, and concurrently file in court for scrutiny, guidelines on the conduct of police officers enforcing the Public Order (State Curfew) Order 2020.

On 1 April 2020 President Uhuru Kenyatta issued a public apology on television 'to apologise to all Kenyans for some excesses that were conducted or happened'.⁶⁷

Subsequently, the judgment ordering the police to stop the excessive use of force was delivered by the courts on 16 April 2020. Yet, in their report the KNCHR recorded complaints resulting from the excessive use of force by police up to 6 June 2020. While there have been instances of positive action, such as police officers assisting mothers with children to get home after the curfew, the overall disregard of constitutional safeguards during the implementation of curfew restrictions suggests that the soul of the Kenyan Constitution is not something the police service, for instance, has taken to heart.

One element of these restrictions that the Court did not address concerns the role of parliamentary oversight, where statutory orders curtailing fundamental freedoms are issued. The judges in the *Law Society of Kenya* case noted that perpetual extension of the curfew was contrary to provisions relating to a state of emergency under the Constitution,⁶⁸ which limits presidential powers to impose such a state of emergency to only 14 days. The circumstances surrounding the declaration of a state of emergency arise only when the state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency.⁶⁹ The Court held that the declaration of the state of emergency must also necessarily meet the circumstances in which the emergency is declared.⁷⁰ Considering the adverse public health, public order, social and economic impacts of the COVID-19 pandemic, it is arguable that the current situation meets the definition of 'other public emergency' in article 58(1). It may be argued that the declaration of a nationwide curfew rather than a state of emergency may have been intended to limit the scope of human rights restrictions by applying it only during night time. However, Kenya has not enacted legislation to implement provisions concerning the declaration of a state of emergency to delimit the

67 'President Kenyatta apologises over police brutality during curfew' Citizen TV Minute 1:27-1:34, <https://www.youtube.com/watch?v=w86rhM8hfVU> (accessed 1 October 2020).

68 *Law Society of Kenya* (n 44) para 9.

69 Art 58(1)(a) Constitution of Kenya 2010.

70 Art 58(1)(b) Constitution of Kenya 2010.

parameters of such powers. Additionally, the state of emergency is valid for 14 days, and subsequently the first extension would require the supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly. This is a very high threshold set by the current Constitution, which the colonial era Public Order Act does not integrate.

As a result, people's representatives have been excluded from any oversight concerning this public order restrictions imposed during the pandemic. The Twitter discussion between the Inspector General of Police and the public under the #EngagetheIG certainly is a good starting point, but the reach of social media is limited to a section of society. The totality of values, including the rule of law, participation of people, good governance and integrity, will need to be applied during the implementation of constitutional and statutory provisions to awaken and drive the soul of the Constitution.

3.2 Public health rules

The Public Health Act has been at the heart of actions taken by the government during the pandemic.⁷¹ As the Public Order Act, this is an old law enacted in 1925 but which has been amended over the years. It is the main legal tool available in Kenya to deal with infectious diseases. Although a new law, the Public Health Act should be implemented in accordance with the Constitution, including the overall principle of constitutionalism that requires the executive branch to exercise restraint, and adhere to the rule of law, as well as the guaranteed substantive and procedural rights. This is important to ensure that, even in the current unprecedented situation of health risks and urgency of action, the soul of the Constitution is not mutilated. In this part the article examines the public actions, steps and decisions taken by the government under this law and assesses whether they have been compatible with the values of the Constitution.

