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Towards Financial Inclusivity in Kenya : A Case for a Rights-Based Approach

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Abstract

Financial inclusion refers to access to full suite of quality financial services at an affordable rate. It can also be referred to as the right to be free from financial exclusion or a right against financial deprivation. The Constitution of Kenya fails to recognize access to financial services and/or financial inclusion directly as a right in its definition of social and economic rights. However, financial services facilitate sustainable livelihood which is a goal of the economic and social rights since it improves economic livelihood. Financial inclusion has befallen an open strategy for accelerated monetary progress and is measured to be important for achieving inclusive augmentation in a country. When it comes to basic human rights such as the rights to food, shelter, education and health, financial access is a vital aspect yet seldom is the issue of financial inclusion brought up in conversations within the context of human rights. The underlying argument is that despite the government's effort to provide for financial inclusivity through Article 43, a rights based approach is required to ensure full realization of financial inclusion in Kenya.

Key Words

Financial Inclusion, Financial Literacy, Mobile Banking, Microfinance, Financial Services, Access

INTRODUCTION

Financial inclusion essentially entails making financial services, e.g., savings, insurance and other payments accessible and also affordable. Additionally, the United Nations in recognizing financial inclusion has described the goals of financial inclusion as gaining access to financial services which

include savings, credit, insurance and other banking services. With the global financial crisis of 2008, the attainment of financial inclusion became even more crucial. The G20 Summit in Toronto of 2010 outlined the principles for Innovative Financial Inclusion. These principles later served as policy and regulatory guidelines aimed at creating low cost financial services for various institutions like banks, insurance and non-bank institutions. The G20 Summit of 2013 in St. Petersburg reaffirmed this position adding that financial inclusion was a vital measure in averting financial crisis.

LEGISLATIVE FRAMEWORK ON FINANCIAL INCLUSIONIN KENYA

To promote financial inclusion as a tool of alleviating poverty, a rights-based approach is required to policy formulation. Financial inclusion development refers to taking a rights based approach since it is basic to human life. Article 25 (1) of the Universal Declaration of Human Rights (UDHR) encompasses the notion that access to food, shelter and health form the basic rights to every single human. It is through access to finance (credit), that food, shelter and health can be acquired.

International and Regional Treaties and Protocols such as the Convention on the Elimination of All Forms of Discrimination against Women and Protocol to the African Union Charter on Human and Peoples on Women's Rights (Maputo Protocol) protect the rights of women to financial inclusion. These provisions enable women access financial services which mainly include credit, training, skills development and extension services to the rural and urban population which would improve their living standards. Art. 2(5) and (6) of the Constitution domesticates international treaties and protocol ratified by Kenya. Kenya has ratified both these legal instruments, hence, are bound by these treaties.

The Constitution of Kenya provides a robust framework upon which the right of financial inclusion could be anchored. Article 10 on national values and principles of governance binds all State organs, officers, public officers and all persons. This is especially with regards to the interpretation of the Constitution and the enactment, application and interpretation of any law and public policy decisions. Implementation is based on human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

The Constitution of Kenya protects socio-economic rights through Article 43. Nevertheless, the aforementioned provision does not expressly provide for financial access. Article 43(3) protects those without social security, however,

it is not suitable in providing access to financial services. This is due to the fact that social security can be achieved without financial inclusion and social security is too general a concept therefore subject to various interpretations. Despite Article 43(3), a considerable number of Kenyans have access to social security. It is estimated that only 20% of Kenyans in employment have a pension cover revealing 80% of Kenyans being excluded. In Kenya, social security is easily available to citizens in the formal sector when a majority of Kenyans are in the informal sector again revealing a pattern of exclusion. The government is obligated to provide social security to vulnerable members of the society. This can be achieved through implementation of a rights-based approach towards legislation of financial inclusion.

The provision on consumer protection promotes access to financial services such as banking. It protects consumers' right to goods and services by ensuring that they meet minimum statutory standards. In addition, Article 46 protects economic interests of consumers but not financial inclusion. Therefore, without a right to financial inclusion consumer rights would be of little use.

The Central Bank of Kenya Act establishes the Central Bank of Kenya and its objectives. The Central Bank of Kenya oversees monetary policy which influences the availability of credit through interest rates. Financial inclusion thrives if there is a robust supervisory regime as this promotes stability in the financial sector. The strength of supervision in the financial sector is based on the supervisory powers and the independence of the supervisor. The Central Bank of Kenya has been given extensive powers in the supervision of commercial banks. However, the Act does not provide for the independence of the board. While it requires the Central Bank to work closely with the National Treasury, it does not provide independence of the regulator as a principle.

