

30th March 2020

The Honourable Chief Justice
The Chief Justice of the Republic of Kenya
President of the Supreme Court of Kenya
Supreme Court Building
City Hall Way
P O Box 30041-00100
Nairobi, Kenya



Dear Hon. Chief Justice David Maraga,

Access to Justice during the COVID-19 Pandemic

Greetings from the Kenyan Section of the International Commission of Jurists (ICJ Kenya).

ICJ Kenya would like to see your indulgence as Chief Justice and President of the Supreme Court on some pertinent issues of human rights concern on access to justice during this difficult time for our Republic, and the world at large.

Following the Presidential address on 25th March 2020, on 26th March 2020, the Cabinet Secretary for Interior and Co-ordination of National Government vide Kenya Gazette Supplement No. 30 under Legal Notice 36 gazetted a state curfew restricting movement between 7:00 pm and 5:00 am daily.

In response to the Corona Virus Disease (hereinafter COVID-19) threat, the President of Kenya announced a series of measures with a view of curbing the spread of COVID-19 in the country. Among these measures are the mandatory quarantining of travellers to Kenya, social distancing policies, closure of schools, places of worship, restaurants and bars, banning of social events, among others. These measures have been given the force of law through a number of statutory instruments made under the Public Health Act by the Cabinet Secretary for Health.

The Judiciary also announced measures to mitigate the spread of COVID-19, including limiting the courts to handling only urgent cases, such as aking pleas for serious cases and bail applications being granted to persons to ensure the non-congestion of our detention facilities. Further on 25th March 2020, the Inspector General instructed all police officers to afford reasonable bail terms to petty offenders to ensure that police detention facilities were not crowded.

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ICJ Kenya applauds the Government, particularly the President, the Ministry of Health and the Judiciary for the proactive and timely measures taken to protect the lives and health of the people of Kenya. The steps taken are necessary to curb the spreading pandemic.

However, ICJ Kenya is concerned about the potential for the abuse of basic human rights, particularly those of the poor and marginalised, in light of these measures. In particular, ICJ Kenya notes with concern the potential and actual impact on the the rights to a fair and speedy trial, and the right to freedom from cruel, inhuman and degrading treatment and punishment. We wish to bring to the attention of the Honourable Chief Justice the following concerns:

1. Rights of an Arrested Person

Following the Government's recording its first COVID-19 case, the National Council on the Administration of Justice (NCAJ) issued a raft of measures, one of which directed that arrested persons seek police bail at the police stations and that only the most serious of offences be presented before the Judiciary. The Judiciary has since directed its officers to keep skeleton staff in some courts while directing the closure of most courts. This has led to security officials illegally and unlawfully taking advantage of the situation to extort and harass citizens. As part of the Civil Society Police Reforms Working Group, we have noted an increase in the number of the extra-judicial killings, disappearances and police brutality cases during this period.

We, therefore, strongly feel that during this curfew period:

- a. The Inspector-General of Police and the leadership within the security sector should caution the security forces to implement the curfew with strict adherence to constitutional and human rights principles. The Inspector-General is a member of the NCAJ, and it is hoped that the enforcement of the curfew will be handled with the utmost respect for human dignity, notwithstanding the unfortunate events of 27th March 2020. We also call upon the Independent Policing Oversight Authority (IPOA) to take note of the increase in cases of police misconduct and further investigate the cases of police violence that have and will be reported during the curfew period.
- b. The security agencies in the enforcement of the curfew to be cognisant of the unfortunate predicament that street families, homeless persons, persons who inject drugs, and others among the '*Key Population*' groups who will find themselves in vulnerable situations, being that there would not have homes to go to after the curfew. Therefore, when implementing the curfew, special consideration ought to be afforded to these vulnerable groups who, if subjected to detention or harassment would be at greater health risk owing to their already compromised health conditions and suppressed immunity.

- c. Petty offenders should not be detained during the period and should instead be given reasonable bail and bond terms. We are encouraged by various Judicial officers who have released petty offenders who were in remand custody.

