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THE MAN OF COVID-19: THE PLACE OF COVID-19 MEASURES IN WOMEN'S HUMAN RIGHTS IN KENYA

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Abstract

The COVID-19 pandemic has greatly impacted on the lives of men and women all over the world. However, the impact on women has been more profound – from the loss of jobs to losses incurred in businesses; and from domestic violence to financial constraints. Further, from food insecurity to lack of clean water, sanitizers, face masks, and gloves, the pandemic continues to magnify structural inequalities that exist in society. Women continue to find themselves in multiple jeopardy with the impact of the pandemic multiplying the impacts of race, sex, and class. This chapter uses the example of the Government of Kenya's COVID-19 response and management to examine the extent to which global and national strategic plans for COVID-19 preparedness, management and response are responsive to international women's human rights standards on the one hand and the constitutional and local context on the other. The chapter argues that even though the World Health Organization and other international actors have put in place elaborate legal, policy, administrative, public health, public order, and socio-economic measures to contain the pandemic as well as mitigate and manage the challenges, these measures continue to impact women disproportionately because they fail to consider the lived realities of women. The chapter focuses on three main types of measures: public order, public health, and socio-economic measures. We rely on Naffine's theory of 'The man of law' to argue that COVID-19 measures have a historically located the man in mind. This man has five main characteristics: he is a male who is educated, affluent and over 21; functions in the public sphere without reference to the demands of a family; is entirely self-interested; is not seen to benefit from the emotional and physical services of a caring wife; and is fully severed from the life of the heart. This 'man of law' can be

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directly analogised to the 'man of COVID-19' measures. Theoretically, the chapter is also inspired by King's 'Multiple jeopardy, multiple consciousness: The context for a black feminist ideology'. We use King and Naffine to argue that women continue to find themselves in multiple jeopardy due to their traditional characterisation as marginal in the eyes of the law. Ultimately, this chapter seeks to intervene in global pandemic measures by ensuring that they factor in the disproportionate effects of COVID-19 on women and to ensure that the management of future pandemics responds not only to international women's human rights but also to local lived realities.

1 Introduction and context

Twenty-five years ago, over 30 000 activists representing 189 nations gathered in Beijing at the Fourth World Conference on Women to shape the future of international women's human rights.¹ This Conference concluded with the drafting of the Beijing Declaration and Platform for Action, which encapsulates women's rights in education, health, marriage, leadership, governance, employment, family life among other areas.² The adoption of the Declaration marked the beginning of far-reaching adoption of several international instruments, conventions and declarations to govern women's human rights.³ Since its adoption, the world

- 1 See UN Women 'On the 25th anniversary of landmark Beijing Declaration on women's rights, UN Women calls for accelerating its unfinished business' (4 September 2020) <https://www.unwomen.org/en/news/stories/2020/9/press-release-25th-anniversary-of-the-beijing-declaration-on-women's-rights> (accessed 30 June 2021).
- 2 UN, Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, UN Docs A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).
- 3 See for instance UN General Assembly, Convention on the Political Rights of Women, 20 December 1952, A/RES/640 (1952). UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13. Optional UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Resolution adopted by the General Assembly, 15 October 1999, A/RES/54/4, UN General Assembly, Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women: Resolution adopted by the General Assembly, 13 December 1985, A/RES/40/108 UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, Plan of Action from the International Conference on Population and Development. UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at <https://www.refworld.org/docid/4720706c0.html> (accessed 23 September 2023). UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized

has also witnessed the constitutionalisation and domestication of various provisions of international and regional instruments on women's human rights.⁴ Several countries in Africa continue to revise their constitutions to reflect the provisions of various international and regional treaties. In Kenya, for instance, the women of Kenya endorsed the enactment of the Constitution of Kenya, 2010 which has often been described as a 'Women's Constitution'.⁵ The Constitution contains numerous provisions that domesticate and seek to protect women's human rights to education, health, family, among other areas.

Ten years after the promulgation of this women-friendly Constitution, however, Kenya continues to face several challenges in implementing it.⁶ The international, regional and national commitment to women's human rights was, nonetheless, never as severely tested than when the first COVID-19 case was discovered in Kenya. World over, the COVID-19 pandemic has greatly impacted the lives of men and women and Kenya is no exception.⁷ The impact of the pandemic on women has been profound

Crime, 15 November 2000, available at <https://www.refworld.org/docid/479dee062.html> (accessed 23 September 2023). UN Security Council, Security Council resolution 1325 (2000) (on women and peace and security) 31 October 2000, S/RES/1325 (2000), available at <https://www.refworld.org/docid/3b00f4672e.html> (accessed 23 September 2023). UN Security Council, Security Council resolution 1820 (2008) (on acts of sexual violence against civilians in armed conflicts) 19 June 2008, S/RES/1820 (2008), available at <https://www.refworld.org/docid/485bbca72.html> (accessed 23 September 2023). UN General Assembly, Declaration on the Elimination of Violence against Women (1993), Dakar Platform for Action (Dakar Platform), African Union, African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999). Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000, Articles 3 & 4. UN General Assembly, Declaration of Commitment on HIV/AIDS, 2 August 2001, A/RES/S-26/2. African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003. African Union, African Union Solemn Declaration on Gender Equality in Africa (SDGEA) 2004. Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998). African Union, The African Union Summit on Maternal, Infant and Child Health and Development (2010).