On 27 March 2020 the Cabinet Secretary for Health published a legal notice under section 17(2) of the Public Health Act declaring COVID-19 a notifiable disease. Further, the legal notice informed the public that the provisions of Part IV of the Public Health Act would now be applicable. Several points are important in analysing this decision. First, 27 March was also the date on which the nationwide curfew

⁷¹ Public Health Act, Cap 242 Laws of Kenya.

orders discussed in the previous part came into effect, demonstrating the seriousness of COVID-19 to the government. Second, Part IV of the Public Health Act provides for actions to deal with infectious diseases. The law defines an infectious disease as one that can be communicated directly or indirectly by any person suffering from it, to any other person.⁷² It is important to highlight that Part IV of the public health law gives powers in regard to disinfecting contaminated areas, the transportation of infected persons, the admission of infected persons to hospital and the isolation of persons exposed to the infectious disease. It also provides that any patient who is not a pauper should repay the cost of treatment incurred by the government. Further, section 36 provides that whenever any part of the country appears to be threatened by any formidable epidemic or infectious disease, the Cabinet Secretary for Health may make rules to govern various matters, including

- (a) the removal of corpses and speedy interment of the dead;
- (b) house to house visitation;
- (c) the promotion of cleansing, ventilation and disinfection and guarding against the spread of disease;
- (d) preventing any person from leaving any infected area without undergoing all or any of the following, namely, medical examination, disinfection, inoculation, vaccination or revaccination and passing a specified period in an observation camp or station;
- (e) the formation of hospitals and observation camps or stations, and placing therein persons who are suffering from or have been in contact with persons suffering from an infectious disease;
- (f) the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;
- (g) the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations.

Based on the global nature of the COVID-19 pandemic, and the public pressure during the period leading up to numerous orders and regulations prescribed by the government, many of the orders continue to be in tension with the Constitution. The mandatory quarantine orders and the cessation of movement orders all contradict the soul of the Constitution and mimic colonial vestiges of rule and control. The public health rules are measures aimed at mitigating the effects of COVID-19.⁷³ The rules provide guidelines for the notification of a medical officer of health in case of a suspected

⁷² See sec 2 of the Public Health Act.

⁷³ See Legal Notice 50: Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020; Legal Notice 49: Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020.

COVID-19 patient. The rules outline the powers for control of COVID-19, the power of search, the power to disinfect premises, and direct the use of a building by a medical officer. The regulations confer significant powers on the Ministry of Health with regard to control measures that are necessary during the COVID-19 pandemic. They allow medical officers and public health officers to have powers over COVID-19 patients and their properties. The aim is to reduce the spread of diseases in the country and is consistently in tension with the spirit of constitutionalism. The rules also outline the procedure for the removal and disposal of bodies.⁷⁴ The guidelines are centred at ensuring that the burial process does not result in a spread of the disease. However, they are lacking in promoting the dignity of deceased persons and their family members, which is at the heart of Kenyan customary law.

3.2.1 Public health case law and its implications for the rule of law and human rights in Kenya

Several cases have been brought to court arguing that burials are being conducted contrary to the procedures and some in contradiction to African customary rites with regard to the dignity of the deceased. For instance, in the case of *Joan Akoth Ajuang*⁷⁵ the petitioners sought to invoke the jurisdiction of the Court to determine the question of whether their rights and fundamental freedoms in the Bill of Rights had been denied, violated and infringed upon. The facts of the case were that the deceased, James Oyugi Onyango, was travelling from Mombasa⁷⁶ to his home in Siaya county in the company of some of his family members. Along the way, the deceased was involved in a road accident wherein he lost control of the motor vehicle he was driving, which was wrecked. The deceased survived the accident but later passed on in the hospital. The next morning the deceased's family proceeded to the hospital to view the body but were informed that they could not view the deceased's body since samples had been taken from the deceased and transported for analysis in line with the COVID-19 Ministry of Health guidelines. The same day the family was informed that they should go and collect the body of the deceased for immediate burial. The petitioners protested this move, but the deceased's body was buried during the night by Ministry of Health officials. These facts necessitated the filing of this petition and

74 See the Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020.

75 Constitutional Petition 1 of 2020 *Joan Akoth Ajuang & Another v Michael Owuor Osodo the Chief Ukwala Location & 3 Others; Law Society of Kenya & Another* [2020] eKLR.

