

## Eswatini's legislative response to COVID-19: Whither human rights?

Musa Njabulo Shongwe\*

Senior Lecturer, Department of Law, University of Eswatini  
<https://orcid.org/0000-0002-6001-1567>

**Summary:** *Having been confronted with the COVID-19 pandemic, the Kingdom of Eswatini has had to adopt both soft and hard response measures. The constitutional emergency response framework had not envisaged the type of emergency brought about by COVID-19, forcing the state to enact extraordinary regulatory measures. Unprecedented emergency powers have been conferred on state functionaries. Questions have arisen as to the nature of these emergency powers, the manner in which these powers have been exercised and the absence of special oversight mechanisms. The response measures and regulations have had an unparalleled impact on lives and livelihoods of Eswatini. This article explores the nature of emergency powers in the laws of Eswatini, and the particular effects of the COVID-19 regulations on human rights. This article commences with an analysis of constitutional emergency powers in Eswatini and the limitations thereof, and considers the question of why the state did not invoke a constitutional state of emergency. The article proceeds to examine the nature of statutory emergency powers under the Disaster Management Act, and considers whether there are effective legal limitations on the exercise of executive authority and effective safeguards against the abuse of power. The article then deals with the particular impact of the COVID-19 response legal framework on human rights protection. In this regard, the article advances examples of situations where rights have been infringed. Finally, the article proposes that the state's response measures should continuously endeavour to mitigate the long-term impact on human rights.*

\* LLB (UNISWA) LLM LLD (Johannesburg); [mnshnogwe@uniswa.sz](mailto:mnshnogwe@uniswa.sz)

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## 1 Introduction

The Kingdom of Eswatini has not been spared the scourge of the COVID-19 pandemic. The first confirmed case was recorded on 13 March 2020, and thereafter the number of infections steadily soared. By 30 September 2020 there were 5 462 confirmed cases and 108 deaths<sup>1</sup> in a population of plus-minus 1,2 million people.<sup>2</sup> As in the case of many developing countries, Eswatini has been particularly vulnerable to the scourge of the virus due to the lack of preparedness<sup>3</sup> and a weak healthcare system which has historically been marked by shortages of basic medical necessities.<sup>4</sup> Eswatini is also among the 33 African countries that have been found to be least prepared to deal with COVID-19.<sup>5</sup> The true extent of the spread of this virus remains relatively unknown today.

The government of Eswatini was reactive in its response to COVID-19. A national state of emergency was declared in terms of which government imposed a partial lockdown of the state's operations.<sup>6</sup> The regulations pertaining thereto featured extraordinary measures that were primarily adopted to slow the transmission of the virus and to restrict freedom of movement, consequently restricting people's freedom to enjoy many other human rights. This article examines the way in which the emergency response measures and the implementation of regulations have inadvertently affected the enjoyment of some fundamental rights and impacted lives and livelihoods. The next part includes an examination of the nature of constitutional and statutory emergency powers and the manner in which these have been exercised, in an attempt to discern how the COVID-19 response framework caters for human rights concerns and ensures compliance with the rule of law. The article proceeds to discuss how the lockdown regime has placed human rights and other legal protections under extra pressure, and also addresses

1 Ministry of Health 'COVID-19 update' 30 September 2020.

2 FAO 2020 Southern African Emergency Response Plan (2019-2020), <https://doi.org/10.4060/ca7652en> (accessed 23 June 2020).

3 UN Eswatini 'Economic Situation Report No 1 – COVID-19' prepared by UNRCO Economist M Mamba 30 March 2020 2.

4 EP Chowa et al 'Emergency care capabilities in the Kingdom of Swaziland, Africa' (2017) 7 *African Journal of Emergency Medicines* 15-18.

5 African Development Bank Group 'African Economic Outlook 2020: Coping with the COVID-19 pandemic', [www.afdb.org](http://www.afdb.org) (accessed 20 July 2020).

6 Government of Eswatini *Declaration of national emergency in response to Coronavirus* 17 March 2020.

how the COVID-19 crisis has exacerbated the vulnerability of the least protected in society by causing greater economic and social inequality. The article highlights a few examples of how violations have occurred under cover of the COVID-19 response measures, and concludes with arguments advocating the strengthening of a rights-based approach to COVID-19 in Eswatini. It is commonplace that the state has a continuing duty to respect, protect and fulfil the rights of its people,<sup>7</sup> and that human rights law recognises the necessary limitations on the exercise of certain rights during national emergencies.<sup>8</sup> It is also accepted that an emergency by its nature is temporary.<sup>9</sup> The article therefore recognises that the scale and severity of COVID-19 may reach levels at which the limitation of some rights might be reasonable on the grounds of public health. From that perspective, the article seeks to identify and interrogate the medium and long-term impact of Eswatini's legislative response to people's lives, rather than to downplay the significance of the response measures.

## 2 Nature of emergency powers in Eswatini

### 2.1 Constitutional emergency powers

The Constitution of Eswatini<sup>10</sup> defines a state of emergency as an emergency due to war, natural disaster or an imminent threat thereof, or an imminent terrorist threat.<sup>11</sup> The King, acting on the advice of the Prime Minister, is constitutionally empowered to declare a state of emergency in terms of a proclamation published in the Government Gazette.<sup>12</sup> Once a state of emergency is declared, the Constitution provides that civil liberties may be suspended for a period of 21 days to three months,<sup>13</sup> with the exception of the right to life, equality before the law, security of the person, the right to a fair hearing, freedom from slavery or servitude, the right of access to justice, and freedom from torture, cruel, inhuman or degrading treatment or punishment.<sup>14</sup>

7 D Dessiarto 'Austerity measures and international economic, social and cultural rights' in EJ Criddle (ed) *Human rights in emergencies* (2016) 244.

8 Criddle (n 7) 32.

9 J Oraa *Human rights in states of emergency in international law* (1992) 30.

10 Act 1 of 2005 (Constitution of Eswatini).

11 Sec 36(2) Constitution of Eswatini.

12 Sec 36(1) Constitution of Eswatini.

13 Sec 46(4) Constitution of Eswatini.

14 Sec 38 Constitution of Eswatini.

When read as a whole<sup>15</sup>, the Constitution is unequivocal on the wide-ranging powers of the monarch. The head of state is vested with executive authority;<sup>16</sup> supreme legislative authority;<sup>17</sup> the power to withhold his assent to legislation;<sup>18</sup> and he is vested with ultimate authority in the appointment of members of the judiciary.<sup>19</sup> Evidence of the unrestrained powers of the head of state is more clearly expressed in section 65(4) which states that '[w]here the King is required by this Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation'.