- 4 K Nkatha 'Constitutionalizing travelling feminisms in Kenya' (2019) 52 *Cornell International Law Journal Special Issue on Gender* 137.
- 5 K Nkatha & P Kameri-Mbote 'Woman of law: Women's triumph in Kenya's Constitution of Kenya 2010' in KW Mukabi, P Kameri-Mbote & A Meroka (eds) *Changing the mainstream: Celebrating women's resilience* (2018).
- 6 N Kabira & R Kibugi 'Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19' (2020) 20 *African Human Rights Law Journal* 436. See also Nkatha (n 4).
- 7 See for instance J Hussein 'COVID-19: What implications for sexual and reproductive health and rights globally?' (2020) 28 *Sexual and Reproductive Health Matters* 1 <https://www.tandfonline.com/doi/full/10.1080/26410397.2020.1746065> (accessed

– from increased domestic chores to domestic violence to loss of jobs to food insecurity to lack of clean water, sanitizers, face masks, and gloves. As Kameri-Mbote and Meroka-Mutua demonstrate, COVID-19 measures and responses have had gendered impacts on men and women in Kenya.⁸ Women continue to find themselves in multiple jeopardy with the impacts of the pandemic multiplying and amplifying the impacts of race, ethnicity, sex, and class.

The Minister for Health's announcement of the first COVID-19 case in Kenya on 13 March 2020, was followed by several laws, policies and regulations aimed at mitigating the effects of the COVID-19 pandemic.⁹

18 September 2023); C Wenham, J Smith & R Morgan 'COVID-19: The gendered impacts of the outbreak' (2020) 395 *The Lancet* 846 at 848 [https://www.thelancet.com/journals/lancet/article/PIIS01406736\(20\)305262/fulltext?te=1&nl=in-her%20words&emc=edit_gn_20200317](https://www.thelancet.com/journals/lancet/article/PIIS01406736(20)305262/fulltext?te=1&nl=in-her%20words&emc=edit_gn_20200317) (accessed 18 September 2023); P Dashraath et al 'Coronavirus disease 2019 (COVID-19) pandemic and pregnancy' (2020) 222 *American Journal of Obstetrics and Gynaecology* 521. HJ McClaren et al 'COVID-19 and women's triple burden: Vignettes from Sri Lanka, Malaysia, Vietnam and Australia' (2020) 9 *Social Sciences* 87.

8 P Kameri-Mbote & A Meroka-Mutua *Gendered impacts of responses to COVID-19 pandemic in Kenya* (2020).

9 Kenyalaw.org divides the different measures as per the enacting and implementing agency: executive orders, gazette notices, ministerial statements, parliamentary and court directions. See for instance the sixth Presidential address on the Coronavirus Pandemic at State House, Nairobi, Kenya on Saturday, 16 May 2020; President Uhuru Kenyatta assents to the Tax Laws (Amendment) Bill of 2020, 25 April 2020; President Kenyatta Urges Kenyans to Observe Government Directives on Coronavirus, 7 April 2020. President's address on Enhanced Measures in Response to the COVID-19 Pandemic, 6 April 2020. Africa To Pursue Loan Waivers As Safeguard Against Adverse Economic Impact Of Coronavirus, 4 April 2020. President Kenyatta Convened First Meeting Of Task force To Marshal Funds For Coronavirus Response, 1 April 2020. Presidential address on the State interventions to cushion Kenyans against economic effects of COVID-19 pandemic, 25 March 2020; Executive Order 2 of 2020; National Emergency Response Committee on Coronavirus issued at State House, Nairobi, 28 February 2020. The Kenya Gazette Notices include Legal Notice 59: Public Finance Management Act 18 of 2012; Waiver of court fees in respect of commercial disputes. Legal Notice 60: Public Finance Management Act (State Officers and Public Officers Motor Car Loan Scheme Fund) (Amendment) Regulations, 2020. Legal Notice 57: Public Order (State Curfew) Variation Order of 2020. Legal Notice 58: Public Health (COVID-19 Restriction of Movement of Persons and Related measures) Variation Rules, 2 of 2020; Legal Notice 50: Public Health (COVID-19 Restriction of movement of persons and Related Measures) Rules, 2020; Legal Notice 51: Public Health (COVID-19 Restriction of movement of persons and related measures) (Nairobi Metropolitan Area) Order of 2020; Legal Notice 52: Public Health (COVID-19 Restriction of movement of persons and related measures) (Mombasa County) Order of 2020; Legal Notice 53: Public Health (COVID-19 Restriction of movement of persons and related measures) (Kilifi County) Order of 2020; Legal Notice 54: Public Health (COVID-19 Restriction of movement of persons and related measures (Kwale County) Order of 2020; Legal Notice 49: Public Health (Prevention, Control and Suppression of COVID-19) Rules of 2020. Other pieces of legislation include Value

