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Implications of Lesotho's COVID-19 response framework for the rule of law

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Summary: Lesotho's COVID-19 response was proactive. A state of emergency was declared prior to confirmation of any positive case of the virus in the country. The approach was two-pronged in that, first, a state of emergency was declared under section 23 of the Constitution with effect from 18 March 2020 and, second, a disaster-induced state of emergency was declared in terms of sections 3 and 15 of the 1997 Disaster Management Act with effect from 29 April to 28 October 2020. An ad hoc body aimed at oversight of the response was also established, but was disbanded after four weeks and replaced with another similarly ad hoc body. On the basis of the three core principles of the rule of law, this article interrogates the repercussions of this approach on the principle of the rule of law, in particular, compliance with international human rights obligations contained in ICCPR, the African Charter as well as municipal laws, namely, the Constitution and the Disaster Management Act. It is argued that while Lesotho had to act swiftly in order to protect lives, in so acting the existing legal and institutional frameworks were ignored in violation of the rule of law principle. The article concludes by recommending that in order to avoid similar challenges in the future, the existing legal and institutional frameworks must be strengthened

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rather than replaced as such duplication of institutions depletes meagre resources and creates a platform for the misuse of public funds and corruption.

Key words: *Lesotho; COVID-19; rule of law; international obligations; state of emergency; Disaster Management Act*

1 Introduction

According to the Universal Declaration of Human Rights, 1948 (Universal Declaration) 'it is essential, if a man is not to be compelled to have recourse ... to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.¹ That is, the rule of law plays a major role in the protection of human rights, more so when there is a threat to life such as the novel Coronavirus disease (COVID-19) pandemic. The concept of the rule of law is traced back to the sixteenth century. Philosopher John Locke defined it as a restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.² It contemplates the existence of an effective legal system, which entails laws and mechanisms or institutions entrusted with the implementation of such laws.³ Saunders and Le Roy argue that the rule of law is based on three core principles, namely, governance of the polity by general rules laid down in advance; the application and enforcement of these rules; and, lastly, effective and fair resolution of disputes.⁴

COVID-19 has put the rule of law principle to a great test as states have had to apply laws and establish mechanisms to respond to a pandemic that was not foreseen at the time of the enactment of such laws. The disease was first reported in the city of Wuhan, China, in December 2019,⁵ and the first positive case in Lesotho was registered on 13 May 2020,⁶ making Lesotho the last African country to register the virus. Since December 2019, the virus has spread across the globe like wildfire. On 30 January 2020 the World Health Organisation (WHO) declared it a public health emergency

1 Universal Declaration Preamble para 3.

2 Stanford Encyclopaedia of Philosophy 'The rule of law' (2016), <https://www.plato.stanford.edu/entries/rule-of-law/> (accessed 7 August 2020).

3 C Saunders & K le Roy 'Perspectives on the rule of law' in C Saunders & K le Roy (eds) *The rule of law* (2003) 5.

4 As above.

5 HA Rothon & SN Byrareddy 'The epidemiology and pathogenesis of Coronavirus disease (COVID-19) outbreak' (2020) 109 *Journal of Autoimmunity* 1, <https://pubmed.ncbi.nlm.nih.gov/32113704/> (accessed 26 May 2020).

6 Lesotho National Emergency Command Centre 18 May 2020.

of international concern.⁷ The spread of the virus and its devastating consequences left many states – Lesotho included – entangled in moral, ethical, human rights and legal dilemmas.⁸

From a legal front, Lesotho adopted a proactive approach towards the pandemic by acting prior to confirmation of any positive case in the country. This approach was two-pronged. First, a state of emergency was declared in terms of section 23 of the 1993 Constitution and later a disaster-induced state of emergency was declared in terms of sections 3 and 15 of the 1997 Disaster Management Act (DMA). The objective of this article is to assess this response against the three core principles of the rule of law as laid down by Saunders and Le Roy. First, the simultaneous declaration of the state of emergency and state of disaster is discussed in light of general rules laid down under both international and national legal frameworks. Subsequently, the emergency measures and their enforcement, including the deployment of the army and the establishment of the National Emergency Command Centre (NECC) and later National COVID-19 Secretariat (NACOSEC) are analysed against these general rules. Finally, judicial oversight and the enforcement of the measures adopted are discussed.

In order to achieve this objective, both descriptive and analytical approaches are adopted. The article is divided into five parts. The first part is an introduction; the second part provides a detailed account of the measures taken towards the pandemic; the third part analyses compatibility of these measures with national and international legal frameworks; the fourth part discusses the judicial oversight and accountability mechanisms; and the last part concludes with a summary and recommendations.

2 Lesotho's response to the pandemic

While the death toll and number of infections rapidly increased around the globe, the brunt of the virus itself was felt in Lesotho around July 2020 when the number of positive cases increased and Lesotho started recording COVID-19-related deaths. The first death was recorded on 9 July 2020. Compared to the rest of the world in

⁷ Statement of the Director-General at the 2nd meeting of the International Health Regulations Committee regarding the outbreak of the novel Coronavirus, <https://www.who.int/news-room/detail> (accessed 26 May 2020).

⁸ R Robert et al 'Ethical dilemmas due to the COVID-19 pandemic' (2020) 10 *Annals of Intensive Care*, <https://annalsofintensivecare.springeropen.com/articles/10.1186/s13613-020-00702-7> (accessed 6 August 2020). In this article the authors discuss the critical ethical choices with which ICU caregivers have been confronted during the COVID-19 pandemic and the limits of such choices.

which the pandemic claimed many lives within a very short period, from May 2020, when the first case was registered in Lesotho, the number of positive and mortality cases did not rise rapidly. However, the ramifications of the pandemic remain dire due to the pre-existing political instability,⁹ poverty,¹⁰ inequality and a culture of human rights violations.¹¹ Due to the proactive steps that the government took prior to the recording of any cases, the socio-economic impact of the pandemic was already being felt. Human rights to movement, liberty and livelihood had already been limited by the state of emergency which operated four months prior to the recording of positive COVID-19 cases.