This indicates that in the exercise of executive functions the King maintains unfettered discretion, and in the context of the state of emergency declaration, the King is not bound to follow the advice of the Prime Minister. When one examines the history of the emergency powers in Eswatini, it becomes difficult to ignore the 1973 Decree<sup>20</sup> which radically changed the political situation in the country. In terms of this Decree,<sup>21</sup> the former head of state unilaterally declared a state of emergency, banned political parties, disbanded government, suspended the 1968 Constitution and consolidated his rule. This ensued after a more radical opposition party had displayed strength in the 1972 elections.<sup>22</sup> From 1973 to 2005 the head of state ruled by decree, with no known limits to his power, the exercise of which was not subject to any checks or balances. In 2001 His Majesty King Mswati III exercised his powers and issued another decree<sup>23</sup> in terms of which he declared a state of emergency in Swaziland. In the absence of a constitution, the decree perpetuated the violation of human rights.<sup>24</sup>

It is interesting to note that in the wake of the COVID-19 pandemic, section 36 of the Constitution was never invoked to

15 It is a general principle of constitutional interpretation to read the constitution as a whole. See the Supreme Court judgment in *Mhlanga & Another v Commissioner of Police & 3 Others* Civ Case 12/2008.

16 Sec 64(1).

17 Sec 106.

18 Sec 108(3).

19 Sec 153(1).

20 Sec 2-3 King's Proclamation 12 April 1973.

21 As above.

22 L Laakso & M Cowen *Multi-party elections in Africa* (2002) 37.

23 Extraordinary Government Gazette Decree 2 of 2001 (23 June 2001).

24 Such as freedom of opinion, expression, media and press freedom. Art 13 of the Decree provides: 'Proscription: Where a magazine, book, newspaper or excerpt thereof is proscribed in terms of the Proscribed Publications Act, 1968 the Minister concerned shall not furnish any reasons or jurisdictional facts for such proscription. No legal proceedings may be instituted in relation of such proscription.' See also sec 7 on the protection of the name and actions of His Majesties; and sec 8, '[m]atters pending before the *Ingwenyama* or King cannot be taken to any court of law'.

declare a state of emergency in Eswatini. The drafters of the 2005 Constitution did not envisage an emergency of this nature under section 36. Had section 36 included a public health emergency, such as the COVID-19 pandemic, the declaration of a constitutional state of emergency would have triggered parliamentary oversight<sup>25</sup> as well as an effective protective role of the Human Rights Commission.<sup>26</sup> This would have gone some way towards ensuring compliance with the rule of law and mitigation of possible rights violations in the response. The implications of a constitutional state of emergency would perhaps have been safer in respect of human rights as safeguards exist in section 38. These are non-derogable rights that include the right to life; equality before the law; security of the person; the right to a fair hearing; freedom from slavery; the right to apply to the High Court for a remedy upon rights violations; and freedom from torture, cruel, inhuman or degrading treatment or punishment. Put together, the constitutional safeguards may have ensured that the state acts within the confines of constitutional authority. It may be observed, therefore, that the decision not to invoke a constitutional state of emergency could have been taken as a matter of political convenience, which consequently enabled the government to act without the constitutional constraints that are implicit in a constitutional state of emergency.

## **2.2 A national emergency in terms of the Disaster Management Act of 2006**

The laws of Eswatini define a 'national emergency' as an emergency due to a disaster event or a threatening disaster (being the COVID-19 pandemic in this case) affecting one or more regions within the state that are unable to effectively deal with it.<sup>27</sup> A state of national emergency is a state in which normal procedures are suspended and extraordinary measures are taken to avert the disaster,<sup>28</sup> a disaster being defined as a serious disruption of society's functioning which causes widespread human and environmental losses, and which exceeds the ability of society to cope by using its own resources.<sup>29</sup> The Disaster Management Act, 2006 (DMA) empowers the Prime Minister to declare a national emergency<sup>30</sup> in consultation with the relevant Minister (in this case the Minister of Health and the Deputy

<sup>25</sup> Secs 36(3)-(7); sec 37(1).

<sup>26</sup> Secs 36(8)-(10).

<sup>27</sup> Sec 29 of the Disaster Management Act 1 of 2006 (DMA).

<sup>28</sup> Sec 2 DMA.

<sup>29</sup> As above.

<sup>30</sup> Sec 29 DMA.

Prime Minister). In the past, section 29 of the DMA was invoked in response to the El Nino drought.<sup>31</sup>

The COVID-19 pandemic has brought about a national disaster. Hence, it would be legally proper to state that Eswatini is in a state of 'national disaster emergency'. Clarity on the distinction between a constitutional state of emergency and a national emergency is critical because on 17 March 2020 a 'national state of emergency' was declared in Eswatini, in terms of which a 'partial lockdown'<sup>32</sup> was imposed by the state. Among other things, all events and gatherings were cancelled, schools were closed, international travel was banned and visas were revoked.<sup>33</sup> Announcing the declaration, the Prime Minister stated:

I have been commanded by His Majesty King Mswati III and *Ingwenyama* to invoke section 29 of the Disaster Management Act 2006, having assessed the magnitude and severity of the outbreak of the Coronavirus (COVID-19) pandemic confirmed world over, to declare a national emergency in the Kingdom of Eswatini with immediate effect for a period not exceeding two (2) months.

This statement highlighted a larger issue about the manner in which the executive executes its mandate, as well as the nature and implementation of the lockdown regulations. First, the wording used in both the legislative instruments and the declarations of emergency brought confusion to non-lawyers as to which type of 'emergency' was being declared. For the Prime Minister to state that he has been commanded by the monarchy would mean either that the Prime Minister was announcing a declaration made by the King, or exercising authority delegated not from the statute (the DMA) but from the monarchy. Both derivations would be inaccurate as the only manner in which the King would declare and pronounce a constitutional state of emergency would be in terms of a Proclamation as required by section 36 of the Constitution. The 'royal command', therefore, had no clear role or legal justification in the Prime Ministers' declaration, especially because the COVID-19 pandemic clearly brought about a national emergency and not a constitutional state of emergency, as it fell outside of the ambit of section 36. Additionally, the Prime Minister's statement did not purport to invoke section 36 of the Constitution. Nevertheless, the public remained confused as to the implications of the declaration

31 Government of Swaziland *Swaziland drought rapid assessment report* (2016).

32 The lockdown was partial in the sense that government, in view of the need for continuity in key operations of the state and certain businesses or institutions in both the public and the private sectors of the economy, decided not to adopt a total shutdown of the country.