These interventions include the declaration of COVID-19 as a national pandemic, rules of mandatory quarantine, disinfection of infected places, deployment of quasi emergency powers to enforce a nationwide curfew, fiscal incentives, socio-economic relief for citizens and businesses, among others.¹⁰

This chapter uses the example of the Government of Kenya's COVID-19 response and management to examine the extent to which global and national strategic plans for COVID-19 preparedness, management and response are responsive to international women's human rights' standards on the one hand and the constitutional and local context on the other. In the chapter, we carry out a gender analysis of the COVID-19 measures to find out if they illustrate an appreciation or knowledge and prioritisation of men and women's roles in curbing the pandemic and whether the policies address the practical and strategic gender needs of men, women, boys and girls at all levels including conceptualisation, implementation and monitoring.

The chapter is divided into five main parts. The first part is an introduction that sets the context. The second part provides the conceptual framework. The third part sets out the methodology. The fourth part analyses the COVID-19 measures from a gender perspective and the fifth and final part provides some concluding reflections.

2 Conceptual framework

In this chapter, we rely on two main theories to argue that COVID-19 measures have a historically and socially located man in mind: Naffine's theory of 'The man of law' and King's 'Multiple jeopardy, multiple consciousness: The context for a black feminist ideology'. We demonstrate that the man of COVID-19 can be directly analogised to Naffine's 'man of law' and that because of their invisibility in the eyes of the law and policy

Added Tax Act of 35 of 2013 Legal Notice 35: The Value Added Tax (Amendment of the Rate of Tax) Order of 2020. The Public Order Act, Cap. 56 Legal Notice of 36: The Public Order (State Curfew) Order of 2020.

10 It is important to note that unlike other countries in Africa, the government did not invoke its state of emergency powers under the Constitution of Kenya, 2010. See Kabira & Kibugi (n 7).

on COVID-19, women's human rights continue to be infringed as women find themselves in multiple jeopardy.

2.1 Man of law

Naffine in her classic piece titled, 'The man of law' argues that law is shot through with contradictions although it professes its import to be internally coherent and certain.¹¹ She argues that laws may be seen to reflect and reinforce the priorities of those who interpret and administer them. Because of this, law plays an important role in reproducing the existing patriarchal order.¹² This patriarchal order is reproduced using an idea of humanity that is imbued with certain social, economic and physical characteristics. Like the 'man of law', the man of COVID-19 is imbued with specific social, economic, physical and moral characteristics that resemble the 'man' of early social contract theorists such as Hobbes, Lock, Rousseau, Gauthier and Aquinas. This man is a chip of the Weberian 'ideal type' and is used as the central justifying character of the *Gesellschaft* concept of justice¹³ whose subjects' social relationships are based on impersonal ties such as general duty to society. This discounts the *Gemeinschaft* concept of justice where social relationships between individuals based on close personal and family ties are critical.

Like the man of law described by Naffine, the man of COVID-19 has five main characteristics: he is a male who is educated, affluent and over 21; functions in the public sphere without reference to the demands of a family; is entirely self-interested; is not seen to benefit from the emotional and physical services of a caring wife; and is fully severed from the life of the heart.¹⁴ This is unsurprising considering that the man of COVID-19 is a creature of law and is therefore closely modelled after 'The man of law'.