The proactive response was in the form of a declaration of a state of emergency by public notice with effect from 18 March 2020. This state of emergency was first declared verbally by the Prime Minister on 18 March and published through a legal notice on 27 March 2020 (Legal Notice 26).¹² The Legal Notice was to operate retrospectively from 18 March but did not stipulate the end period.¹³ On the day of publication of Legal Notice 26, a 21-day lockdown was also imposed by the Prime Minister without the involvement of Parliament. Towards the end of the 21 days, Parliament confirmed the state of emergency and extended it by six months to 18 October 2020. A month later there was another publication of a state of emergency (Legal Notice 40) in terms of which the Prime Minister, acting in accordance with sections 3 and 15 of the DMA, declared a 'COVID-19 state of disaster-induced emergency' for a period of six months with effect from 29 April 2020 to 28 October 2020.

In terms of Legal Notice 40, lockdown measures imposed included movement restrictions; the prohibition of public gatherings; the

⁹ K Matlosa *Understanding political crisis of Lesotho post-2015 elections* (2017); see also Institute of Peace and Security Studies 'The Kingdom of Lesotho conflict insight' in which poverty, the fragmented multiparty system and disregard for the rule of law are identified as major causes of political instability in Lesotho, www.ipss-addis.org/publications (accessed 6 August 2020); see also RS Weisfelder *Free elections and political instability in Lesotho* (2015), <https://www.eisa.org.za/pdf/JAE14.2Weisfelder.pdf> (accessed 6 August 2020); see also Z Maundeni 'Political culture as a source of political instability: The case of Lesotho', <https://academicjournals.org/journal/AJPSIR/article-full-text-pdf/5F5BE7D40715> (accessed 6 August 2020).

¹⁰ According to UNDP, Lesotho is one of the least developed nations in the world; 57,1% of the population lives below the national poverty line; see also G Callander 'The complex causes of poverty in Lesotho' *Borgen Magazine* 4 November 2017, <https://www.borgenmagazine.com/complexx-causes-of-poverty-in-lesotho/> (accessed 6 August 2020).

¹¹ T Makatjane et al 'HIV/AIDS-related discrimination among females aged 15-24 in Lesotho' (2009) 13 *Review of Southern African Studies* 64 who illustrate the high level of double discrimination based on sex and HIV status against young females in Lesotho.

¹² Declaration of COVID-19 State of Emergency Notice 26 of 2020.

¹³ As above.

closure of all businesses excluding essential services; and limitation of funeral attendees to 50. The Lesotho Defence Force (LDF) was deployed and authorised to ensure compliance with these measures. The Legal Notice further authorised the Minister of Health to publish regulations in line with international standards on the pandemic. The first Public Health (COVID-19) Regulations 2020 were published by the Minister of Health on 27 March 2020¹⁴ and since then have been amended several times.¹⁵ Over and above reiterating the lockdown restrictions, the Public Health (COVID-19) Regulations also contain offences and penalties in relation to the lockdown restrictions as well as the establishment of the NECC, with a mandate to oversee Lesotho's COVID-19 response. It should be noted, however, that the NECC was later disbanded and replaced by NACOSEC.

Amid the state of emergency, Prime Minister Thomas Thabane's coalition government collapsed owing to a vote of no confidence and a new coalition government headed by Dr Moeketsi Majoro was established. Among changes brought about by the Majoro regime to Lesotho's COVID-19 response is the establishment of NACOSEC and the adoption of a National COVID-19 Strategy. The question of whether the approaches adopted by the two regimes complied with the rule of law is discussed in the next part.

3 Compatibility of Lesotho's COVID-19 response with international and domestic legal standards

The exercise of emergency powers in order to save lives is an acceptable practice in democratic dispensations. Sunshine et al argue that 'emergency declarations are a vital legal authority that can activate funds, personnel and material and change the legal landscape to aid in the response to a public health threat'.¹⁶ However, as Keith and Poe suggest, because human rights are more likely to be violated during a state of emergency, it is important that circumstances leading to a declaration of a state of emergency as well as powers resultant therefrom be subjected to the rule of law.¹⁷ That is, the emergency powers must be exercised within the confines of pre-set legal standards. Hence, this part assesses Lesotho's COVID-19 response – the declaration of a state of emergency and state of disaster – against pre-set obligations contained in international

14 Legal Notice 27 of 2020.

15 Legal Notices 30, 31, 36, 38, 41, 43 & 46 of 2020.

16 G Sunshine et al 'Emergency declarations for public health issues: Expanding our definition of emergency' (2019) 47 *Journal of Law, Medicine and Ethics* 95.

17 LC Keith & SC Poe 'Are constitutional state of emergency clauses effective? An empirical exploration' (2004) 26 *Human Rights Quarterly* 1071.

treaties and domestic laws. With regard to international law, the article analyses the response against the International Covenant on Civil and Political Rights (ICCPR),¹⁸ the African Charter on Human and Peoples' Rights (African Charter)¹⁹ and the Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Minimum Standards). The discussion in relation to domestic laws focuses on the Constitution and the DMA.