33 Government of Eswatini (n 6).

announced in such a manner, giving some an indication that the Prime Minister acted in terms of powers derived from the King.

This issue goes to the heart of respect for the rule of law in Eswatini, a founding value protected in paragraph 5 of the Preamble to the Constitution. Where a statute confers detailed authority or power on the Prime Minister to act, there is no need or justification for the monarchy to interfere in the exercise of that function. The wording used by the Prime Minister not only brought confusion but, as will be discussed further in this article, it subsequently opened the door to certain types of human rights violations by law enforcement officials who may have laboured under the impression that the country was in a 'state of emergency' as defined in the Constitution, which would permit the derogation of rights.<sup>34</sup> Some lawyers have argued that because the Constitution vests the King with executive authority<sup>35</sup> and that the King-in-Parliament is vested with supreme executive and legislative authority,<sup>36</sup> the King legitimately exercised his authority through the Prime Minister by commanding the Prime Minister to declare the national emergency.<sup>37</sup> However, this argument would then bring into question the intention of the legislature. Had the legislature intended to defer the declaration of a national emergency to the authority of the King, the DMA would have explicitly provided as such in section 29. What is even more puzzling from this experience is the clear absence of a separation of powers. It must be noted that constitutionally 'the King' and *Ingwenyama* refer to the head of state,<sup>38</sup> the latter in his capacity as traditional head of the Swazi state,<sup>39</sup> whose role is a customary one.<sup>40</sup> This means that the powers of the monarchy, in both capacities, are unlimited and overreaching the executive.

Returning to the emergency powers enshrined in section 29 of the DMA, the Prime Minister, in consultation with the Deputy

34 Incidents of brutal enforcement of lockdown regulations by the police reported on mainstream media: K Sibiya 'Policeman shoots boy, 15, playing football during Coronavirus lockdown' *Times of Eswatini* 13 April 2020 2; Z Dlamini 'PM condones police brutality during lockdown' *Independent News Eswatini* 15 April 2020 1.

35 Sec 64 (4) Constitution of Eswatini.

36 Sec 106 Constitution of Eswatini.

37 It has been argued that the Prime Minister of Eswatini only enjoys powers as delegated by the King. See S Boysen 'The legislature of Swaziland – Compromised hybrid' in N Baldwin (ed) *Legislatures of small states: A comparative study* (2013) 88.

38 Sec 4 Constitution of Eswatini.

39 Sec 228 Constitution of Eswatini.

40 See A Dube & S Nhlabatsi 'The King can do no wrong: The impact of the *Law Society of Swaziland v Simelane NO & Others* on constitutionalism' (2016) 16 *African Human Rights Law Journal* 281.

Prime Minister<sup>41</sup> and the National Disaster Management Council,<sup>42</sup> is empowered to determine and classify<sup>43</sup> a threatening disaster event, and to declare a national emergency.<sup>44</sup> The Act provides for the establishment of a national disaster management policy and an operationalisation plan thereof, which is subject to cabinet approval and publication in the *Government Gazette*.<sup>45</sup> The Act also provides for the establishment of the Ministerial Disaster Management Team chaired by the Deputy Prime Minister (DPM), consisting of cabinet ministers responsible for their respective portfolios.<sup>46</sup> This team carries an advisory function as it is mandated to give recommendations to the Prime Minister on policy, coordination, emergency declarations and compliance with international obligations.<sup>47</sup> The Act also provides for the establishment of the Disaster Management Council, which is a technical advisory organ to the DPM, consisting of principal secretaries from the various ministerial portfolios, executive representatives of the disciplined forces, emergency departments, regional secretaries, chiefs, religious and welfare groups, and civil society.<sup>48</sup> The National Disaster Management Agency (NDMA) is established in terms of Part II of the DMA as the primary implementing body.

This framework enables almost all key stakeholders within the central and local government hierarchy to participate in the national disaster response. Read in its entirety, the Act clearly vests major executive powers in the Prime Minister and the Deputy Prime Minister who work in collaboration with a select cabinet committee. It is also clear that the Act does not establish any special mechanism for ensuring the accountability of these state officials and for the prevention of abuse of emergency powers. This especially is a risk factor as the state of emergency by its nature calls for an immediate legislative response, and that alone creates the possibility of the absence of systems of checks and balances that would be done in the ordinary legislative process. The provisions of the Act are generally couched in terms that primarily cater for emergency response and the mitigation of disaster-related harm. Nowhere in the Act is there provision for human rights considerations in the response framework and in the implementation of emergency response plans.

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41 The Minister responsible for disaster management is the Deputy Prime Minister. See sec 2 of the DMA.

42 Appointed in accordance with secs 8-11 of the DMA.

43 In conducting the assessment of the magnitude and severity, the Prime Minister may also enlist the services of an independent assessor. See sec 29(2). In the case of COVID-19 the state relied on the WHO, the Ministry of Health and other partners for expert information.

44 Secs 29(1)-(6) of the DMA.

45 Sec 4. An example is the NERMAP 2016-2022.

46 Sec 5 DMA.

47 Sec 6 DMA.

48 Sec 10 DMA.



Instead, glaring possibilities of rights violations are apparent. For example, special discretionary powers are conferred upon the Deputy Prime Minister to take action necessary for the preservation of human life 'without authority'.<sup>49</sup> Such action includes compelling or preventing the evacuation or movement of people and resources between disaster-stricken areas, and directing the termination or restriction of public utility services. Police officers and members of the army are also given powers of search and seizure which they are permitted to exercise without authority or a warrant.<sup>50</sup>

The DPM is empowered to make regulations for purposes of the Act,<sup>51</sup> and it is interesting that the powers and functions of the DPM may further be delegated to 'any person in the public service'.<sup>52</sup> For that reason, section 44(1) of the DMA appears to be contrary to the constitutional and administrative law principle *delegatus non potest delegare* according to which powers conferred on a person through delegation cannot be further delegated to another person.<sup>53</sup> The conditions of delegation are also questionable as, even though they are required to be in writing, they are made subject to 'unspecified' conditions.<sup>54</sup> Therefore, there are limited safeguards on the prevention of *ultra vires* acts or undefined authority. Even though in practice the DPM's office has not delegated the authority to develop the COVID-19 regulations, ministers have been accorded the prerogative to develop and issue guidelines for the enforcement of the regulations. This article will demonstrate how this state of affairs has resulted in indecisive leadership, back and forth regulations, and has created legal uncertainty during the lockdown.