The Banking Act of Kenya (Cap. 488) regulates commercial banks. Section 24 provides for the appointment of the external auditors. The strength of supervision highly relies on the ability to meet with auditors. The Central Bank regulated the appointment of auditors, lays out the duties of the auditor and the obligations the person has towards the Central Bank.

High rates make access to credit expensive and the central banks have an influence on the interest rates through the monetary policy. This is an inspection of all books, accounts, records and necessary documents as required. The person making the inspection is required to make a report if there is any breach of the Banking Act. Under Section 33, the Central Bank has the power to direct and advise any financial institution if it has reason to believe its business is being carried out contrary to the Act or any of its officers is engaged in a

practice that is in contravention of the Act. If a Bank is engaged in a practice that is in contravention of the Act or detrimental to the best interest of the depositors, the Central Bank can give advice or issue directions.

There are various aspects in banking regulation that can promote, enable or prevent financial inclusion. The Bank (Amendment) Act 2016 introduced interest caps on loans. The government made this move in order to lower the cost of credit. However, the law led to banks not lending to the small businesses which are owned by the low income earners.

One of the aspects in building financial inclusion is the competition legal framework. The competition policy should promote financial services providers in creating a range of financial products. Competition policy has to address the rules governing market entry, market exit and abuse of dominance.

The regulations need to promote digital financing as it has a huge potential in promoting financial inclusion. Digital financing reduces transaction cost therefore, increasing disposal income. The advantage the government can make in digital financing is to adopt it to lower income markets. This involves having innovative products, at appropriate pricing. Financial stability is important in financial inclusion.

The key is not to provide it as a grant or donation but to offer financial services in a manner that businesses generate profits. At the same time still meet the objective of financial inclusion. Financial and non-financial institutions must be convinced in a way that the poor and low income clients can present a viable business opportunity.

SIGNIFICANCE OF FINANCIAL INCLUSION

Many vulnerable people are unable to access affordable financial services. Some of the barriers to financial inclusion include the cost of accessing financial institutions, distance to financial markets, lack of collateral, strict rules regarding the opening and sustaining bank accounts, high costs that come with doing transactions and lack of appropriate products and information a symmetry. The poor, vulnerable and marginalized have low incomes, are unemployed, with low education and financial literacy levels. This is in addition to cultural, religious and social barriers. With unstable financial markets, the poor fear losing their savings when banks collapse.

Financial inclusion plays a critical role in the alleviation of poverty and the realization of human rights. Financial services facilitate sustainable livelihoods which is a goal of the socio-economic rights since it improves economic livelihood. It provides opportunities for improvement of economic conditions

and improves access to many aspects of human life including education, health services, housing, and social security.

Financial inclusion promotes inclusive development, therefore, core in realization of human rights. This is by providing opportunities for households to work their way out of poverty therefore enabling them to access higher standards of living. Hence, meeting the aim of the economic and social rights provided under Article 43 of the Constitution of Kenya, 2010.

Through financial services, families can access insurance services such as health insurance to enable them get quality healthcare without depleting family resources. Savings services enable families to manage and increase income. Social security services such as pension schemes where individual can save to secure future days when they are no longer in employment reduce the cost of dependency. Credit services enable households to fund their business growth and therefore increase income. These aspects enable quick realization of human rights.

Human rights are interdependent as fulfillment of one right enables the fulfillment of other rights. Equal promotion of the economic and social rights expand the reach of human rights to all people especially the marginalized groups such as women. Even though the Constitution of Kenya, 2010 and international instruments do not recognize financial inclusion as a human right, it is a derivative right as it enables realization of the recognized human rights. It is an empowerment right that helps one to acquire other rights. The right to credit for the poor is derived from the right to free oneself from poverty therefore, enabling realization of Article 43 rights. The development of the financial sector and its primacy in modern society makes financial inclusion crucial to human survival and therefore, its consideration as a human right.

The human rights approach towards financial inclusion can be seen in the conduct of the international community. States across the world are looking into ways to include their entire population in the financial services sector. This has led to international cooperation in attaining universal financial inclusion. The international community has recognized that social inclusion is unattainable without financial inclusion. Financial inclusion has been described as a key element for helping households to develop economically.

The right to financial inclusion enables people living below the poverty line to get out of poverty into sustainable development. The benefits of moving people from exclusion to inclusion include reduction in transaction costs, mobilization of savings and encourage investments. Absence of financial inclusion has been linked to persistent inequality and slow economic growth.