76 One of the largest cities in Kenya.

the petitioners sought various orders from the Court, including an order that the body of the late James Oyugi Onyango be exhumed by the respondents and subjected to an autopsy/biopsy to ascertain the cause of death, the deceased's body to be re-buried immediately thereafter in a decent burial in accordance with the World Health Organisation guidelines on the safe management of a dead body in the context of COVID-19 (if confirmed that the deceased died as a result thereof), the Constitution and cultural requirements.

The main legal issues for determination by the Court were (i) whether the petition disclosed any infringement of the petitioner's rights; (ii) whether the deceased had rights and whether those rights and the petitioner's rights had been infringed; (iii) whether the petitioners are entitled to the exhumation of the body of the deceased and whether a biopsy/autopsy should be carried out on the deceased's body to determine the cause of death of the deceased; and (iv) what orders the Court should make, whether the instant petition discloses any infringement of the petitioner's rights.

On the question of whether the petitioner's rights had been infringed, the petitioners argued that they had the right to practise their cultural rights under articles 27, 28, 32 and 44 to bury the deceased and these rights had been violated by the respondents. The Court found that article 28 of the Constitution was clear on this right and that the provisions required no further elaboration. The Court held that it was not disputed that the deceased indeed had been buried without any of the cultural rites of the Luo community, of which the deceased had been a member, being observed, causing the petitioners pain and anguish. In addition, the Court found that the deceased was hurriedly buried in the night and without any coffin. His family members did not participate in his hurried burial, he was interred in a shallow grave, the undertakers were overwhelmed by the body, so they literally dumped the body wrapped in plastic bags into the grave.

On the question of whether the dead have rights, the petitioners argued that the deceased's right to a decent burial in line with his cultural practices were infringed by the respondents, whereas the respondents argued that the petitioners could not claim the violation of any right or freedom on behalf of the deceased as a dead person does not enjoy the rights and privileges of a living person. The Court argued that even once dead, one does not lose their dignity and, moreover, others can retain an important interest in their bodies and legacy. The Court went on to further note that whereas it would not consider the direct rights of the deceased to have a private

and family life, but the action taken against his cadaver could be considered to the extent that it affected the private and family lives of others around him and also affected his inherent dignity which does not expire even after his death. To emphasise this point, the Court proceeded to quote various international covenants and laws that specifically deal with the rights of handling the dead. The Court reiterated that Kenyan law does not guarantee specific rights to the dead but provides for the protection of the dignity of every person. However, the Court stated that article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. Thus, the Court mentioned that whereas there are no proprietary rights to a dead body, one does not cease being a human once dead, that only the state of life is altered. The Court stated that it is universally agreed that a dead body is the physical remains of an expired human being prior to complete decomposition. It was also noted that although the right to a decent burial has long been recognised at common law, no universal rule exists as to whom the right of burial is granted to.

The Court also mentioned that the right to possession of a dead human body for the purpose of burial lies with the spouse or other relatives of the deceased. However, it was the Court's view that an unrestricted property right to a dead body does not exist. The Court further mentioned that the matter of the disposition of the dead is a matter of public interest, including the public's health, safety and welfare, and is subject to control by law and not the desires of individuals. Finally, in concluding that indeed the dead have limited legal rights, the Court stated that chief among those rights is the right to remain silent. The Court said that from the time of the ancient Egyptians, the conviction has been that corpses have the right to rest undisturbed. The dead have rights attributable to those they leave behind and, further, there was a legitimate expectation that the dead be interred in a respectful and dignified manner.

As to whether the deceased and the petitioner's rights had been infringed, the petitioners alleged that the undignified burial of the deceased, without a coffin, was against their culture and an affront to their rights as envisioned in articles 11 and 44 of the Constitution. The fourth respondent argued that the rights of the petitioners could be limited as provided under article 24 of the Constitution as a result of the COVID-19 pandemic. The Court highlighted the traditional view of grief resolution which requires the bereaved person to disengage from the deceased. The Court said that that was often expressed as a necessary 'letting go' of the past for the survivor to be free to continue with his or her life and form new relationships.