The DMA required the state, through the Minister of Finance, to create a Disaster Management Fund, the objective of which is to fund the disaster management plan, emergency relief and relief operations.<sup>55</sup> At the inception of the state of emergency the fund had not been created. What existed before 2006 was a Disaster Relief Fund managed by the Deputy Prime Ministers' office and the NDMA which subsequently became dormant after 2005 as its mandate had lapsed. It must be noted that if the fund had been created after the Act came into force in 2006, the state would have had resources saved up to finance expenses aimed at mitigating the effects of COVID-19. The state therefore has been caught off-guard

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49 Sec 32(1).

50 Sec 32(2).

51 Sec 43.

52 Sec 44(1).

53 C Parker *Administrative law cases and materials* (2019) 90-91.

54 Sec 44(3)(b).

55 Sec 35(1).

in terms of financing the national response, and relies heavily on donor funding and loans, a situation that will have a negative impact on the country's economy. Following the declaration, the state put in place a National Emergency Committee made up of all members of cabinet, as well as a task team consisting of commanders of the disciplined forces, regional administrators and many technical experts that are representative of non-governmental organisations (NGOs), industry, health and other sectors. These organs were responsible for coordinating and implementing emergency policy plans.

The emergency powers discussed above are subject to limitations provided for in sections 33 and 35 of the Constitution (the right to administrative justice and the right to approach the High Court for a remedy) which create an oversight role for our courts. The national Human Rights and Public Administration Commission is also established by the Constitution<sup>56</sup> with the mandate to investigate complaints about human rights violations and to provide remedies. Although the Commission has received and investigated complaints submitted to it, its remedial role remains curtailed by the absence of enabling legislation.<sup>57</sup> The legislature also plays an oversight role by, for example, interrogating the tendering processes and general expenditure of COVID-19 funds. Even though parliament at times is constrained by the need to work remotely in the context of the lockdown and the continued spread of the virus to members, the response to COVID-19 is monitored by the legislature through a parliamentary select committee.

The partial lockdown took effect on 27 March 2020 after the regulations had been passed by Parliament.<sup>58</sup> Although Parliament had a role in passing the regulations, the exigent circumstances under which they scrutinised these regulations provided limited time and therefore constituted an insignificant oversight mechanism. In April 2020 the Prime Minister announced a gradual easing of the partial lockdown, but in view of the escalations in cases of infection, an almost total shutdown was re-instated a week later. The lockdown has been extended three times.<sup>59</sup> There has generally been back and forth regulations as changes are announced almost every week by the state. The sudden changes and easing of the lockdown created

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56 Sec 163.

57 Commission on Human Rights and Public Administration 'Press statement: Concerns on human rights violations during the COVID-19 pandemic' 1 June 2020. The Human Rights and Public Administration Omission Bill of 2020 has not yet been passed by Parliament.

58 The Coronavirus (COVID-19) Regulations 2020 *Government Gazette* 53 (VII) (27 March 2020).

59 The Declaration of a National Emergency (Extension of Time) Legal Notice 66 of 2020 and Legal Notice 80 of 2020.

confusion which could be attributed to the unprecedented growth in the numbers of infections. It was also noted that in extending the period of the lockdown, the Prime Minister stated that '[g]overnment has re-issued a Declaration in accordance with Section 29 of the Disaster Management Act'.<sup>60</sup> The Act requires a Government Gazette to be issued to extend the partial lockdown.<sup>61</sup>

The rule of law is of crucial importance as it serves to avoid the arbitrary use of power, and it protects all people from human rights abuses that flow from arbitrariness. The exercise of state authority must be authorised by specific legislation or regulations made under the enabling Act.<sup>62</sup> It is also crucial that the law authorising the exercise of public power must be certain and clear, not subject to conflicting interpretations, so that the public to whom the law applies knows what is expected of them.<sup>63</sup> This is the principle of legality.<sup>64</sup>

### 3 COVID-19 regulations and their impact on human rights and the rule of law

While the Constitution provides for the derogation of rights in a constitutional state of emergency, it has been established that Eswatini's response measures were taken in terms of the DMA and the COVID-19 regulations, rather than the constitutional derogation clause. It may be argued, therefore, that the state's duty to ensure the protection of constitutional rights continues even during the national emergency.<sup>65</sup> It is accepted, however, that the nature of COVID-19 has called for a response that will at times result in a legitimate limitation or infringement of rights. These limitations and infringements must nevertheless be permitted by just laws; they must be absolutely necessary, and must be proportionate to the aims of the response.<sup>66</sup> As provided in section 37 of the Constitution:

60 Statement of the Prime Minister of Eswatini, 23 June 2020.

61 Secs 29(3) and 29(7) of the DMA.

62 T Maseko & L Abdulrauf 'Constitutional implementation: The Swaziland experience' in CM Fombad (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016) 72.

63 As above.

64 See art 15 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

65 Eswatini is also bound by its ICCPR obligations including art 4 of ICCPR; the Convention Against Torture (CAT); Human Rights Committee General Comment 29. Eswatini is expected to abide by the non-binding Paris Minimum Standards of Human Rights Norms.

66 International Institute for Democracy and Electoral Assistance 'The impact of the COVID-19 crisis on constitutionalism and the rule of law in Anglophone countries of Central and West Africa' (2020) Analytical Report, Webinar 28 May 8, DOI: <https://doi.org/10.31752/idea.2020.30> (accessed 1 July 2020).

Nothing contained in or done under the authority of a law shall be held to be inconsistent with or in contravention of any provision of this chapter (the Bill of Rights) to the extent that the law authorises the taking, during any period of public emergency, of measures that are reasonably justifiable for dealing with the situation that exists during that period.

The outbreak of COVID-19 in Eswatini brought about a crisis and a threat to human life. One may therefore argue that the response measures limiting or restricting the enjoyment of rights came with new exceptions and variations from normalcy in the realm of human rights protection, and that fact raises a debate as to whether or not the measures that have an impact on human rights may be permissible in terms of the Constitution. Indeed, the supremacy of the Constitution has been tested under these circumstances because statutory law and regulations, which are the *lex specialis* in this context, are being used as the primary response framework, without constitutional guidelines. While it is true that the response measures have assisted Eswatini's attempts to delay the spread of the virus, the COVID-19 regulations imposed a plethora of limitations on the enjoyment of rights and, in an unequal society that is Eswatini,<sup>67</sup> those limitations have had disparate effects on the population.