Five points to note about the man of COVID-19. Firstly, the law's characterisation of the man of COVID-19, like the man of law, often serves to render women (and many men) marginal in the eyes of the law.¹⁵ Secondly, in *Gesellschaft* law, the man is deemed to be the natural inhabitant of the public sphere; the woman is accorded a more constraining domestic role.¹⁶ Thirdly, the omission of the experience of women from our *Gesellschaft* type of justice is neither an innocent oversight nor a

11 N Naffine *Criminal law and the man problem* (2020).

12 Naffine (n 11) 2 & 3.

13 Naffine (n 11) 23.

14 Naffine (n 11) 25.

15 Naffine (n 11) 13.

16 Naffine (n 11) 11.

conscious male conspiracy against women. Rather, it seems to be a function of a positive and genuine commitment on the part of law and its agents to a traditional view of the sexes.¹⁷ Fourthly, there is a clear relation between law and class and the legal idea of neutrality itself displays a class bias in favour of the status quo in that it sanctions wilful blindness to existing differences (inequalities) between the sexes.¹⁸ Fifthly, because of uneven distribution of resources in the society, the real effect of the legal ideals of freedom and equality to preserve the existing rights of people who own property to quiet possession of that property, and to engage in profitable transactions. Paradoxically, the right it confers on those who have little property to interfere or negotiate in the market and to freedom from interference with property is a meaningless right.¹⁹ Furthermore, the man of COVID-19 embodies a middle-class style of masculinity.²⁰ Lastly, it is important to note that even though the *Gesellschaft* law envisages a person who is largely a fiction it is vital for the legal scheme of things that he is seen to be typical.²¹

The man of COVID-19 is educated, he goes to work, has a big house where he can socially-distance, self-isolate and avoid mingling with people, has a wife, has children going to school, has a car and time for leisure in the evening. He also has flowing water to wash his hands and is making enough money to buy sanitizer when needed to protect himself and prevent the spread of disease and to afford the well-balanced diet needed to provide the necessary immunity from the disease.

2.2 Multiple jeopardy, multiple consciousness

In her article titled, 'Multiple jeopardy, multiple consciousness: The context of a black feminist ideology', King notes that first and foremost, a black feminist ideology, declares the visibility of black women. It acknowledges the fact that two innate and inerasable traits, being both black and female, constitute a special status in American society. Second, black feminism asserts self-determination as essential.²² She demonstrates that black women in the United States have long recognised the commonalities that they share with all women, as well as the bonds that connect them

17 Naffine (n 11) 13.

18 As above

19 Naffine (n 11) 16.

20 Naffine (n 11) 18.

21 Naffine (n 11) 25 & 26.

22 DK King 'Multiple jeopardy, multiple consciousness: The context of a black feminist ideology' (1988) 14 *Signs: Journal of Women in Culture and Society* 42.

to black men.²³ King asserts that black women in the United States experience special circumstances, in essence, they share commonalities with all women, as well as the bonds that connect them to the men of their race.²⁴ She argues that the interactive oppressions that circumscribe their lives provide a distinctive context for black womanhood.²⁵ The dual and systematic discriminations of racism and sexism remain pervasive, and, for many, class inequality compounds those oppressions.²⁶

She demonstrates that black womanhood²⁷ is characterised by dual and systematic discriminations of racism and sexism that remain pervasive, and, for many, class inequality compounds those oppressions.²⁸ On theoretical invisibility of black women, King asserts that the scope, both institutionally and culturally, and the intensity of the physical and psychological impact of racism is qualitatively different from that of sexism. This is not to argue that those forms of racial oppressions are greater or more unjust but that the substantive differences need to be identified and to inform conceptualisations.²⁹ Beale describes 'double jeopardy' as the dual discriminations of racism and sexism that subjugate black women. She states that:

As blacks they suffer all the burdens of prejudice and mistreatment that fall on anyone with dark skin. As women they bear the additional burden of having to cope with white and black men.³⁰

Racism, sexism, and classism constitute three, interdependent and inseparable control systems. An interactive model, which King proposes, finds that the processes are better captured when referred to as 'multiple jeopardy'. The modifier 'multiple' refers not only to several, simultaneous oppressions but to the multiplicative relationships among them as well.³¹ She notes that feminism has excluded and devalued black women, our experiences, and our interpretations of our own realities at the conceptual and ideological level.³² The assumption that the family is by definition

23 King (n 22) 42.

24 As above.

25 As above.

26 King (n 22) 43.

27 King (n 22) 42.

28 King (n 22) 43.

29 King (n 22) 45.

30 F Beale 'Double jeopardy: To be black and female' in TC Bambara (ed) *The black woman: An anthology* (1979) at 90-100.

31 King (n 22) 47.

32 King (n 22) 58.

patriarchal, the privileging of an individualistic worldview, and the advocacy of female separatism are often antithetical to many of the values and goals of black women and thus are hindrances to their association with feminism.³³ She argues that although each form of discrimination has a single, direct, and independent effect on the status of the woman, racism, sexism, and classism constitute three, interdependent control systems. This is because the interactive processes between these forms of discrimination are better captured when referred to as ‘multiple jeopardy’. The modifier ‘multiple’ refers not only to several, simultaneous oppressions but to the multiplicative relationships among them as well. In other words, the equivalent formulation is racism multiplied by sexism multiplied by classism. King uses the example of sexual exploitation of black women in slavery in a historical example. While black women workers suffered the same demanding physical labour and brutal punishments as black men, as females, they were also subject to forms of subjugation only applicable to women. Davis, in ‘Women, race and class’, notes, ‘[i]f the most violent punishments of men consisted in floggings and mutilations, women were flogged and mutilated, as well as raped’.