Financial inclusion enables the poor to save, thus, allowing them to accumulate the needed sums for investments and for income smoothing and risk mitigation. Kenya's Vision 2030 envisages Kenya becoming a regional financial hub with a vibrant, efficient and global competitive financial system. This would not be possible without affordable financial services to all Kenyans, especially the poor.

ASSESSMENT OF FINANCIAL INCLUSION IN KENYA

Banking

The foundation of much of financial inclusion is banking. In countries like India, the impact of increased access to banking has been found to be mostly positive. Expanded bank access leads to increased economic activity as well as savings. Kenya has 75% of its adult population banked. This is encouraging since the global average stands at 69%. Fin Access reports indicate that there is evidence of more un-banked citizens moving into the formal financial grid. Additionally, money initially circulating in informal systems can now be accounted for.

Mobile Banking

Financial inclusion in Kenya is largely driven by mobile banking with services such as Mpesa, Mshwari and Mkopa among others. Mpesa grew out of the inefficiencies of traditional methods of delivering financial services such as high cost, long distances, poor infrastructure and the negative attitude of commercial banks towards small and poor savers. The introduction of M-Pesa further led to product innovation. It led to a savings and loans facility dubbed M-Shwari.The Alliance for Financial Inclusion estimates that 23 million Kenyans or 74% of Kenya's population use mobile phones to access financial services through 90,000 agents. 17.5 million of those saving through mobile phones access credit through mobile banking platforms. This made it possible for the number of those holding accounts to rise from 1 to 20 million between 2002 and 2012. This has been possible through technological innovation such as Mshwari. Mshwari has enabled the cost of services to come down while expanding usage and access to financial services such as account opening and credit availability over the phone. Credit scoring has also been made possible through voice articulation, payment of phone, electricity and water bills as well as saving through the phone.

These innovations have however not touched on certain regions and groups in Kenya where the uptake of financial services is still very low. This is illustrated by the fact that whereas 93% of those living in Nairobi have a bank account, less than 25% of the population in the North Eastern part of the country

holds any form of basic account. This is attributed to better infrastructure. Access to financial services shows some gender biases, for example women form the highest proportion of those without access to bank accounts. Mobile banking offers a range of service which is quite limited to the transfer of small amounts of money which makes the platform not insufficient in achieving financial inclusion. In addition, the authors fail to consider a human rights approach which could enable delivery of financial services to marginal areas that are yet to be covered by Safaricom. These are the gaps this study will fill.

Non-Banking Financial Institutions

The non-banking financial institutions have had a great influence on the growth of financial inclusion. The institutions did not have the full bank license nor were they supervised by the Central bank of Kenya.

The non-banking financial institutions included microfinance institutions, insurance firms, Sacco's cooperatives, mutual funds, pension schemes and brokerage firms. Financial inclusion grew majorly in the microfinance institutions, Sacco's and the informal sectors. The microfinance institutions and Sacco's were among the highest contributors to financial inclusion.

The microfinance industry mushroomed in Kenya as a vital tool in providing access to credit and savings. The poor could only use informal means such as loan sharks to obtain credit. The institution improved financial inclusion since it based on savings, provided channels for disbursement of foreign aid. The institution had extensive networks especially in the rural areas which was lacking for the commercial banks. The institutions were highly beneficial in the rural areas as they provided affordable and accessible credit for farmers. The institutions developed informally. They developed as rural community banks. Compared to the commercial banks, the microfinance institutions were indigenously owned.

Microfinance institutions first developed as informal industries. They provided financial access to the poor as the formal banking sector had neglected them. This was besides other informal measures such as shylocks, community savings and loans groups, rotating savings and credit associations. The growth of microfinance institutions led to the creation of the microfinance act in the year 2006. The introduction of the microfinance act formalized the microfinance sector. It brought the sector under a regulator which was the Central Bank of Kenya. Despite Kenya's advance on mobile money, it has not made great progress on mobile microfinance.

A CASE FOR A RIGHTS APPROACH TOWARDS FINANCIAL INCLUSIVITY

Various scholars have attempted to define the meaning of rights within their own ethical, political or legal theory.In the objective and older sense, 'rights' is defined as 'what is fair or just.' However, this objective sense of 'right' is not the same as the modern notion of 'a right'. Authors have congested the discourse by applying different features of rights as definitive of the modern concept. Hohfeld has defined all rights as claims. According to Mill, when a person claims that they have a right, it means that the person has a valid claim on society to protect the person in the possession of it. This can either by the hand of the law or by that of opinion and education. Therefore, to have a right according to Mill is to have something which the society is mandated to defend a person in possession of them.