The freedom to move freely throughout Eswatini guaranteed by the Constitution<sup>68</sup> is subject to limitations on the grounds of public health and safety.<sup>69</sup> Restrictions on the movement of persons are also sanctioned by the DMA.<sup>70</sup> The regulations banned non-essential travel between towns and cities, loitering in public spaces, and also restricted the use of public transportation by requiring a one metre distance between passengers.<sup>71</sup> The regulations specifically banned non-essential cross-border travel and provided for a systematic tracking of all cross-border travellers.<sup>72</sup> Although the main objective of the travel restriction was to break the chain of infections, issues arose with regard to the lack of clarity on what constituted essential travel, as well as issues pertaining to inconsistencies in the enforcement of these regulatory restrictions. It was officially communicated and widely accepted that internal travel to seek medical attention, to procure household necessities such as food, and travel by emergency response officials were classified as essential and were permitted subject to travellers obtaining written permits from their local

67 T Debyl 'Culture and resistance in Swaziland' in C Bassett & M Clarke (eds) *Postcolonial struggles for a democratic Southern Africa* (2016) 4.

68 Sec 26 Constitution of Eswatini.

69 Secs 26(3)(a) & (b) Constitution of Eswatini.

70 Sec 32 DMA.

71 Regulation 15.

72 Regulation 16.

government authorities (chiefs, *Tindvuna tetinkhundla* or *Bucopho*).<sup>73</sup> However, there was no standard form or criteria for the local authorities to assess and grant these permits. Hence, there were many reported incidents of unjustified refusals to grant permits, as well as many cases of dubious permits.<sup>74</sup> Even though the restrictions on the freedom of movement may have been proportionate to the aims of the response, they may not have been 'non-discriminatory'.<sup>75</sup> For example, the Commissioner of Police unilaterally decided to suspend these permits through a press statement<sup>76</sup> wherein the commissioner reasoned that he had noted an influx of permits issued by traditional local authorities and that those rendered the regulations useless. The commissioner proceeded to impose a curfew on the Manzini city, which in itself constituted a highly-punitive measure. Although the commissioner has the authority to make guidelines to combat COVID-19 within police stations, posts and holding cells,<sup>77</sup> the DMA does not empower the commissioner to make national regulations, but only to enforce regulations. More concerning is the fact that neither the regulations nor the Act provide for any safeguard against the abuse of the regulations. Not only did the commissioner's unilateral imposition of a curfew and new regulations constitute an usurpation of executive authority, but it also had an considerable impact on the lives of people whose livelihoods relied on their ability to move from place to place, such as hawkers.

The border lockdowns have also severely affected populations that live along the borders of South Africa and Eswatini in areas such as Pongola/Piet-Retief/Mshololo; Matsamo/Schoemansdal; and Mozambique-Eswatini. The use of informal crossing points has been reported to be on the rise due to the dependence of those persons on education, services and opportunities obtainable from either side, as well as their dependence on illicit trade in alcohol and cigarettes – which for some has become a source of earning a living.<sup>78</sup> Before COVID-19, these informal crossings operated without tough restrictions from border-line defence forces, and therefore people have established their livelihoods on those premises. However, since the lockdown the defence forces on both sides have strictly manned informal crossings, and turned people back. Although it

73 Local headmen and members of the Chief's Council.

74 K Khumalo & Z Dlamini 'NATCOM suspends travel permits from chiefs' *Eswatini Observer* 30 April 2020.

75 UN 'COVID-19 and human rights: We are all in this together' April 2020 4, [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf) (accessed 2 June 2020).

76 M Msweli 'Epicentre Manzini under lockdown' *Times of Eswatini* 27 April 2020 1.

77 Sec 2 & 32(1) DMA.

78 See F Musoni *Border jumping and migration control in Southern Africa* (2020) 81-82.

is illegal to cross at the informal crossings, it may be argued that the prevailing strict enforcement has created an injustice in terms of which established livelihoods are now being disrupted, and this disruption will foreseeably have a long-term negative impact on the socio-economic rights of the communities living in the affected areas.

One of the consequences of internal travel restrictions during the initial period of the lockdown was that some people were unable to access healthcare services. This particularly affected those taking anti-retroviral treatment, and patients with existing chronic illnesses such as tuberculosis. The declaration advised the public not to visit medical healthcare facilities unless it was an emergency, and the problems associated with travel permits, as explained above, exacerbated people's inability to access health care. The Constitution of Eswatini categorises the right to health as a non-justiciable directive principle of state policy. It provides that '[t]he state shall take all practical measures to ensure the provision of basic health care services to the population'.<sup>79</sup> Eswatini is also party to a number of international conventions that guarantee the right to the highest attainable standards of health.<sup>80</sup> A major objective of the national COVID-19 response framework was to preserve the health of all persons in Eswatini by preventing the transmission of the virus and minimising the loss of lives.<sup>81</sup> The regulations therefore properly placed a legal duty on all persons to prevent the transmission<sup>82</sup> and a compulsory obligation to notify the Ministry of Health of any person exhibiting COVID-19 symptoms.<sup>83</sup> They further provided for the isolation of symptomatic persons and those that have been in contact with a symptomatic person.<sup>84</sup> These provisions clearly protected the right to health and also recognised its inextricable link to the right to life.<sup>85</sup> It was disturbing, therefore, that a 54 year-old COVID-19 patient who refused treatment and refused to be admitted into a health facility was never compelled into isolation and to undergo the prescribed treatment procedures, but opted to self-isolate. In an undocumented statement, the Minister of Health informed the nation that this patient had exercised their constitutional right to refuse medication. The Minister stated:

79 Sec 60(8) Constitution of Eswatini.

80 Universal Declaration of Human Rights 1948 art 25; International Convention on Economic, Social and Cultural Rights 1966 (ICESCR) art 12.

81 See sec 15 of the Constitution of Eswatini read together with the DMA and the COVID-19 Regulations.

82 Regulation 3.

83 Regulations 4 & 7.

84 Regulations 8-12.

85 See Office of the United Nations High Commissioner for Human Rights The Rights to Health Fact Sheet 31. See also IE Koch *Human rights as indivisible rights: The protection of socio-economic demands under the European Convention on Human Rights* (2009) 60.

We respect people's rights as enshrined in the Constitution to say no to certain types of treatment if they do not need them. But we need to emphasise that we are dealing with a contagious disease here, so we appeal to the nation to please comply.

It is submitted that the Ministry of Health and the COVID-19 enforcement officers have a legal duty in terms of section 12 of the COVID-19 regulations to isolate or quarantine a patient and to administer treatment to them. The regulation proceeds to specify that such a person 'shall not refuse consent' to an enforcement officer.<sup>86</sup> The right to refuse treatment therefore is unfounded in this context. There are exceptions to the guarantee of the right to life in terms of the Constitution, and those exceptions do not cover this type of situation.<sup>87</sup> In this case, the Ministry of Health and the NDMA had a duty to act as per the dictates of section 12 in order to prevent the possible loss of her life and the lives of those that would have been in contact with this patient.