The Court noted that the contemporary grief theory, in contrast, recognises that healthy grieving involves maintaining bonds with the deceased. The relationship between the bereaved person and the person who has died, although transformed, is ongoing. The Court made reference to the WHO Guidelines on the management and handling of the dead bodies of victims of COVID-19 and Legal Notice 49 published on 3 April 2020 under the Public Health (Prevention, Control And Suppression of COVID-19) Rules 2020, after which the Court stated that these rules and regulations do not restrict burials or funerals but in fact acknowledge the need to follow a deceased's customs during the preparation of their burial.

Thus, the Court found that the Ministry of Health officials were responsible for the transportation and burial of the deceased at his ancestral home. In the process of handling and interment of the body of the deceased, the officials did not follow the protocol or guidelines set up and established by the Ministry of Health on the disposal of the body of the deceased, James Oyugi Onyango. That being the case, the Court found that the fourth respondents violated the protocols or guidelines established for handling dead bodies and did not adhere to the guidelines on observance of the deceased's and the petitioner's cultural norms and practices of giving respect and dignity to the deceased. The Court found that that was a violation of the rights guaranteed in articles 11, 28 and 44 of the Constitution.

The petitioners also alleged discrimination of the deceased in the manner in which he was buried as there were other persons (COVID-19 victims) who were accorded decent burial ceremonies including a church service and a coffin burial during the day and in the presence of his family members. To counter this argument, the fourth respondent argued that had the deceased and his family been truthful about the deceased's condition from the start, the deceased could have been treated in a different manner. The fourth respondent argued that the deceased and his family members knew or suspected that he was COVID-19 positive, having travelled from Mombasa, a hotspot of the pandemic, but declined to disclose this information to the hospital authorities early enough. Instead, despite feeling unwell with symptoms of COVID-19, he undertook treatment with over the counter drugs which worsened his situation.

The Court held that the deceased was buried in the dead of the night in disregard of the deceased's custom or religious beliefs and practices which are guaranteed under articles 11, 32 and 44 of the Constitution, and without any input by the deceased's surviving relatives and further in direct contravention of the guidelines of both WHO and the local authorities, the Ministry of Health. In conclusion,

the Court found and held that the deceased's and the petitioner's rights had been violated by the fourth respondent.

As to whether the petitioners should be granted the orders sought, the Court addressed itself on the question of what remedy the petitioners have in law after it had found that their rights had been violated. The petitioners had sought orders to exhume the deceased's body, carry out an autopsy and biopsy and subsequently a decent re-burial to be carried out in the presence of the petitioners and their family members at the cost of the respondents. The petitioners further prayed that they may be provided with protective gear during the re-burial of the deceased, James Oyugi Onyango. Article 24(1) requires that there be reasonable and justifiable reasons for the limitation to a right. Thus, the question was whether there was reasonable justification to inter the deceased as carried out by the fourth respondent's agents. The Court was alive to the fact that both the guidelines of WHO and local authorities acknowledge the need to respect the deceased's customs during burial and further that there is no need to bury the deceased without a coffin. On the burial and exhumation of dead bodies, the Court examined section 146 of the Public Health Act, which provided that no dead body wherever interred in Kenya can be exhumed without a permit granted by the Cabinet Secretary for the time being responsible for matters relating to health.⁷⁷

The Court appreciated the precautionary principle which was to the effect that authorities must take precautionary measures when stakes are high, despite scientific evidence about the expected event being harmful not yet being certain. This implied that protective action should be taken to prevent any possible harm. For example, when there is a hurricane, it would make more sense to get out of its way than to stay put and evaluate possible responses. In applying the precautionary principle, the Court held that it was better to err than to be sorry. It followed that if the consequences of an activity could be serious and subject to scientific uncertainties, as in this case, where it was not certain whether the body of the deceased was suspected of having been COVID-19 positive, then precautionary measures should be taken, or the activity should not be carried out. Finally, the Court concluded by stating that it was indeed unfortunate that the deceased, James Oyugi Onyango, was not accorded a proper,