MacCormick's theory of legal rights contributes significantly to the discussion on the right to financial inclusion. The theory addresses the issue of who is a right holder and who is not in the event that the right to financial inclusion fails to subscribe to traditional concepts of rights espoused by Hohfeld. Hohfield's view of rights is that legal personality is granted to all entities that have *locus standi* in a court of law.

The gist of interest theory is that economic regulation is not intended to benefit the public but certain interest group in the financial sector. According to MacCormick, what is important is that interests are protected by the duty. MacCormick's posits that the right holder is the intended beneficiary of a specific share of the benefit rather than a generalized beneficiary of the right. Choice theory states that rights protect the autonomous choice of the right holder and Wellman supposed this point of view. He asserts that those without capacity are not right holders as they are incapable of moving the legal machinery providing an example of a child that's been injured. The difficulty with this position is that it does not conform to remedial rights (damages) recognized in law. The law compensates the child's loss and not the parents'.

MacCormick's legal theory of rights posits that rights can exist without the correlative concept.One cannot exhaust the analysis of rights by the mere fact that they are not provided in existing duties, obligations, privileges, powers, immunities or permission. It could be a ground for creating another duty as circumstances change like those surrounding financial inclusion. Thus, where an opportunity to expand the sphere of human lives arises as with financial inclusion, it becomes unnecessary to require that such definition as a human

right must betied to an existing legislation. The Constitution in Article 20 (1) deals with the issue of duty bearers as it binds all state organs and persons in the protection of human rights. The government ought toemulate the legal discourse on financial inclusion that the provision envisions.

Academics like Njaramba have stated that the failure to link access tofinancial services to human rights has been a huge impediment to achieving financial inclusivity. He propounds that any attempt to invoke human rights to financial services has to be accomplished by stretching existing rights in the Constitution and other legal instruments like the Central Bank of Kenya Act (Cap. 491), the Micro-Finance Act (Cap. 493D) and the Banking Act (Cap. 488). However, Njaramba has taken the Hohfeldian Rights Theory. He opines that for access to financial services to be considered as a human right, it must fit into the four corners of the Hohfeldian Rights Thesis. Otherwise, if it does not fit into it, it would mean financial inclusion does not fit into the conventional rights. Therefore, a decision must be made whether it is a right notwithstanding. Additionally, he states that the absence of a legal framework is a big setback to the enforcement of financial inclusion. He recommends a human rights approach to financial inclusion that should be accompanied with economic empowerment as the government has a constitutional mandate to provide social security. The government and banks need a partnership that would improve financial infrastructure.

Jurisdictions that have adopted a human rights based approach towards financial inclusion have seen substantial progress. For example, Europe has used legislative interventions to facilitate financial inclusion. The objective of direct legislation in financial inclusion in these jurisdictions is meant to achieve objectives such as : ensuring banking institution financial capability, consumer protection and therefore, increase trust in the market. This translates to improvement of general relationships between banks and customers, mediation for disputes settling and protection for investments products.

In Belgium, the government has made it compulsory for all banks to open bank accounts to offer basic banking services to the unbanked. In France, the right to own a bank account is available through legislation to all individuals without a current account. In Norway, any person with a Dummy Number (DN) has a right to a regular bank account issued by the government.

CONCLUSION

Despite the government's effort to provide for financial inclusion through various constitutional and legislative frameworks, it has yet to achieve full

financial inclusivity. In order to do so, a rights-based approach is required. This would require the government to incorporate this right in its policies. Financial inclusion is integral in the realisation of other rights such as gender equality and the right to own property. The legal framework can be restructured to capture the needs of the people, encourage the usage of mobile banking and internet, microfinance institutions, financial literacy. It can also be best realized through restructuring the sector to provide financial products that even the poor can be able to access. Government interventions are needed as it is usually non-economical for private financial institutions.

Financial inclusion can also be achieved with the aid of the government's intervention on access to certain financial services. The government ought to provide a suitable financial integrity to make the mobile banking service maintain public trust. There is need to have proper regulation that defines the rights and obligations of the service providers and its clients. Most importantly, financial inclusion will best develop if the private and public sector take a multi-stakeholder approach towards realization of universal financial inclusion.

The passing of Financial Services Authority Bill 2016 into law would bridge the existing lacuna in the law in unifying legislative framework for financial services. If the Bill is passed into law, it would largely promote financial inclusion. It would allow people to have timely and just access to appropriate, just and affordable financial products and financial services. Most importantly, the bill focuses on, *inter alia*, harmonizing legislations on financial services on appointments, shareholding, dispute resolution, licensing, regulation and investment in secondary markets.

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