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We are rarely recognized as a group separate and distinct from black men, or a present part of the larger group ‘women’ in this culture When black people are talked about the focus tends to be on black men; and when women are talked about the focus tends to be on white women.

After having acknowledged that the man of COVID-19 is a historically located man who has very specific characteristics, King helps us further problematise the invisibility of the African woman in COVID-19 measures. The multiplier effect of the intersections between racism, sexism, and classism constitute multiple jeopardy for women. As Kamari-Mbote notes women are often excluded in law and legal discourses in multiple ways by

33 A Lorde *Sister outsider* (1984) 66-71; b hooks ‘Feminist theory: From margin to centre’ (1984); L Burnham ‘Has poverty been feminized in Black America?’ (1985) 2 *Black Scholar* 14.

34 King (n 22) 45.

virtue of their race, class, religion and ethnicity.³⁵ The fact that the face behind the man of COVID-19 fails to recognise the diverse positions within which men and women find themselves constitutes multiple jeopardy for not only women but also men in the face of a pandemic.

3 Methodology

The methodology adopted here relies on traditional and contemporary gender analysis frameworks to develop the tools of analysis.³⁶ The analysis of the measures is conducted in five main steps:³⁷ The first stage entails identification of the issue. At this stage, we ask ourselves, what is the issue? Who says it is an issue? Why has it become an issue? What are the root causes? How are the root causes perpetuated? What factors are influencing this issue?

The second step entails defining the anticipated outcomes. In this stage of analysis, we ask ourselves: what does the government want to achieve with these measures? For whom? What outcomes would other stakeholders expect from this policy? For which specific outcomes was the measure defined? How do the expected outcomes meet or hinder other policies or legislation? How do the outcomes hinder the commitments to women's human rights as encapsulated in the Constitution of Kenya, 2010 and other international women's human rights instruments?

The third step involves determining the extent to which men, women, boys and girls were consulted in the making of the policies, laws and measures. At this stage, we ask: what do we need to know about this particular issue? What is the underlying problem that this measure seeks to address? Who was involved in the enactment of the measures? What

35 PK Mbote 'The fallacies of equality and inequality: Multiple exclusions in law and legal discourses' University of Nairobi, Inaugural Lecture, 2013.

36 The frameworks include the following: (a) the ABCs of gender analysis developed by FEMNET for FAWE to analyse school curriculum and textbooks for gender responsiveness; (b) The Caroline Moser Framework, developed in 1983 and examining the impact of the triple roles of women on meeting practical gender needs and strategic gender needs; (c) Gender Analysis Matrix, developed by Rani Parker for community based gender analysis; (d) The Gender Management System, developed by the Commonwealth Sectoral gender analysis and gender mainstreaming within sectors; (e) The Harvard Framework of Analysis, developed in the 1980s to achieve efficiency in the use of resources; (f) Social Relations Framework, which defines development as human wellbeing and examines power and social relations. It includes an institutional analysis of government policies, programmes and projects; and (g) The Women's Equality and Empowerment Framework (WEEF), developed by Sara Longwe, for UNICEF for gender mainstreaming.

37 These steps are adopted and remodelled from a reading of Status of Women, Canada 'Gender-based analysis: A guide for policy-making' (1996).

methodology was used to come up with the measures? What options are indicated in the policies? How do these options impact men and women?

The fourth step involved investigating the assumptions, presuppositions, biases that are implicit in the measures prescribed by the government. This step entails investigating what aspects of the policy environment affect or hinder the implementation of the recommendation.

3.1 Unpacking the practical and strategic gender needs

The fifth and last step entails disaggregating the practical and strategic gender needs as outlined by Sarah Longwe³⁸ in order to interrogate the extent to which the measures take into account the varied needs of men and women. The practical needs include water, food, shelter, clothing, work and health. These needs relate to the material conditions of life and can be met through material provision or access to these needs.³⁹ Strategic gender needs refer to the socio-economic and political positions of women compared to men. These needs relate to longer term structural issues such as patriarchal structures, marginalisation of women, subordination of women and the devaluation of women's work and place in the family and in the society. We also examine the impact of the measures on men and women.

