

# Excessive Law Enforcement in Kenya

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Allan Maleche

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## Introduction

It has been a little over eight weeks since Kenya confirmed its first Coronavirus case on 12 March 2020. Days after the confirmation of two more cases, President Kenyatta gave orders that hastened the government's plans to contain the virus. This included travel bans, self-quarantine requirements, the suspension of learning institutions and the establishment of the National Emergency Response Committee (the "Committee") on Coronavirus formed by Executive Presidential Order on 28 February 2020. The Committee was mandated to co-ordinate Kenya's preparedness, prevention and response to the threat of the Coronavirus Disease (COVID-19). Kenya has now adopted the mantra "test, isolate, treat and trace" in the fight against COVID#19 as it works to decrease the steady rise of positive cases now at 737 (as at the time of writing).

## No state of emergency

The President may exercise his powers granted in Article 132 (4) (d) of the Constitution of Kenya 2010 (the "Constitution") and declare a state of emergency as provided by Article 58 where the state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to meet the circumstances for which the emergency is declared. A state of emergency can only be declared prospectively and not for longer than 14 days. The National Assembly can approve an extension for a maximum of two months at a time following a public debate. This is subject to scrutiny by the Supreme Court on the validity of the declaration and any ensuing legislation.

The President is yet to declare a state of emergency and has opted to implement measures that ensure citizens can [continue with their lives](#). He has stated that a total lockdown of the country is the last option on the table and as long as the country strictly adheres to the measures in place, we will not be forced to yield to the inconvenience of a total lockdown.

## Introducing executive restrictions

Since Kenya is not in a state of emergency the Public Health Act Cap 242 (the "PHA") and Public Order Act Cap 50 (the "POA") are the primary legal bases for the emergency power the Executive has been utilising. The Kenyan government has progressively introduced a series of new guidelines and directives derived from various principal legislation including the PHA and the POA. They have also implemented several prevention and management measures in the form of protocols

in the fight against COVID-19. On 2 March the Cabinet Secretary for Health (the “CS”) declared COVID-19 a notifiable disease under the PHA which means that the provisions of Part IV of the PHA dealing with the prevention, control and suppression of infectious diseases would be applicable. This declaration provides a legal basis for travel restrictions and quarantine rules and further empowers the CS to generate rules and guidelines for the management of the Pandemic.

One of the immediate actions taken by the government included the ban on all international flights which came into effect at midnight on 25 March and has been extended by 30 days on 6 April 2020. Another was the order that individuals who entered Kenya after 22 March were to undergo mandatory quarantine for 14 days at designated facilities at their own expense.

In the exercise of the powers conferred by the POA, the Cabinet Secretary for Interior and Co-ordination for National Government ordered that with effect from 27 March 2020 for a period of thirty days, the country would be subject to a 7:00pm – 5:00am curfew through Legal Notice 36 of 2020, [Public Order \(State Curfew\) Order, 2020](#). The order prohibits public gatherings, processions or movement either alone or in a group during the period of the curfew. Essential service workers are exempt from the provisions of this order.

On 3 April 2020, the CS published the [Public Health Act \(Prevention, Control and Suppression of Covid-19\) Rules 2020](#) which instituted reporting obligations, guidance on burial procedures and gave the CS the power to declare any place an infected area thereby regulating all conduct and activities therein. Additionally, the [Public Health Act \(COVID-19 Restriction of Movement of Persons and Related Measures\) 2020](#), creates rules that are enforceable in an infected area. The rules apply for a specific period of time known as the ‘restricted period’ during which movement of persons into or out of an infected area using any means is prohibited save for vehicles transporting food, certain cargo or ambulances. These rules were initially applied in four out of the forty-seven counties within the country but include a fifth county. [In a press briefing held on 25 April 2020](#), the President stated that the cessation of movement rules as well as the nationwide dusk-to-dawn curfew would be extended for a further period of 21 days.

Another important dynamic is the [lack of involvement of county governments](#), given Kenya has a devolved system of governance and health is a devolved function there has been a marked silence from the county governments in this response with most decisions being centralised contrary to the Constitution.

## **Enforcing executive restrictions: Quarantine as punishment**

Any person that contravenes the curfew order is liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months or both. Those that violate the cessation of movement rules shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months, or both. However, despite this the Ministry of Health, on [19 April 2020](#),

announced that all those found to breach curfew will be assumed to have been in contact with suspected cases and would be mandatorily quarantined for a period of 14 days. The State is now using mandatory quarantine at own cost as a penalty.