Lesotho has ratified both ICCPR and the African Charter. Although not all aspects of the African Charter have been incorporated into the national legal system, chapter two of the Constitution, which contains fundamental human rights and freedoms, is framed in terms similar to those of ICCPR and some civil and political rights provisions of the African Charter. However, unlike other countries, such as South Africa and Zimbabwe, where there are constitutional provisions that dictate the circumstances under which international instruments are to be applied, the Constitution of Lesotho is silent as to the place that international instruments occupy in the hierarchy of laws in the national legal system.²⁰ As in the case of many other countries that have inherited Roman-Dutch law and its legal traditions, Lesotho has been categorised as dualist.²¹

Despite the dualism debate that international treaties are only applicable upon their domestication into municipal law, cases decided by the High Court of Lesotho suggest that where human rights are concerned, the courts have leaned more towards emphasising Lesotho's obligation to comply with international human rights obligations than on an inquiry as to whether or not such human rights treaties have been domesticated. For instance, in the case of *Fuma v Lesotho Defence Force* the High Court of Lesotho specifically held that '[t]he unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter, but that by default, it technically assumes the effect of municipal law in the country'.²²

¹⁸ Lesotho acceded to ICCPR on 9 September 1992.

¹⁹ Lesotho ratified the African Charter on 10 February 1992.

²⁰ Sec 39 Constitution of South Africa; sec 326(1) of the Zimbabwean Constitution makes customary international law part of the law of Zimbabwe, while sec 327(3) states that international treaties ratified by the executive shall only become part of the law of Zimbabwe upon incorporation by an Act of Parliament.

²¹ WCM Maqutu & AJGM Sanders 'The internal conflict of laws in Lesotho' (1987) 20 *Comparative and International Law Journal of Southern Africa* 377; see also I Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho' (2019) 19 *African Human Rights Law Journal* 194.

²² Constitutional Case 8/2011 [2013] LSHC 68 para 22.

On the basis of the foregoing, this article proceeds on the premise that by ratifying ICCPR and the African Charter, Lesotho has created law for itself and, therefore, in terms of the *pacta sunt servanda* principle must comply with the standards contained in these instruments.²³ This approach is also supported by the fact that in relation to human rights protection, judicial practice – although it is not clear whether this was deliberate or not – has tilted towards the application of provisions of international instruments directly without probing into their domestication or otherwise.

3.1 Compliance with the International Covenant on Civil and Political Rights

Article 4 of ICCPR regulates states' power during emergencies. It defines circumstances in which a state of emergency may be declared as 'times of public emergency which threatens the life of the nation' and mandates that such a state must be declared officially.²⁴ According to WHO, the COVID-19 pandemic is a public health emergency, thus falling within the confines of article 4.²⁵ The legal notices that the government of Lesotho published signify the official declaration of a state of emergency as required by article 4.²⁶ Article 4 also lists rights from which states may not derogate even in times of emergencies. These are the right to life; freedom from torture and other cruel, inhuman and degrading treatment or punishment; freedom from slavery; and the right to freedom of thought, conscience and religion.²⁷ Lastly, it mandates that other states must be informed not only of the existence of the state of emergency but also the rights from which the state in question has derogated, the reasons for such derogation and the date on which there shall be a return to normalcy.²⁸

Lesotho has partly complied with article 4. According to the Public Health (COVID-19) Regulations, some of the rights limited during the state of emergency with a view to flattening the curve of infections

²³ Il Lukashuk 'The principle of *pacta sunt servanda* and the nature of obligations under international law' (1989) 3 *American Journal of International Law* 513.

²⁴ Art 4(1). The Human Rights Committee, however, has warned in its General Comment 29 that not all situations call for such declarations and the consequent derogation of human rights. Human Rights Committee, CCPR General Comment 29: Article 4 Derogations during a state of emergency, 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11, (HRC, GC 29) para 3.

²⁵ See statement of WHO Director-General (n 7).

²⁶ Legal Notice 26 which published a declaration of state of emergency under sec 23 of the Constitution and Legal Notice 40 which published a declaration of state of disaster-induced emergency under sec 15 of the DMA.

²⁷ Art 4(2).

²⁸ Art 4(3).

are freedom of movement, freedom of association and assembly. These rights are not among those shielded from derogation by article 4(2) and, therefore, to this extent there is compliance. The violation, however, is exhibited in the deployment of the army as a means to enforce adherence to these limitations. This is so because Lesotho was not at war and matters of public order are ordinarily within the mandate of the Lesotho Police Service (LPS).²⁹ The deployment of the army to enforce the lockdown regulations led to their use of excessive force against members of the public which in turn violates article 7, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment.³⁰ The excessive use of force is also a violation of article 4(2) because General Comment 29 lists the right to be treated with dignity and humanity as one of the rights from which there cannot be lawful derogation even during a state of emergency.³¹

Bearing in mind that the movement restrictions did not prohibit people from worshipping in their homes, the next question is whether the closure of places of worship through the Public Health (COVID-19) Regulations violates article 4(2) which lists article 18 – freedom of thought, conscience and religion – as one of the rights from which states may not derogate even in times of emergency. The right to freedom of religion is contained in article 18 of ICCPR. A limitation of this right is found in article 18(3). It states that the right to manifest one's religion and belief may be subject to 'only such limitations as are prescribed by law, and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'. Because public gatherings were identified by the WHO as 'super spreaders' of the pandemic, their limitation was essential in order to reduce the number of infections 'to protect public ... health' as contemplated in article 18(3). People were still able to worship individually in homes and jointly through internet connections. Therefore, by restricting movement and enforcing

29 The separation of the army and the police is based on Adama's quote in which he said: 'There's a reason you separate the military and the police. One fights the enemies of the state, the other serves and protects the people. When the military becomes both, then the enemies of the state tend to become the people.' W Adama 'Battlestar Galactica, Miniseries quotes', <http://www.quotes.net/show/-1> (accessed 13 September 2020).