3.2 International women's human rights law in Kenya

Since adoption and coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of African Women (Maputo Protocol) for Kenya, the country's women have become more active participants in the regional, local and global women's rights movements.⁴⁰ As a result, many international women's human rights have been negotiated, adopted, ratified and domesticated in Kenya. The Constitution of Kenya, 2010 in many ways enshrines the vision of the international women's human rights movement as conceived in the Maputo Protocol. The Kenyan Constitution contains several women-friendly provisions. The Constitution provides that equality is a national value and principle and seeks to mainstream it in various areas. Women's first, second, third and fourth generation rights are protected in this Constitution. Women have a right to education, to food, to shelter, to start a family, among other rights. In addition, the Constitution provides that international law is a source of law in Kenya and this has created room for

38 C March, I Smyth & M Mukhopadhyay *A guide to gender-analysis frameworks* (1999).

39 FEMNET *Easy-to-use guide for mainstreaming gender* (2013).

40 Kabira & Kibugi (n 7).

the possibility of applying international women's human rights provisions directly in our courts. This includes all treaties promoting women's rights.⁴¹ The Constitution of Kenya specifically provides⁴² that women have equal fundamental rights and freedoms with men. It further provides that women have equal access to political and economic opportunities and equality in cultural and social spheres.⁴³ The Constitution also guarantees women's right to access reproductive healthcare and the right to economic and social rights without discrimination on the basis of their gender.⁴⁴ The Constitution further protects women from forceful cultural rites and practices.⁴⁵ It also protects women against forced marriages and also offers women equal rights in the marriage.⁴⁶ Women also have the right to own any form of property individually or in partnership with others.⁴⁷ Essentially, the Constitution of Kenya contains elaborate provisions on women's human rights and, in fact, have precipitated the enactment of laws and policies to respond to the constitutional provisions.⁴⁸

In the next section, we evaluate what becomes of women's human rights in the face of the COVID-19 pandemic.

4 COVID-19 measures

Like many other governments all over the world, the government of Kenya has passed several laws, policies and regulations that aim at mitigating the effects of the COVID-19 pandemic. In this section, we analyse the laws, policies and directives on public health, public order and socio-economic measures from a gender perspective.

41 The Constitution of the Republic of Kenya, 2010, arts 2(5) & 6.

42 The Constitution of the Republic of Kenya, arts 27(1) & 27(2).

43 The Constitution of the Republic of Kenya, art 27(3).

44 The Constitution of Kenya, art 43.

45 The Constitution of the Republic of Kenya, art 44(3).

46 The Constitution of the Republic of Kenya, art 45(2) & (3).

47 The Constitution of the Republic of Kenya, art 40(1) & (2).

48 Some of the laws include: Marriage Act 4 of 2014; Matrimonial Property Act 49 of 2013; National Gender and Equality Commission Act 15 of 2011, Prohibition of Female Genital Mutilation Act 32 of 2011; Protection Against Domestic Violence Act 2 of 2015; The Public Finance Management (National Government Affirmative Action Fund) Regulations, 2016, among others.

4.1 Public order

The Public Order (State Curfew), 2020 is the regulation that seeks to mitigate COVID-19 from a public order perspective.⁴⁹ The Cabinet Secretary for Interior and Coordination of National Government relied on the powers conferred on him in the Public Order Act to enforce a curfew period. The regulation states that in view of the threat posed by COVID-19 to national security and public order, a curfew would be enforced between 19h00 in the evening and 05h00 in the morning. This order was to remain in effect for 30 days from 27 March 2020. The President has subsequently extended the curfew period several times.⁵⁰ The order outlawed public gatherings and restricted the procession or movement of persons alone or in groups. The only exception to this rule was if a police officer had granted permission. The order excluded persons working in 'essential services' such as 'medical professionals and health workers, people working in the airport, railways, farmers, distributors, dealers and pipeline among others from its application'.⁵¹ The public order rules were later varied to include Kenya Ferry Services, its employees and officers engaged in transportation of food supplies.⁵²

4.2 The man of public order

In response to global developments and WHO guidelines on management of the COVID-19 pandemic, the measures contained in the Public Order (State Curfew) Order, 2020 were aimed at minimising the spread of

49 Kenya Gazette Supplement 46 of 17 April 2020. See also Legal Notice 57: Public Order (State Curfew) Variation Order of 2020.

50 See for instance Kenya Gazette Supplement 46 of 17 April 2020. Legal Notice 57: Public Order (State Curfew) Variation Order of 2020.