The mandatory quarantine directive which started as a necessary precaution only meant for those that entered the country from already infected countries, has been weaponized against alleged breaches of law. Mandatory quarantine has been consecutively extended for a further 14 days for all persons in certain facilities due to the discovery of positive cases or a breach of the guidelines around social distancing within these facilities. Some persons in quarantine are being continually detained because they are unable [to pay for the cost of quarantine](#). However, following complaints on the issue by those in quarantine and other interested parties, the government announced that the cost of targeting testing and government quarantine facilities shall now be met by the government with effect from 6 May 2020. This move was implemented to encourage citizens to go for testing without the fear of having to pay for the costs of quarantine. Unsurprisingly, the government only refers to those placed in quarantine by the Ministry of Health and not those quarantined for violation of the curfew rules. Some of the facilities have been placing people in [deplorable conditions and increasing the risk of contracting the virus](#). Some persons within quarantine pulled off a ['prison break'](#) and escaped from one of the facilities housing over 200 people. Presently, [15 of the 50 persons](#) that escaped have surrendered to the Police.

There are concerns surrounding the rationality of decisions being devised by the government, for instance, the decision to quarantine persons who breach curfew yet the law does not provide for such a penalty. Firstly, this was announced by the Ministry of Health and that is not the Ministry responsible for public order and secondly it is contrary to the principal legislation which specifies punitive measures. That policy decision is not guided by any legislative framework or existing power.

## **Controlling executive restrictions: Parliamentary rubber-stamping**

After a short recess which commenced on 18 March, Parliament is now sitting but under [guidelines published on 2 April](#) with respect to conducting its business. The [Pandemic Response and Management Bill, 2020](#) has been tabled before the Senate and it aims to provide a legal framework for a coordinated response and management of activities and mechanisms for temporary measures and relief during a pandemic. The Bill proposes the establishment of a National Committee and County Committees to co-ordinate the country's response to a pandemic through the implementation of strategies and measures to both combat and cushion the effects of a pandemic. The Bill also establishes a Pandemic Response Fund and lays down socio-economic protective measures for the public such as: tax incentives; review of loan repayment modalities and removal of repayment penalties; prohibitions governing contractual obligations; tenancy agreement obligations; employer-employee relations; social safety schemes like cash transfers to support vulnerable

persons; and utility waivers. If passed, this Bill will provide greater clarity on the way the country as a whole should deal with any future pandemic occurrences.

The rules introduced by the government, are statutory instruments under the Statutory Instruments Act, 2013 (the "SIA") as they are established in the execution of a power conferred by or under an Act of Parliament. As per the SIA, the regulations should be tabled before Parliament for approval or annulment within seven days of gazettelement. Following this, statutory instruments are referred to the Committee on Delegated Legislation which may approve them or, if they opt to annul (partially or wholly), they shall be tabled to the house for consideration.

The National Assembly has [declined to approve](#) the Public Health Act (Prevention, Control and Suppression of COVID-19) Rules 2020 and the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules 2020 due to their punitive nature. The relevant cabinet secretary members have been summoned to justify the rules, explain the brutality from police and the continued detention of persons in quarantine. Apart from that, the actions of the National Assembly have been mostly to rubber stamp the actions of the Executive and in the instance that they are interrogating the rules, this is done belatedly as agents of the executive enforce them upon gazettelement. The curfew orders and the cessation of movement orders have been approved.

## **Enforcing constitutional rights and obligations: The judiciary during the pandemic**

The Judiciary scaled down its operations for a period of two weeks from March 16 in response to the news of the first confirmed COVID-19 case. This led to [the first online ruling](#) being issued as a precautionary measure in accordance with the suspension directive issued by the Chief Justice, David Maraga. The Judiciary has since introduced new [practice rules](#) to shield its staff and other court users. These measures have forced the closure of the courts and the use of technology by litigants, lawyers and judicial officers has replaced the usual means of operations and is now being used to dispense Justice. A directive issued by the National Council on Administration of Justice requiring courts to reopen sparked protests among judiciary staff who still feared for their safety. The Chief Justice agreed that such a move would prove hazardous to the judicial staff, he acknowledged that judicial officers are frustrating the judiciary's efforts of conducting proceedings remotely and is mitigating the issue by directing that Judges and Magistrates send monthly returns of the work being done.

Despite a slow start the Judiciary has begun to play its role in checking executive power. There has, for example, been uproar surrounding [police brutality during the curfew](#) period. Police have been pictured and recorded caning citizens who allegedly breached curfew and [it has been reported that at least six people have died](#) from police violence since its implementation. Despite the President calling their actions regrettable, the actions from the police are symptomatic of much deeper seated issues around [policing in Kenya](#) that have been exacerbated by an increase in

policing during this period. The High Court, however, has declared the unreasonable use of force by the police [unconstitutional](#). In addition, the Ministry of Interior has been ordered to include the Independent Policing Oversight Authority (“IPOA”) in the list of essential service providers in light of the need to closely monitor police engagement in an effort to curb the virus. The Attorney General has entered a [notice to appeal](#) this decision.

Constitutionally, rights may only be limited by law and only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. While the current situation calls for extraordinary emergency response strategies in line with the government’s public health objectives, a human rights-based approach must still be employed.