30 Eg, according to Mokobori, on 3 April 2020 a Mosotho man and an employee of one of the local security companies, Thabang Mohlalisi, was attacked and assaulted with rifle butts by members of the army at his home while polishing his work shoes. TB Mokobori "'Lockdown' brutality: A case for Lesotho' *Selibeng* 6 July 2020, <https://selibeng.com/lockdown-brutality-a-case-for-lesotho/> (accessed 13 September 2020). Several other cases are depicted on social media platforms such as Facebook and in Whatsapp in video clips where both the police and members of the army are seen assaulting individual citizens who were found in the streets during the lockdown period.

31 Human Rights Committee General Comment 29 (n 24).

the closure of places of worship, the Public Health (COVID-19) Regulations violate neither article 4 nor article 18 of ICCPR.

The last aspect of article 4 is that it mandates states to 'immediately' inform state parties to ICCPR of the declared state of emergency.³² The purpose of this notification is to ensure monitoring of the situation by the Human Rights Committee, other state parties and stakeholders.³³ According to the United Nations Treaty Collection (UNTS), only 13 states have notified the UN Secretary-General on their derogations from ICCPR as part of the COVID-19 response. Lesotho is among many state parties to ICCPR that have 'resorted to emergency measures ... without formally submitting a notification of derogation'.³⁴ Therefore, in this regard there is non-compliance.

As far as ICCPR is concerned, it may be concluded that Lesotho violated its obligations in two ways. First, the deployment of the army and their excessive use of force as a measure to restrict freedom of movement and assembly went beyond the confines of articles 4(1) and (2) as well as article 7. Second, the failure to inform other state parties through the UN General Assembly of the declared state of emergency, the rights from which there has been a derogation and the reasons for such derogation as well as the time when such is expected to be lifted, contravened obligations contained in article 4(3).

3.2 African Charter on Human and Peoples' Rights

The main human rights instrument at the regional level is the African Charter on Human and Peoples' Rights of 1981 (African Charter).³⁵ Unlike the European Convention of Human Rights of 1950 and American Convention on Human Rights of 1969, the African Charter contains neither a clause that regulates states of emergency nor a derogation clause.³⁶ There are several opposing views regarding

32 Art 4(3).

33 Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, UN Doc CCPR/C/128/2, 24 April 2020 para 2(a).

34 Human Rights Committee (n 33) para 1.

35 According to its Preamble, it is based on 'historical values of African civilisation' and state parties undertake to 'eliminate colonialism, neocolonialism, apartheid, Zionism and to dismantle aggressive foreign military bases'; see also R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 675.

36 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 40. In this communication the African Commission emphasised that the effect of this silence is that 'the Charter does not allow for state parties to derogate from their treaty obligations during emergency situations'.

the absence of a derogation clause in the African Charter.³⁷ This debate notwithstanding, in the case of *Constitutional Rights Project & Others v Nigeria* the African Commission on Human and Peoples' Rights (African Commission) stated that the rights contained in the African Charter may not be derogated from but may be limited in accordance with article 27(2), which provides that '[the rights] shall be exercised with due regard to the rights of others, collective security, morality and common interest'.³⁸ The African Commission further held that such limitations may only be justifiable if they are 'strictly proportionate with and are absolutely necessary for the advantages which follow'.³⁹

That is, in order for the emergency measures adopted in Lesotho to comply with the African Charter, they must pass a three-pronged test: one, whether they are proportionate and necessary to protect the rights of others; two, whether they are meant to maintain collective security, morality or common interest; and, lastly, whether the measures do not erode the rights in question in a way that renders them illusory.

As illustrated under the discussion on compatibility with ICCPR, while the lockdown measures were meant to protect the lives of the people of Lesotho, the excessive use of force against those who failed to comply was not necessary and created a greater risk of losing lives than the pandemic itself. That is, in this regard the measures adopted fail the first test under article 27(2) of the African Charter. The measures pass the second test in that the movement restrictions and the enforcement of such were meant for the protection of a common interest, that is, public health. However, they also fail the third test, that they should not be such as to render the rights being limited illusory. In this regard, funds and efforts were not focused on the improvement of healthcare facilities and healthcare professionals so as to protect the rights to life and health. Rather, much focus was on the allocation of funds to *ad hoc* committees such as NECC

³⁷ See AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law, Democracy and Development* 78; see also L Sermet 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion' (2007) 7 *African Human Rights Law Journal* 159 who applauded the African Charter for not allowing states to derogate from human rights contained in its provisions as such would stand the risk of abuse and rampant human rights violations under the guise of a state of emergency; see also MA Tolera 'Absence of a derogation clause under the African Charter and the position of the African Commission' (2013-2014) 4 *Bahir Dar University Journal of Law* 229 who views this silence as a defect that needs to be corrected.

³⁸ (2000) AHRLR 227 (ACHPR 1999); see also *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (*Media Rights* case) para 67.

³⁹ *Constitutional Rights Project* case (n 38) para 42.

and NACOSEC, thus rendering the rights to life and health which in the first place were supposed to be protected, meaningless. The approach was also such that the people were viewed more as a problem rather than as a solution to the problem and, therefore, the limitation on movement in turn negatively impacted on other rights such as the right to livelihood as no arrangements were made as to how the people would live during the lockdown. This led to the common saying among the people that they would rather die of COVID-19 than of hunger.

3.3 Paris Minimum Standards of Human Rights Norms in a State of Emergency

The Paris Minimum Standards were approved by the International Law Association in Paris in 1984.⁴⁰ Although non-binding in nature, they provide a guideline as to what experts deem the proper exercise of powers during a state of emergency. The Paris Minimum Standards contain 16 articles that articulate non-derogable rights and freedoms. Among these are right to life; the right to liberty; freedom from torture; freedom of thought, conscience and religion; and the right to a remedy.⁴¹ Most importantly, the Principles state that the duration of a state of emergency should not go beyond the period specified in the Constitution and the democratic control of the state of emergency should not change the basic institutions of the country.⁴²

As illustrated under both ICCPR and the African Charter, the Public Health (COVID-19) Regulations did not in principle derogate from the non-derogable rights. However, in implementing the movement restrictions, excessive use of force was used in violation of the duty not to derogate from freedom from torture. Furthermore, by establishing NECC and NACOSEC as opposed to the use of the existing structures in the DMA, Lesotho, as Roepstorff warns, has changed the basic institutions of the country by replacing a statutory body with *ad hoc* structures established by the executive. This violates the first core principle of the rule of law that states must govern on the basis of pre-set legal standards.