51 The list of exempted persons included: (1) Medical professionals and health workers; (2) National security, administration and coordination of national government officers; (3) Public health and sanitation officers in the County Governments; (4) Licensed pharmaceuticals companies, pharmacies and drug stores; (5) Licensed broadcasters and media houses; (6) Kenya Revenue Authority; (7) Kenya Airports Authority and Licensed Civil Aviation Service Providers; (8) Kenya Civil Aviation Authority; (9) Kenya Airways PLC; (10) Kenya Ports Authority and Licensed Port Operators; (11) Power production and distribution Companies; (12) Kenya Railways Corporation; (13) Kenya Pipeline Company; (14) Water service providers; (15) Food and farm produce processors, distributors, dealers, wholesalers and transporters; (16) Licensed supermarkets, minimarkets and hypermarkets; (17) Licensed distributors and retailers of petroleum and oil products and lubricants; (18) Licensed telecommunications operators and service providers; (19) Licensed banks, financial institutions and payment service providers; (20) Fire brigade and emergency response services; (21) Licensed security firms; and (22) Postal and Courier services.

52 The Public Order (State Curfew) Variation Order of 2020.

COVID-19.⁵³ The curfew order was intended to restrict movement of persons thus effecting social distancing to minimise the spread of COVID-19. This issue has been highlighted by WHO and mimics historical global responses to control pandemics.

While these measures were intended to protect all Kenyans, this order disproportionately impacted women. It assumes that all men and women are in paid work and are, therefore, able to work from home. Even when women as farmers are able to move around as an exception, it is highly unlikely that they will be walking around at night, given both security concerns and their triple burden of productive, reproductive and communal responsibilities.⁵⁴

In the implementation of the State Curfew Order, several cases of police brutality arose. Many women and men have died as a result and others have sustained injuries due to unlawful police actions. The brutal application of the law led to the institution of legal actions against the police. These are *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others*; and, *Kenya National Commission on Human Rights & 3 others (Interested Parties)*.⁵⁵ The court declared that the unreasonable use of force by the police in enforcing the curfew was unconstitutional. The Cabinet Secretary in Charge of Health was consequently directed to issue guidelines for quarantine, curfew and containment of COVID-19. The Cabinet Secretary was also required to issue information on the working conditions of healthcare providers. In this case, The Federation of Kenya Women Lawyers [FIDA] argued that women and children had been greatly affected by the Curfew Order and had been the subject of police brutality. The Curfew Order certainly hindered the realisation of the commitments to women's human rights as encapsulated in the Constitution of Kenya, 2010 and other international women's human rights instruments. Despite the fact that the Constitution guarantees the rights of all Kenyan men and women to movement and dignity, the implementation of the Curfew Order greatly impacted the lives of women. Not only was their freedom of movement restricted but in the process of the enforcement of the order, women's rights to dignity was greatly impacted. However, unfortunately, there has been a failure to implement the orders issued under the case.

53 As above.

54 C Moser *Gender planning and development: Theory, practice and training* (2012).

55 *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.

Several studies have demonstrated that the failure to implement the orders led to an increase in the incidents of domestic violence.⁵⁶ In enacting the Order, the government did not consult men, women, boys and girls in designing the policies, laws and measures. Not surprisingly, the Order impacted men and women differently. It is worth noting that the Order presupposes that the person whose movement is being restricted is a man. This man is being restricted from going to a bar at night. This man is monogamous. This man has a big house where he can self-isolate from his wife(ves) and children. The man can actually stay home with no negative impact on his income or status. In addition, the Order is tailored for a formal economy and not one where most citizens, particularly women, are working in the informal sector to make ends meet as is the case in Kenya. The Order also fails to recognise that more than seven million Kenyans go to bed hungry.⁵⁷

In addition, the Order does not take practical gender and strategic gender needs into consideration. Practical gender needs with regard to the order would include food, shelter, clothing, work and health. The Order assumes that all sexes have the same level of material conditions of life necessary for survival. The Order also assumes that women have the strategic gender needs such as agency, voice and capacity to operate where they are restricted from movement. Given the patriarchal nature of the Kenyan society, the marginalisation of women and their cultural subordination, it is not surprising that the stay-at-home order results in a rise in domestic violence and constrained access to livelihood resources.

4.3 Public health

The Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020,⁵⁸ are measures aimed at mitigating the effects of COVID-19. The Rules outline the COVID-19 control powers, such as powers of search, power to disinfect premises, and direct use of a building by a medical officer. The regulations assign more power to the Ministry of Health to take measures to control the COVID-19 pandemic than are necessary in normal times. They allow medical officers and public health officers to have powers over COVID-19 patients and their properties. The aim is to contain the disease, prevent and reduce the spread of the disease in the

56 Kameri-Mbote & Meroka-Mutua (n 8).

57 AWSC 'Food security report' (2013).

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

country. The Rules also outline the procedure for removal and disposal of the corpses of COVID-19 casualties.⁵⁹