⁷⁷ The Court also noted that powers to order the exhumation of a body are to be found in sec 388(3) of the Criminal Procedure Code, which empowers the Attorney-General to direct that a body be disinterred for the purposes of an inquiry into the cause of a particular death, and in sec 387(2) of the Criminal Procedure Code which empowers a magistrate holding an inquest to cause a body to be disinterred.

decent and dignified burial. However, the Court was unable to find that the actions of the respondents were deliberate or that they were wholly intended to stigmatise the petitioners and disrespect the dead. In the Court's view, the circumstances prevailing were beyond the capacity of the public health officials at Siaya. In dismissing the substantive prayers sought in the petition, the Court, however, ordered the government of Siaya to cement the grave of the deceased at their own expense and in all its future endeavours to comply with public health and WHO protocols on the management and disposal of bodies of persons suspected of having succumbed to highly-infectious diseases such as COVID-19.

The case raises several issues. First, this case illustrates the tension between the traditional rights to bury the dead as protected under the Constitution versus the international guidelines outlined in the WHO. It also highlights the tension between the individual rights of the deceased person to equality and non-discrimination and the rights to public interest and public safety. The tension here is clear because it is between the WHO rules and regulations and local culture and traditions on burial processes. The tension inherent in the international/local WHO guidelines are based on the assumption that a burial is a private affair when in fact it is a communal affair that involves celebrations, feasting, dancing and other cultural activities. The second tension is the tension between the individual and communal customary rights to bury and be buried and the public interest and public safety. All these tensions highlight that in upholding the rule of law and human rights, the classic liberal tension discussed in part 2 of this article continues to play out in rights rhetoric in the courts.

4 Lessons from Kenya's experience with constitutionalism

Many lessons may be drawn from Kenya's experience with constitutionalism during the COVID-19 pandemic. However, for the purposes of this article we will limit ourselves to three main lessons. The first lesson relates to how the government of Kenya sought to restrict human movement and interactions to curtail the spread of the pandemic. As was highlighted in the article, the Cabinet Secretary for Interior, upon the recommendation of the National Security Council, invoked the colonial era Public Order Act to impose a nationwide dusk to dawn curfew which has been extended severally at intervals of 30 to 60 days. In contrast, the declaration of a state of emergency under article 58 of the Constitution would have required the National Assembly to approve any extension after

the initial 14 days with a two-thirds majority for a maximum of two months at a time. Any subsequent extension would require three-quarters approval of all the members of the National Assembly. The involvement of the legislature in an exercise which, in spite of its noble intention, resulted in the violation of fundamental rights, would have assured automatic application of checks and balances through parliamentary oversight. A plausible argument against the deployment of state of emergency provisions would be that Kenya has no statute that defines the parameters and degrees of such a state of emergency. This argument could mean that declaration of a state of emergency in such circumstances might amount to a total curtailment of civil and political rights. However, a reading of article 58 together with article 24 of the Constitution provides valuable insight into inherent proportionality safeguards during a limitation of fundamental rights. Article 24(1) requires limitations of any fundamental rights and freedoms to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁷⁸ It also requires such limitations to take into account various factors, including the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.⁷⁹ This would then mean that in the face of the pandemic, justifiable limitations such as a dusk to dawn curfew or cessation of movement orders could be framed and enforced through state of emergency provisions while maintaining parliamentary oversight on the actions of the executive branch.

The second lesson relates to the way in which the government responded to the pandemic using the Public Health Act. The colonial era Public Health Act focuses on mainly criminal enforcement of measures and unless read together with article 10 of the Constitution and the Bill of Rights, it can result in the erosion of fundamental rights and freedoms. Two examples stand out concerning mandatory quarantine and burials. Human Rights Watch, an international advocacy body, reported that, in forcefully quarantining tens of thousands of people, the Kenyan government was potentially facilitating the transmission of the COVID-19 virus as these facilities lacked proper sanitation, protection equipment and nutritious food.⁸⁰ Indeed, people were also forced into these overcrowded quarantine facilities for violating the curfew or

⁷⁸ Art 24 Constitution of Kenya 2010.