40 RB Lillich 'The Paris Minimum Standards of Human Rights Norms in a state of emergency' (1985) 79 *American Journal of International Law* 1072.

41 Lillich (n 40) 1075.

42 K Roepstorff 'Terrorism as a public emergency and its impact on human rights' *Law and Development.org* 14, <http://lawanddevelopment.org/articles/terrorismhumanright.html> (accessed 16 September 2020).

4 Compliance with domestic laws

As Viljoen states, while most human rights are contained in international human rights instruments, it is at the domestic level that individuals are more able to access those rights.⁴³ Without their application at the domestic level, the international obligations remain mere aspirations. When assessing the importance of domestic law in the European human rights system and *vice versa*, Slaughter and Burke-White observe that while traditionally that was not the case, with the growing body of human rights law, international law has transcended into the domestic sphere to regulate the relationship between governments and their own citizens.⁴⁴ Hence, this part discusses the control of emergency powers at the national level as a means to protect rather than violate human rights.

In order to ensure the control of emergency powers, different scholars suggest various models, including constitutional,⁴⁵ legislative,⁴⁶ accommodation, law for all seasons, and the extra-legality model, among others.⁴⁷ In response to the COVID-19 pandemic, Lesotho has adopted both the constitutional and legislative models. In line with the constitutional model, a state of emergency was declared under section 23 of the Constitution, which provides:⁴⁸

In time of war or other public emergency which threatens the life of the nation, the Prime Minister may, acting in accordance with the advice of the Council of State, by proclamation which shall be published in the Gazette, declare that a state of emergency exists for the purposes of this Chapter.

Section 23 also regulates by whom, when, how and for how long a state of emergency may be declared. Over and above the section 23 state of emergency, a state of disaster-induced emergency was declared under the DMA. The legislative regulation of same is contained in sections 3 and 15 of the DMA. Section 15 provides:

The Board shall –

...

43 F Viljoen *International human rights law in Africa* (2012) 517.

44 A Slaughter & W Burke-White 'The future of international law is domestic (or European way of law)' (2006) 47 *Harvard International Law Journal* 327.

45 A Zwitser 'Constitutional reform and emergency powers in Egypt and Tunisia' (2015) 7 *Middle East Law and Governance* 257.

46 J Ferejohn & P Pasquino 'The law of exception: A typology of emergency powers' (2004) 2 *International Journal of Constitutional Law* 231.

47 O Gross & F Aolain *Law in times of crisis: Emergency powers in theory and practice* (2006) 2.

48 Sec 23(1) Constitution.

- (b) advise the Prime Minister, through the Minister, on the requirements for and the timing of a declaration of a disaster-induced emergency in accordance with the Constitution and to declare the country, any district or part thereof to be a disaster area ...

Based on this premise, this part assesses Lesotho's COVID-19 response against both the Constitution and the DMA with reference to other laws on financial accountability, including the Financial Management and Accountability Act 2011 and the Public Procurement Regulations 2007.

4.1 Regulation of state of emergency under the Constitution

The importance of constitutional provisions for states of emergency is to limit governments' propensity to abuse emergency powers.⁴⁹ In terms of section 23 of the Constitution, where there is an emergency that threatens the life of a nation, the Prime Minister, acting in accordance with advice of the Council of State, may, by publication in a *Gazette* declare a state of emergency.⁵⁰ The state of emergency which began on 18 March 2020 was declared through a legal notice published in a *Gazette*, thus fully complying with section 23(1).⁵¹ Further procedural compliance regarding the questions as to by whom and how a state of emergency may be declared is indicated by the fact that in its text, Legal Notice 26 states that a state of emergency is declared by the Prime Minister acting pursuant to the advice of the Council of State.⁵² The challenge, however, is with regard to the silence in Legal Notice 26 as to when the state of emergency is to end. Section 23 explicitly states that a state of emergency declared under its provisions lapses at the expiration of 14 days,⁵³ which may be extended by Parliament for a period of not more than six months.⁵⁴ Legal Notice 26 states 18 March 2020 as the commencement date for the state of emergency, but does not state the end period. This anomaly was rectified by Parliament by extending the state of emergency to October. However, instead of articulating the date on which the state of emergency is to lapse as required under section 23, the Prime Minister published yet another *Gazette* which declared a state of disaster purportedly in terms of section 15 of the DMA. In Legal Notice 40 the Prime Minister makes no reference to section 23 of the Constitution and the earlier state of

49 Keith & Poe (n 17).

50 Sec 23(1).

51 Legal Notice 26 of 2020.

52 As above.

53 Sec 23(2).

54 Sec 23(5).

emergency published under Legal Notice 26, but declares a new state of disaster without following the requirements of section 23 of the Constitution as directed by section 15 of the DMA. This duplication of approaches does not comply with the rule of law principle, giving the impression that the state of emergency declared under section 23 remains indefinite and risks abuse, as Gowder warns, that an indefinite state of emergency may lead to unchecked executive powers and ultimately the demise of the rule of law.⁵⁵

An argument may be advanced that the operative state of emergency is the latter one declared in Legal Notice 40. However, this argument cannot be sustained as the two Legal Notices are published pursuant to different laws, one being section 23 of the Constitution and the other being sections 3 and 15 of the DMA. Another reason why this argument collapses is that section 23(3) clearly states that a state of emergency declared in terms of section 23(1) may 'be revoked by the Prime Minister acting in accordance with the advice of the Council of State, by proclamation which shall be published in the *Gazette*'. Therefore, in the absence of a revocation of the state of emergency published in Legal Notice 26, in law Lesotho remains with two states of emergency, one declared under section 23 of the Constitution and another declared under section 15 of the DMA. Furthermore, a revocation of the section 23 state of emergency cannot be implied from the declaration of the DMA state of disaster for two reasons: First, the latter is silent about the status of the former; and, second, section 23 requires explicit revocation.