4.4 The man of public health

The Public Health Rules are aimed at reducing the spread of disease. For instance, the burial rules are also centred around ensuring the burial process does not result in spread of the disease. However, they are lacking in promoting the dignity of deceased persons and their family members. Consequently, there have been cases of burials being conducted contrary to the procedures and some in contravention of African customary burial rites relating to the dignity of the deceased. The rules are supposed to protect others from the threat posed by carriers of COVID-19.⁶⁰ This justifies the need to give more powers to medical officers to obtain the required specimen from such persons. The movements and actions of such individuals are also restricted by the regulations owing to the danger they pose to the public. The regulations also provided for designation of facilities to handle or treat COVID-19 patients.⁶¹

In essence, the issue here is that the spread of the disease is fanned by poor public health and sanitation standards, which need to be improved to contain the disease. The desired outcome from these rules is that by ensuring that all Kenyans wash their hands and practice the highest levels of hygiene, the spread of COVID-19 will be minimised. The rules hinder the realisation of women's human rights as encapsulated in the Constitution of Kenya, 2010 in that the rules do not take into account the practical and strategic needs of women. The rules assumed that a certain level of socio-economic status would guarantee adherence to the rules. The assumptions, presuppositions, biases are implicit in the measures prescribed by the government. These guidelines assume that men and women in Kenya have all the necessary strategic and practical gender needs. They assume that food, water, shelter and clothing are readily available to most Kenyans and that Kenyans have the money to buy the masks and sanitizers. This does not seem to be informed by the reality where access to water for basic survival needs continues to be a major issue. It is important to note that women in Kenya represent 51 per cent of the population but lack equal access to health, education, earning power and political representation.⁶² According to a UN Women Report, Kenya

59 Public Health Rules, sec 8.

60 Public Health Rules, sec 11.

61 Public Health Rules, sec 13.

62 Government of Kenya 'Kenya Population and Housing Census 2009' (2009).

is ranked 76th out of 144 countries on the Global Gender Gap.⁶³ As a result of invisibilising the unique experiences of women, the failure to take into account specific reproductive health issues has resulted in various challenges facing women in accessing their rights to health.

4.5 Socio-economic measures

A mechanism to disburse funds to vulnerable Kenyans is necessary to ensure they do not suffer disproportionately due to COVID-19 effects.

4.6 The man of socio-economic measures

The government put in place socio-economic measures to cushion the impact of COVID-19 to the Kenyan population. The root cause of these measures is the realisation that most Kenyans would not be in position to survive a lockdown, a curfew and the various restrictions in the absence of social security. The government's anticipated outcome was that provision of rebates would also cushion the Kenyan economy from failures. The socio-economic measures, for instance around taxes, hinder the commitments to women's human rights as encapsulated in the Constitution of Kenya, 2010 and other international women's human rights instruments. This is primarily because these measures are focused on mitigating the effects on companies. In essence, the public was not consulted in the making of these measures and for the most part focus on mitigating impacts on industry. The fiscal measures presuppose that the greatest impact in the country will be on the economy and on industries. The measures are focused on ensuring that the policy environment is conducive for the formal business economy. The measures do not consider the practical and strategic gender needs. Beyond access to food and water, the measures are not geared towards ensuring that women participate in the making of the rules and that they have ownership and control of the resources. For instance, in the case of elderly women, the disbursement of funds is likely through their sons who live in the city and therefore have little control and ownership in the process. In addition, it is important to note that in many areas such as employment, environment, agriculture and childcare, there is no data to ascertain the extent of women's work in these areas – their work and contribution is therefore invisible. Kenya has about 80 per cent of its population living in the rural areas where agriculture dominates and women predominantly perform most of the tasks.⁶⁴ Given the focus on the socio-economic measures on corporate and

63 World Economic Forum 'The Global Gender Gap Report 2017' (2017).

64 Republic of Kenya, National Food and Nutrition Security Policy (2011). See also Kameri-Mbote & Meroka-Mutua (n 8).

industry and the little attention to the practical and strategic gender needs, it is clear that these measures did not take into account the fact that about one third of Kenyans is food insecure and over ten million Kenyans suffer from food insecurity and between two and four million require emergency food assistance at any given time.⁶⁵

5 Conclusion

Who is the man of COVID-19? To what extent have the COVID-19 measures considered women's human rights as enshrined in the Constitution of Kenya, 2010 and international women's human rights treaties. Using specific examples of public order, public health and socio-economic measures, this chapter has demonstrated that COVID-19 measures have a historically located man in mind. This man who is educated, married and in a monogamous union and contributing to the formal economy as a worker has a big house, school going children, goes to church and the measures are aimed at restricting his movement. By debunking the assumptions behind the measures, we have further argued that although Kenya has enacted a constitution that captures elaborate women's human right provisions, the pandemic has greatly tested the application of these rights.

65 Republic of Kenya, National Food and Nutrition Security Policy (n 64).

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