Health workers have also been affected by the state's inability to provide sufficient personal protective equipment (PPE). The Nurses' Union had planned to institute an action against the government complaining about the non-availability of PPEs, and the overcrowding of hospitals.<sup>88</sup> Although at the time of writing this article the matter had not yet been enrolled in our courts, the continued inadequate availability of PPEs has placed the lives of health workers and those of patients at risk. There have also been reports of government hospitals' incapacity to handle COVID-19, dental services, and reports of persons being denied health care because of the lack of PPE.<sup>89</sup> It is probable that the deterioration in healthcare delivery and access to health care might lead to more illness and a greater loss of lives.

The right to work and the right to pursue a lawful trade or business<sup>90</sup> have also been affected by the lockdown. The halting of the operation of various businesses has created unemployment, especially within the manufacturing and hospitality industries,

86 Regulation 12(2).

87 In sec 15(4) it is provided that a person may not enjoy the right to life in the event they are convicted and sentenced to death or when medical treatment poses a serious risk to their health (in the context of abortion).

88 J Richardson 'eSwatini: Nurses' union to take government to court over handling of the COVID-19 crisis' *The South African* 29 April 2020 1.

89 JL Pigoga et al 'Evaluating capacity at three government referral hospital emergency units in the Kingdom of Eswatini using the WHO Hospital Emergency Unit Assessment Tool' *BMC Emerg Med* (2020) 33.

90 Sec 32 Constitution of Eswatini.

and has resulted in food insecurity for many families.<sup>91</sup> This has exacerbated the already high poverty levels in Eswatini. It is observed that the COVID-19 regulations do not equally effect all people: While persons in the middle and higher classes who enjoy secure employment were being inconvenienced by the lockdown, the lower class who are financially insecure and the destitute people of Eswatini have been hit hard. Food aid and cash relief grants or social welfare grants have been provided to deserving communities by the National Disaster Management Agency. However, not all deserving persons have received the grants. In the Manzini region, for example, more than 700 persons registered for the grants, but by 21 June 2020 only 20 people are reported to have received the funds.<sup>92</sup> The criterion for destitute persons that qualify for the grants has also not been made clear to the public upon registration.<sup>93</sup> It appears as if the determination is made at the discretion of politicians in each constituency.

The lockdown has also had a significant impact on non-essential businesses and their employees. The closure of businesses has resulted in very low or no profit for some businesses, such that they have failed to pay salaries. The courts have been robust in their response against such rights violations, as demonstrated in the case of *Vilakati & Others v Du Toit Holdings (Pty) Limited t/a The Specialists*.<sup>94</sup> In this matter the applicants had filed an urgent application before the Industrial Court contending that they were paid drastically reduced salaries for the month of May 2020 without any prior consultation as required under the Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic Notice. They applied for an order setting aside the employer's decision to reduce salaries, declaring this unlawful. The Court held that, even though the reasons behind salary cuts were understandable in the circumstances, the decision to reduce salaries was procedurally unfair and it constituted an unfair labour practice as it was taken without genuine and effective consultation. Hence, it was set aside.

91 See United Nations Food and Agriculture Organisation 'Crop prospects and food situation' *Quarterly Global Report* 2 July 2020 23; and the IPC Eswatini Acute Food Insecurity Analysis June-September 2020, <https://reliefweb.int/report/eswatini/eswatini-acute-food-insecurity-situation-june-september-2020-and-projection-october> (accessed 30 September 2020).

92 Z Dlamini 'Pay back the money or face arrest – NDMA CEO' *Eswatini Observer* 21 June 2020 2.

93 See TG Nhaphi & J Dhemba 'The conundrum of old age and COVID-19 responses in Eswatini and Zimbabwe' *International Social Work* (2020) 1-5.

94 *Vilakati & Others v Du Toit Holdings (Pty) Limited t/a The Specialists* (34/2020) [2020] SZIC 92.



The regulations have also provided for the protection of consumers by outlawing price increases.<sup>95</sup> This was an attempt by the state to exercise its responsibility to protect<sup>96</sup> in terms of which the Ministry of Commerce and Trade, as well as the Eswatini Competition Commission, have actively guarded against the over-inflation of prices during the period of the national emergency.

As stated earlier, the emergency declaration announced the immediate closure of schools and tertiary institutions and, subsequently, the regulations affirmed the position.<sup>97</sup> The closure invariably disrupted the right to education.<sup>98</sup> At the initial stages of the lockdown there were no plans in place for home-based or remote learning. The difficulties in asserting the right to education in Eswatini were highlighted early in *Swaziland National Ex-Mine-Workers Association v The Ministry of Education & Others*,<sup>99</sup> where it was found that the state's obligation to provide free education is subject to the availability of resources. The Ministry of Education in July 2020 instituted distance-learning programmes that were run through national media houses that have country-wide coverage. Many primary, secondary and high school learners have been able to receive lessons via radio, the national newspaper, and these programmes are made available at all tinkhundla<sup>100</sup> centres around the country.<sup>101</sup> However, it is true that a minority of children without access to radio's and newspapers, and those who cannot travel to their local inkhundla continue to face difficulties and are thereby excluded. Private schools and tertiary institutions around the country are implementing online learning systems. However, similar issues of inaccessibility and exclusion are experienced by students who are without the required devices or data, as well as students living in remote areas where the mobile network coverage is poor. When the state announced the staggered re-opening of learning institutions in July, only students in the final years of study were to return to their institutions subject to the institution having been certified as ready to receive learners in compliance with the World Health Organisation (WHO) guidelines adopted by the state which require screening, social distancing, the availability of sanitary equipment, isolation centres,

95 Regulations 17-20.

96 S Seck & D Chimisso Dos Santos 'Exports, credits sovereign debt and human rights' in I Bantekas & C Lumina (eds) *Sovereign debt and human rights* (2019) 90.

97 Regulation 27.

98 Sec 29 Constitution of Eswatini.

99 (2168/09) [2010] SZHC 258.