With a view to controlling emergency powers and protecting human rights during a state of emergency, section 21 of the Constitution regulates derogations from human rights and fundamental freedoms. It empowers government to derogate from the right to liberty (section 6) and equality and non-discrimination (sections 18 and 19). As a safeguard against the abuse of such powers, section 21(1) further provides that the measures of derogation must be done through an 'Act of Parliament' and must be 'necessary in a practical sense in a democratic society' for addressing the situation that led to the declaration of emergency. Applying section 21 to the COVID-19 situation, it is clear that extraordinary measures were necessary in order to reduce the rate of infections. However, the Constitution was not followed to the letter and there was no justification for the resort

⁵⁵ P Gowder 'Permanent state of emergency, unchecked executive power and the demise of the rule of law' (2017) 124 *Queen's Quarterly* 476.

to the DMA for a process and result that fall squarely within section 23 of the Constitution.

4.2 Regulation of a disaster-induced state of emergency under the Disaster Management Act 1997

Prior to 1997 disasters in Lesotho were dealt with on an *ad hoc* basis in that a committee would be set up to deal with a particular disaster for its duration, whether such be a severe drought, heavy snowfall or a health pandemic such as COVID-19. The 1997 DMA was promulgated with the objective of establishing a permanent structure in the form of a Disaster Management Authority (Authority), to regulate emergencies arising out of disasters, including prevention, mitigation, preparedness, response and recovery measures for the protection of life and property against the effects of such disasters, and to vest responsibility of disaster management in the Authority and district secretaries which later were termed district administrators (DAs).⁵⁶ The DMA defines the two terms emergency and disaster as follows:⁵⁷

‘Emergency’ means any occasion, instance or event for which, in the determination of the Prime Minister, exceptional assistance from the government is needed to supplement national, district, community or individual actions to save lives, protect property and public health and safety or to prevent or mitigate the threat of a catastrophe or extreme hazard in any part of Lesotho.

‘Disaster’ means a progressive or sudden, widespread or localised, natural or man-made event including not only prevalent drought but also heavy snowfalls, severe frosts, hailstorms, tornadoes, landslides, mudslides, floods, serious widespread fires and major air or road traffic accidents.

In the case of *David Mochochoko v The Prime Minister & Others* the Court stated *obiter* that COVID-19 falls within the above definition of ‘disaster’ in section 2 of the DMA.⁵⁸ In this case the applicant, a village chief, challenged the government’s decision to deal with the scourge of COVID-19 through channels other than the DMA. He challenged, in particular, the establishment of the NECC in that it was created outside the confines of the DMA as the Board established in terms of sections 13 and 14 of the DMA should be the one tasked to ‘deal with the management and administration of the Corona virus’.⁵⁹ The applicant also argued that the funds used

56 Preamble.

57 Sec 2.

58 Lesotho High Court CIV/APN/141/2020 (unreported) para 4.

59 *Mochochoko*’s case (n 58) para 1.

by the NECC had not been approved by Parliament as mandated by section 114 of the Constitution. Although the case was dismissed on the grounds that the applicant had no legal standing to sue, Mokhesi J stated *obiter* that '[i]t is clear that when Parliament enacted this Act, it envisaged a body which will be vested with *exclusive*⁶⁰ powers to manage disasters and not any other body created on an *ad hoc* basis'.⁶¹

The DMA contains extensive provisions with regard to the question as to by whom and the circumstances under which a state of disaster may be declared;⁶² the emergency powers exercised by the Minister during such disaster-induced state of emergency;⁶³ the establishment and functions of the Authority and other task forces and working groups whose mandate is to prevent, mitigate, prepare for, respond to and implement recovery measures for the protection of life and property against the effects of disasters.

Despite the clear provisions of the DMA, when the pandemic hit Lesotho, the government responded by establishing the NECC which was later disbanded and replaced by NACOSEC. The argument in this article is that the establishment of NACOSEC was equally unlawful as the provisions of the DMA were not followed notwithstanding the statement in Legal Notice 61 that the Minister acted pursuant to the provisions of the DMA. It is argued that the permanent structures provided for in the DMA should have been used to respond to the pandemic as opposed to the creation of NACOSEC as a new *ad hoc* structure. The DMA clearly articulates that its objective is to vest the responsibility of disaster management in the Disaster Management Authority.⁶⁴

The other argument is in relation to the delegation of section 4 powers of the minister to NACOSEC. In terms of section 4 of the DMA, the minister is empowered to perform various actions, including the suspension of the operation of certain statutes and regulations if such would hinder action in coping with the emergency; to use government resources; to transfer government personnel; and to receive, accept and account for donations and other funds that may be given to the Authority. In terms of Legal Notice 61, these

⁶⁰ My emphasis.

⁶¹ *Mochochoko* case (n 58) para 4.

⁶² Sec 3(1).

⁶³ Sec 4 empowers the minister to perform various actions including the suspension of operation of certain statutes and regulations if such would hinder action in coping with the emergency; to use government resources; to transfer government personnel; to receive, accept and account for donations and other funds that may be given to the authority.