⁷⁹ Art 21(4)(e) Constitution of Kenya 2010.

⁸⁰ Human Rights Watch 'Kenya quarantine conditions undermine rights', <https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights> (accessed 28 September 2020).

defying orders to wear face masks.⁸¹ It is important to note that at no time had Kenya enacted any legislative provision or regulation prescribing mandatory quarantine as a criminal penalty for violating the state curfew or for failing to wear face masks. The prescribed penalty for curfew violation is a fine not exceeding 15 000 shillings or imprisonment not exceeding three months,⁸² while the penalty for not wearing a mask is a fine not exceeding 20 000 shillings or to imprisonment for a period not exceeding six months or both.⁸³ While article 10 of the Constitution makes the rule of law mandatory for all actions by state and public officers, the use of mandatory quarantine as an unlawful form of punishment discloses a deficit in observance of the restraint in the use of governmental authority as required by constitutionalism. On the issue of burials, there was the undignified handling of human remains including early morning interments by public health officials without upholding customary last rites practices. This goes against John Mbiti's perspective that the African view of the person amounts to 'I am because we are, and since we are, therefore I am'. This ratifies the argument that a person, even with distinct individual traits, is one and the same with his or her community which through culture defines their identity even in death. Therefore, the undignified handling of the body of a deceased person in turn amounts to undignified handling of his family and community. Yet, the preservation of human dignity is the very essence of the Bill of Rights.⁸⁴ In similar circumstances in the future, public health officials ought to bear in mind the importance of dignity under African customary law and culture especially during funerals. An unintended consequence of public health measures was the spread of stigma against people who were visited by public health officials dressed in personal protective wear. Sufficient public and community level awareness building on disease infection and risk factors could provide an accurate picture of the situation and lessen the ostracisation of those perceived to be infected.⁸⁵ This could be done, for instance, using community health workers and advocacy civil society organisations.

The third lesson relates to the compliance mechanisms established by the Constitution to ensure observance of human rights by the state. The Constitution of Kenya has established the Kenya National

81 As above.

82 Sec 8(6) of the Public Order Act.

83 Legal Notice 50 of 2020.

84 Art 19(2) Constitution of Kenya.

85 Centre for Global Development 'Protecting community health workers: PPE needs and recommendations policy action', <https://www.cgdev.org/publication/protecting-community-health-workers-ppe-needs-and-recommendations-policy-action> (accessed 22 August 2020).

Human Rights Commission with a mandate to ensure compliance with the rule of law and human rights obligations.⁸⁶ It also guarantees the Commission independence such that it is not subject to direction or control by any person or authority.⁸⁷ Yet, in the face of the pandemic the Commission's investigatory role only yielded the report referred to in this article but failed to hold accountable those responsible for the violations. In its report, the Commission revealed a high degree of human rights violations by security services. These human rights violations demonstrate the difficulties the country continues to face with respect to compliance with the rule of law as enshrined in the Constitution of Kenya. It also indicates a need to enhance the legal powers and practical capabilities of this Commission and other such oversight mechanisms in Kenya to adequately respond to future violations of human rights and the rule of law.

Based on its extensive Bill of Rights, state obligations on human rights, enforcement mechanisms and mandatory values and principles of governance, the Kenyan Constitution contains the hallmarks of a transformative supreme law. This supremacy has been tested during the pandemic and the documented violations vitiate the transformative claim because of the inability to limit the power of the state. Therefore, ten years after promulgation, the implementation of this Constitution has proved to be a double-edged sword, a site of tension, on the one hand, and transformation, on the other. While the Kenyan government has made major strides forward as far as consolidating the rule of law, human rights and governance is concerned, the COVID-19 pandemic has revealed that there is a minefield in the path to realising constitutionalism. It is important for state officials and citizens to recall that the Constitution itself requires that it must be construed in a manner that promotes its purposes, values and principles, contributes to good governance, and advances the rule of law and human rights.

86 Art 58 Constitution of Kenya.

87 Art 249(2)(b) Constitution of Kenya.