100 These are local government centres located at political constituencies across the country.

101 [www.globalpartnership.org](http://www.globalpartnership.org) (accessed 5 August 2020).

the training of all persons, and so forth.<sup>102</sup> However, at the time of reopening there were, and are still, safety concerns among both learners and teachers as the pandemic remains on the rise in Eswatini. In many schools there is a visible lack of the COVID-19 institutional checklist requirements. The difficulties surrounding the closure and reopening of schools have been highlighted in the case of *Swaziland National Association of Teachers v Ministry of Education and Training, the Attorney General & Others*.<sup>103</sup> In this case the teachers' association instituted an action against the government of Eswatini based on section 18 of the Occupational Health and Safety Act<sup>104</sup> calling for the state to provide PPE for teachers so as to protect the teachers' and learners' right to life. The teachers argued that COVID-19 in their context was an occupational disease<sup>105</sup> to which they risked exposure. Although the matter has not yet been finalised, it can be anticipated that the decision and the modalities of reopening schools will have a long-term impact for both teachers' and learners' rights right to health and the right to education. The competing interests between the health and safety of persons in learning institutions can be balanced through strengthening the already-existing systems of remote learning as well as providing affordable access to the required facilities such as teaching and learning tools as well as recognising internet access as a human right.<sup>106</sup>

The lockdown regulations have also limited the number of persons at gatherings and, initially, a total closure of places of worship.<sup>107</sup> Although the constitutional freedom to practise a religion and the freedom to worship in community with others<sup>108</sup> are guaranteed, they remain subject to legal limitations on the grounds of public health and safety.<sup>109</sup> In the wake of 9 June 2020 the Minister of Home Affairs released a highly-controversial statement in which she announced that places of worship may reopen with a maximum of 70 per cent attendance capacity, but following a public outrage, the Minister retracted the statement in a subsequent press statement to state that the maximum capacity is 70 people instead of 70 per cent, which also shocked the entire nation as it became clear that the

102 Government of Eswatini Ministry of Education and Training *Schools guidelines on prevention of COVID-19* (2020).

103 Industrial Court Case 163/2020.

104 Act 9 of 2001.

105 The WHO defines an occupational disease as 'any disease contracted primarily as a result of an exposure to risk factors arising from work activity'.

106 See A Peacock *Human rights and the digital divide* (2019) 1.

107 Ministry of Home Affairs press statement 'COVID-19: Suspension of services' 31 March 2020, which banned all church gatherings and limited the number of people to no more than 20 at other types of gatherings. The number was later on increased to 50.

108 Sec 23 Constitution of Eswatini.

109 Sec 23(4) Constitution of Eswatini.

Minister exercised her own discretion and in an arbitrary manner.<sup>110</sup> This not only caused legal uncertainty, but also made the rationale for reopening churches questionable. Numerous other back and forth regulations have occurred with minimal institutional checks and balances, which negates the rule of law. Subsequent guidelines on gatherings,<sup>111</sup> for example, allowed for churches to apply for permits to operate at 30 per cent holding capacity of the place of worship, which was later revised<sup>112</sup> to allow for 20 people, a one-hour service, a total ban on persons over the age of 50 and on children below 15 years of age. These legal uncertainties have the potential to cause people to lose faith in the legal system in the long term, and to lose faith in the ability of the state to protect them or act in their best interests.

As a customary cultural and religious practice, many people of Eswatini have traditionally conducted burials as a community affair, as many African communities do.<sup>113</sup> Families, extended family, friends, colleagues and the church have normally congregated to bury their own, following rituals tied to their ethnicities, cultures and religious beliefs. The practice of such rituals and customs had come to be known as burial rights.<sup>114</sup> The state has amended the COVID-19 regulations<sup>115</sup> and provided guidelines on the management of the body of a person who has died from 'acute respiratory illness'.<sup>116</sup> The new guidelines have fundamentally altered the traditional manner in which the body of such a deceased person is handled, the persons permitted to handle and transport the body, the management of the home and at the burial ground.<sup>117</sup> Although these regulations are in line with international or WHO guidelines, they have resulted in burials becoming a private affair. It is foreseeable that in the long term the burial customs and practices of the people of Eswatini may be lost.

There have been notable incidents of unequal enforcement of lockdown Regulation 25 which restricts the number of persons in public gatherings. Media reports have covered numerous government events in which gatherings exceeded the maximum number. These

110 Z Dlamini 'Cabinet pressured, retracts changes announced by Minister' *Eswatini Observer* 10 June 2020.

111 Ministry of Home Affairs Variation of Gatherings Directive, 8 July 2020.

112 Ministry of Home Affairs Variation of Gatherings Directive, 24 July 2020.

113 M Okechukwu Izunwa 'Customary right to befitting burial: A jurisprudential appraisal of four Nigerian cultures' (2016) 12 *Ogirisí: A New Journal of African Studies* 122.

114 *Shabangu-Zwane v Shabangu & Others* (85/2019) [2020] SZSC 1.

115 The Coronavirus (COVID-19) (Amendment) Regulations 2020.

116 As above.

117 As above.

events were generally state-led COVID-19 sensitisation workshops at tinkhundla centres. However, the police have ignored these, and have rather been stricter in policing church gatherings<sup>118</sup> and social events. The problem is that there is a general failure to hold those in authority accountable for their wrongful conduct. Law enforcement officials, that is, the police, the army and correctional services officers, have not been impartial in the enforcement of regulations. Their use of force must ideally be reasonable and proportionate to the aims of the regulations. The regulations allow for the engagement of the military and other disciplined forces to aid the enforcement of the regulations,<sup>119</sup> but there are no special mechanisms in place to ensure that there is no unjustified use of force or inhumane treatment of persons. Although Eswatini is a state party to the 1984 Convention against Torture (CAT), legislations such as the Public Order Act of 2017 and the Police and Public Order Act 1963 provide that a gathering that is deemed by a police officer (above the rank of sergeant) to be a direct and immediate threat to public order or safety may be dispersed, if necessary by force necessary to secure the dispersal of the gathering, and shall be proportionate to the circumstances of the case and the object to be attained. It is unfortunate that in carrying out their mandate, law enforcement officials on many occasions have found to have failed the proportionality test.<sup>120</sup> The unfortunate situation is that Eswatini does not have a specialised independent police oversight body with a mandate that may be similar to that of the South African Independent Police Investigative Directorate. The lack of efficient checks and balances over law enforcement authorities makes it difficult to avoid the excessive use of power.

The impact of the COVID-19 regulations has been felt strongly within the alcohol production and distribution value chain. Alcohol consumption has been identified as one of the leading factors that can increase the chances of the spread of the Coronavirus, and therefore has been banned in Eswatini.<sup>121</sup> This was done in terms of Regulation 21 and 32 which give the Prime Minister and cabinet ministers the power to issue guidelines to address, prevent and

118 Four pastors were arrested in April for violating Regulation 25 and sentenced to 12 months' imprisonment or 2000 fine which they paid. See S Khumalo 'Four pastors arrested for defying COVID-19 Regulations' *Times of Eswatini* 7 April 2020 1.