2. Right to a Fair Trial

ICJ Kenya has been analysing the implication and interpretation of the memos issued by the Chief Justice and the Chief Registrar of Judiciary on the scaled-down operations of the Judiciary. This information has since caused confusion amongst the public with many questioning how the Judiciary will be operating during the period, being that it is an essential arm of democratic governance. We wish to request the Chief Justice to give further direction on this to assure the public and the legal fraternity:

- a. To the extent to which the courts of law are functioning. Which courts in particular, and in which stations?
- b. Is the Judiciary still hearing (urgent) matters, and if so, which kinds of matters are considered urgent during this period? Do they include criminal, constitutional and human rights cases?
- c. Does the closure of the Judiciary only mean that the Judiciary is physically closed but can still operate digitally?
- d. What are the implications to an arrested person's rights to fair trial if he or she cannot be charged and taken to court within 24 hours? What is the procedure of arraigning arrested persons before the courts?

At ICJ Kenya we are encouraged by the uptake of technology by various judicial officers during this period to ensure that judgements are delivered in a timely fashion. The Judiciary's expedited response to the petition filed by the Law Society of Kenya on 30th March 2020 indeed confirms the Judiciary's commitment to upholding the tenets of the Constitution.

2. Right to Legal Representation and Access to Free Legal Aid

Legal services were not classified as an essential service in the Gazette Notice. This ought not to be the case as every person has a right to receive legal assistance, even during the pandemic and precisely because the possibility of rights violations by the authorities remains high.

On 27th March 2020, Kenyans were horrified by the manner in which security agencies conducted themselves in implementing the curfew. The security officers were seen on recordings using excessive force amounting to assault and harassment against innocent civilians who were trying their best to get to make the curfew using the limited public transport available. In Mombasa, at

the Likoni Ferry crossing, the security agencies began harassing the public two hours to the start of the curfew period.

We note with regret that violence was meted upon the most vulnerable members of the public, women carrying children, men and women from casual jobs, homeless Kenyans and persons who rely on public transportation, who were caught in transit. These Kenyans were tear-gassed and physically assaulted, resulting in many of them coughing, sneezing, and vomiting, all actions which are in contravention to the WHO guidelines on preventing the spread of the COVID- 19 virus. It was ironic that actions meted out by the security agencies against the public went against the very purpose of the curfew, which was to suppress the spread the COVID-19 virus.

These victims, among others, are entitled to seek legal redress for the human rights violations committed against them. We, therefore, implore the Chief Justice to confer with the Cabinet Secretary in the Ministry of Interior and Coordination of National Government to include legal services as essential services and accredit Article 59 institutions, as well key Civil Society Organisations with expertise in human rights work to monitor violations and legally represent Kenyans who may be arrested, or who may need legal assistance during this period.

We humbly submit that right to a fair trial cannot be suspended even in the face of a pandemic. Key institutions that would lend support to the Article 59 institutions and would require clearance include the Law Society of Kenya, the Kenyan Section of International Commission of Jurists (ICJ Kenya), International Justice Mission, Independent Medical Legal Unit, Katiba Institute, Kenya Human Rights Commission, Defenders Coalition, Haki Africa, Amnesty International Kenya, Federation of International Women Lawyers (FIDA-K), Transparency International Kenya, among others.

3. Right to Information

The Government ought to ensure that all information appertaining to the curfew is communicated to all persons in a language that they understand. We humbly feel that a majority of Kenyans still do not have sufficient information on the COVID-19 virus as it has not been communicated sufficiently to them in a language they understand. Inclusive considerations also need to be out in place for persons with mental disabilities and persons who inject drugs to ensure they have information on the COVID-19 pandemic as well as the government curfew.

Sharing accurate, timely and lifesaving information is not only a constitutional obligation and necessary to meet the rights to health and information, but it is also critical in ensuring transparency,

which builds public trust in these difficult times—as such, passing stigmatising information on testing, isolation and quarantine will be counterproductive to the response.

There are gaps in the information shared and contained in the public domain. Comprehensive information will not only fulfil the constitutional right to access information but also help alleviate public fear, anxiety and hysteria around COVID-19. If the public does not trust the accuracy and completeness of the information received, Kenyans may be less willing to comply with and adopt these measures. This may result in the State using security forces to enforce measures which are detrimental.

We therefore humbly request the Honourable Chief Justice’s intervention on these issues, both on matters which you can make a direct intervention, as well as where you can, using your office confer with the relevant Cabinet Secretary to extend the list of essential services to key legal service providers to ensure constitutional and human rights are safeguarded during this period.

ICJ Kenya is willing to discuss this further with your office and is grateful for the valuable partnership of your office.

Kind regards,



Kelvin Mogeni
Chairperson