⁶⁴ Preamble.

powers are delegated to NACOSEC.⁶⁵ The contention is that these powers are vested in the minister by an Act of Parliament which is the DMA. Therefore, their delegation to NACOSEC through an executive order is unjustified and creates a platform for the abuse of public funds. The danger is that while the DMA states measures that ensure accountability in the exercise of such powers by the minister, NACOSEC is not expressly subjected to such accountability measures.

Section 11 of the DMA provides for the establishment of the Disaster Management Authority which, according to section 13, 'shall act as the central planning, coordinating and monitoring institution for disaster management and post-disaster recover'. According to section 14, the Authority shall be governed by a board whose functions are detailed in section 15. The use of the term 'shall' in section 13 suggests that it is mandatory that all situations that fall within the meaning of 'disaster' in section 2 of the DMA must be coordinated by the Authority. The establishment of NACOSEC through an executive order and giving it the mandate to perform functions of the Authority established in terms of an Act of Parliament thus contravenes section 13 as well as the principle of the rule of law. Although the Court dismissed the *Mochochoko* case on the ground that the applicant had no standing to sue, it, however, stated that when establishing the NECC, government had circumvented the provisions of sections 11 and 14 of the DMA which address the establishment of a Disaster Management Authority.⁶⁶

Similarly to the challenges against the NECC in the *Mochochoko* case that the funds used by the NECC had not been approved by Parliament as mandated by section 114 of the Constitution, there are no clear guidelines as to how funds would be appropriated to NACOSEC and how such would be managed and accounted for. This has led to bickering between the executive secretary of NACOSEC and government. After two months of operations, conducting public consultations and drafting of a National COVID-19 Strategy, which had been adopted by Parliament, the squabbles about funds has led to the halting of operations as NACOSEC has no bank account and its procurement and recruitment processes have been terminated abruptly. The challenge with this is that while the power struggle continues, the virus keeps spreading, lives are being lost and no institution is taking charge of the situation.

⁶⁵ Sec 3(a) Legal Notice 62/2020.

⁶⁶ *Mochochoko* case (n 58) para 5.

The power struggle between government and NACOSEC could have been avoided by following the provisions of the DMA in terms of which the Minister has the power to establish a Disaster Management Fund.⁶⁷ The fund would be maintained by the Accountant-General as a separate account for recording receipts including donations, monies appropriated by government for purposes of the disaster at hand⁶⁸ and disbursements required for liabilities and the discharge of functions of the Authority.⁶⁹ Because it is a permanent structure, the Authority already has an annual budget approved by the board in terms of section 39 of the DMA. Its technical, human and financial capacity should have been strengthened to deal with COVID-19.

Section 40 of the DMA also provides for the auditing of the books of the Authority by the Auditor-General. Therefore, the utilisation of the Authority and its financial structures could be in accordance with the rule of law, by complying with the DMA as well as Public Financial Management and Accountability Act 2011 the objective of which is 'to establish and sustain transparency, accountability and sound management of receipts, payments, assets and liabilities of the government of Lesotho'. The current approach, in terms of which a separate entity has been established with no guidelines on financial accountability, creates a fertile ground for corruption, the misuse of public funds, non-accountability and the violation of other legal regulations such as the Public Procurement Regulations 2007.

5 Judicial oversight

The last of the three core principles of the rule of law is that there should be an effective and fair resolution of disputes. In addressing the role of courts in response to the COVID-19 pandemic, Petrov argues that 'the deliberative ... dispute resolution function of courts are crucial not only for preventing the abuse of emergency measures, but also for increasing the effectiveness of emergency measures by improving conditions necessary for compliance' with such measures.⁷⁰ A few cases were decided in relation to Lesotho's COVID-19 response. These cases illustrate both the dispute resolution and the enforcement roles played by the judiciary in Lesotho's fight against the pandemic.

⁶⁷ Sec 34.

⁶⁸ Sec 35.

⁶⁹ Sec 36.

⁷⁰ J Petrov 'The COVID-19 emergency in the age of executive aggrandisement: What role for legislative and judicial checks?' (2020) *The Theory of Practice and Legislation*, <https://www.tandfonline.com/loi/rtpl20> (accessed 20 September 2020).

The first is the case of *ABC & Others v The Prime & Others* (Prorogation case).⁷¹ This case challenged the prorogation of Parliament which was done soon after the declaration of a state of emergency. On the evening of 20 March, two days after the verbal declaration of a state of emergency, Prime Minister Thabane requested the King to prorogue Parliament by 21:00. The King did not act as advised, and later that night the Prime Minister issued a *Gazette* proclaiming the prorogation of Parliament.⁷² The Prime Minister claimed that the prorogation was aimed at curbing the spread of COVID-19 by avoiding large gatherings in Parliament. The All Basotho Convention (ABC), a political party led by the Prime Minister, the Basotho National Party (BNP), one of the four coalition parties, and some members of parliament challenged the prorogation on various grounds including the failure to consult coalition partners and the obstruction of Parliament from discharging its functions to disburse funds meant for the fight against the COVID-19 pandemic. The Court held that the Prime Minister had failed to follow section 92 of the Constitution which governs the prorogation of Parliament and also failed to consider Parliament's indispensable role in the fight against the pandemic.⁷³ The prorogation was declared unlawful and Parliament proceeded with its business, including the allocation of funds for the fight against COVID-19.

Following the establishment of the NECC in April, in May the case of *David Mochochoko v The Prime Minister & Others* was lodged, challenging the lawfulness of the NECC and the disbursement of funds to it without following the procedures contained in section 114 of the Constitution.⁷⁴ Although the case was dismissed on the ground that the applicant lacked legal standing to sue, the Court played the important role of highlighting the flaws in the government's COVID-19 response. In particular, the Court stated that the establishment of the NECC was outside the confines of the DMA.

Another case is *The Coalition of Health Professionals Association/Health Committee & Others v The National Emergency Command Centre (NECC)/National COVID-19 Secretariat (NACOSEC) & Others*.⁷⁵ In this case health professionals sought orders that the hospitals be declared a hazardous environment from which they were entitled to withdraw until such places were rendered safe for their health

⁷¹ Constitutional Case 6/2020, Lesotho High Court 17 April 2020 (LSHCONST) 1.

⁷² Prorogation of Parliament Legal Notice 21 of 2020.

⁷³ Prorogation case (n 71) paras 89-95.

⁷⁴ *Mochochoko* case (n 58).

⁷⁵ CIV/APN/214/2020, Lesotho High Court, 21 July 2020 (unreported).

and that of their families. In order to avoid unnecessary deaths, the government, through NACOSEC and the Ministry of Health, were directed by the Court to ensure the safety, health and welfare of health professionals by maintenance and improvement of the working environment that is clean, safe and without risks to health and life and that they are not unreasonably exposed to the risks of COVID-19. This case also illustrates the oversight role played by the courts in support of the rule of law principle.

The courts have also played a crucial role with regard to the enforcement of the lockdown measures. For instance, within a period of one month of the total lockdown (29 March to 27 April 2020) there had been more than 80 cases involving 134 people countrywide.⁷⁶ The majority of the cases involved violations of the regulations on the sale and consumption of alcohol, the holding of church services and operating businesses outside the hours prescribed in the Public Health (COVID-19) Regulations. Penalties for these offences ranged from M500 00 to M10 000.00 while sentences were in the range of one to two months' imprisonment. In some cases suspended sentences were imposed.

6 Conclusion and recommendations

This article has illustrated that the pandemic has not only been a challenge to health and economy but has also put Lesotho's rule of law to a great test. Compared to other countries, Lesotho had the opportunity to better prepare in terms of legal and institutional frameworks since the virus arrived on the shores of Lesotho at a later date, at a time when other countries were not only grappling with the legal and ethical dilemmas, but also the spread of the virus and spiralling death tolls. The declaration of a state of emergency prior to the recording of a positive case created prospects of taking stock of the existing legal and institutional frameworks and capacity building of such institutions so as to better respond to the pandemic.

The two-pronged approach of declaring a state of emergency in terms of section 23 of the Constitution and later a state of disaster-induced emergency in terms of sections 3 and 15 of the DMA during the subsistence of the former was an unnecessary and uncalculated move which also trampled upon the principles of the rule of law. This reflects an approach that was a too hasty, wholesale importation

⁷⁶ 'Fines for breaching Lesotho's Public Health (COVID-19) Regulations' *Selibeng* 9 May 2020, <https://selibeng.com/fines-for-breaching-lesothos-public-health-covid-19-regulations-/> (accessed 21 September 2020).

of what obtained in neighbouring South Africa and a disregard for the pre-set legal rules such as section 23 of the Constitution which already existed at the time of the pandemic. It leads to a conclusion that the Thabane regime, which was in place in the early stages of the pandemic, and the Majoro regime, which took over when the former was ousted by a vote of no confidence, treated the COVID-19 threat to health in a cavalier manner.

A disregard for the first and second core principles of the rule of law is also reflected in the institutional framework established in response to the pandemic. First of all, the government did not utilise the already-existing permanent structures established under the DMA but resorted to the establishment of NECC and later NACOSEC which both are *ad hoc* in nature. The delegation through an executive order of powers that are otherwise legislatively vested in the Authority and the Minister to NACOSEC is also against the principle of the rule of law.

With regard to the manner in which the lockdown measures were implemented, Lesotho has acted against the second core principle of the rule of law and also transgressed its international human rights obligations as contained in ICCPR and the African Charter in various ways. Examples are the failure to inform the Secretary-General of the United Nations of the declared state of emergency, as required by article 4 of ICCPR, and the excessive use of force by the army in an attempt to enforce the lockdown regulations in contravention of articles 7 and 5 of ICCPR and African Charter respectively. Article 27(2) of the African Charter was also contravened by employing measures that were not proportionate to the risk that was being averted.

On the basis of the foregoing and in line with the three core principles of the rule of law, it is recommended that Lesotho must comply with its obligations under international human rights instruments and domestic laws. Compliance with international human rights obligations would result in the filing of proper notice with the office of the Secretary-General of the United Nations about the state of emergency, the reasons for such, its duration and measures put in place to ensure the protection of human rights during the period of emergency. Compliance with national legal frameworks would have assisted in avoiding the current situation in which there exist the section 23 state of emergency and the DMA state of disaster-induced emergency without revocation of the former as required by the Constitution. The second recommendation, which is based on the second core principle, is that enforcement of the measures should be done within the confines of the existing legal frameworks. For

instance, the deployment of the army could have been avoided by recourse to laws governing public law and order that are enforced by the police service. It therefore is recommended that allegations of the use of excessive force by members of the army be investigated, the perpetrators punished and victims redressed in accordance with both national and international human rights obligations. Furthermore, adherence to the DMA could have resulted in use of the structures envisaged under the DMA instead of the establishment of the NECC and later the NACOSEC which are *ad hoc* in nature, while the DMA had envisaged a permanent structure, the Disaster Management Authority, and gave it the exclusive mandate to address disasters such as COVID-19.

The third and final recommendation is that oversight institutions such as the judiciary, civil society organisations and the media should be reinforced in order to enable checks and balances. Over and above this, the long overdue Human Rights Commission, which is provided for under the Constitution and the Human Rights Commission Act, should be established in order for it to also play a role in ensuring that laws are complied with and that the executive does not act outside the law and usurp its powers during a state of emergency as such poses a greater risk of human rights violations.