119 Regulation 32(3). The powers conferred upon the Minister by subsection (1) may be exercised also by a police officer, a member of the army or a member of the fire emergency service and any other authorised person.

120 See eg *Matsebula v The National Commissioner of Police & Another* (542/2017) [2020] SZHC 35; *Rose Magameni Lukhele (nee Fakudze) v The Commissioner of Police & Another* (1088/2012) [2015] SZHC 170.

121 This was contained in an official statement by the Prime Minister of Eswatini, Mr Ambrose Mandvulo Dlamini, on 1 July 2020 when he announced the immediate ban on the production and distribution of alcohol.

combat the spread. The sale of alcohol was banned in April, reopened on 15 June, and once again closed on 1 July, in response to a continued rise in COVID-19 cases between 15 and 30 June. The state has taken the position that alcohol consumption results in irresponsible behaviour and that it was necessary to prevent the health system being overwhelmed by alcohol-related cases.<sup>122</sup> The Swaziland National Liquor Association, through a Communiqué to the Prime Minister, challenged the regulations, arguing that the ban had been instituted arbitrarily and irrationally, without consultation of industry stakeholders, and that as such it went against the right to administrative justice.<sup>123</sup> They argued that the ban violated sections 59 and 60(3) of the Constitution.<sup>124</sup> They also argued that the closure of wholesale and distribution would negatively impact all workers employed within the value chain. Although no legal action has been taken in respect of this matter, it is worth noting that the right to administrative justice and the right to continue a lawful trade or business do not fall under the derogations that were prohibited in section 38 of the Constitution. Therefore, the sale and distribution of liquor could be lawfully restricted. The total ban remained in force up to the end of September 2020, and it has undoubtedly decimated the industry and those dependent on it.<sup>125</sup> It may also be observed that the basis of the liquor ban may not have been due to the fault of traders and distributors in violating COVID-19 regulations but, instead, the justification for the ban was attributable to the fault of the end users. It is submitted, therefore, that the total ban brought about an injustice in that the rights and livelihoods of persons within the entire value chain were infringed because of the non-compliance of end users.

#### 4 Balancing response measures and public health objectives with human rights

In view of the magnitude of the impact of the COVID-19 pandemic on people's lives, it is important that the state's response measures should continuously endeavour to mitigate the impact on human

122 As above.

123 Sec 33 Constitution of Eswatini.

124 Sec 59(1) provides that '[t]he state shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Swaziland and to provide adequate means of livelihood and suitable employment and public assistance to the needy'. Sec 60(3) states that '[t]he state shall give the highest priority to the enactment of legislation for economic empowerment of citizens'.

125 N' Mhlongo 'Eswatini beverages effects 10% salary cuts' *Times of Eswatini* 17 August 2020.

rights. The right to health itself is inextricably linked to other human rights. This is because one can only enjoy all other rights when they are in 'a state of complete physical and mental health, and not merely the absence of disease or infirmity'.<sup>126</sup> The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.<sup>127</sup>

It is important to consider the socio-economic and political context within which the COVID-19 response has been framed. In the past decade the government of Eswatini has experienced major financial challenges that have been caused by a variety of factors including the rising government debt,<sup>128</sup> poor governance and corruption.<sup>129</sup> COVID-19 hits the state at a time when the new government elected in 2018 was at the early stages of implementing an economic recovery plan.<sup>130</sup> The state has had limited resources to deploy in the COVID-19 response. In the haste of responding, some laws and policies that are meant to benefit the people of Eswatini and that are justifiable on public health grounds have limited people's rights in a manner that has had extremely negative consequences for some. While it is true that this pandemic has brought about a novel crisis warranting extraordinary response measures aimed at saving lives, those very same measures inadvertently affect people's means of survival and people's ability to enjoy other human rights.

It remains important, therefore, that the manner in which emergency powers are exercised must take into consideration the need to mitigate potential rights violations. It is also important that the response measures adopted by the state must be informed by both scientific and public health objectives as well as considerations of the degrees to which persons, especially those vulnerable, will be affected. In Eswatini there are persons who reside in poverty-stricken communities with inadequate access to basic amenities such as water, people living on an inadequate minimum wage and those without employment security. Many men and women employed in informal jobs have no recourse to social assistance. The lockdown,

126 Art 1 of the WHO Constitution.

127 The ESCR Committee has affirmed this in General Comment 14.

128 The World Bank Group 'An analysis of issues shaping Africa's economic future: Assessing the economic impact of COVID-19 and policy responses in sub-Saharan Africa' (2020) 21 *Africa's Pulse* 97.

129 KR Hope 'The corruption problem in Swaziland: Consequences and some aspects of policy to combat it' (2016) 32 *Journal of Developing Societies* 130.

130 National Development Plan 2019-2022 (NDP); Strategic Roadmap 2019-2022 (SRM).

which halted the operations of industries and firms, has caused a stoppage of income for many families, which also means that their financial ability to access food has been severely compromised. It is not clear how the people of Eswatini will recover or at least have some resilience to get past this situation.

It is recommended that COVID-19 responses must not create discrimination but must be inclusive of all. Human rights must be used to address the human rights implications of the state's health policy and legislation.<sup>131</sup> It is clear now more than ever that the government has a responsibility to guarantee and ensure the realisation of economic and social rights. It is recommended that budget reallocations must cater for social assistance targeted to the most vulnerable, and the availability of the three basic needs, namely, water, food and decent housing. A rights-based response will ensure that long-term programmes enable future rebuilding after the emergency has subsided. The state must during this time also escalate protection to front-line health workers.

Emergency powers must not be used arbitrarily. Incidents of heavy-handed law enforcement must be discouraged as they affect the faith of the people in the state. The principles of legality and the rule of law must continue to prevail. Because COVID-19 is a global threat, Eswatini must strengthen its efforts to abide by WHO standards, and to adopt responses taking into account the transnational impact of the virus. Eswatini must not be left behind in the international cooperation and assistance initiatives, such as pursuing research in the development of a vaccine, providing national statistics and the required data globally.

## 5 Conclusion

This article has demonstrated how a public health emergency has required the adoption and use of extraordinary powers which, while enabling the state to respond to the crisis, have created opportunities for excess power. It has been demonstrated how the Disaster Management Act gives the Deputy Prime Minister's office free reign over the development of regulations, and cabinet ministers the authority to make specialised regulations, which are subject to weak restraints. This state of affairs in our law has resulted in incidents of manifest misuse of power. It has also shown how, in the context of the pandemic, there is a continuing need for the state to abide by the

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<sup>131</sup> RM Essawy 'The WHO: The guardian of human rights during pandemics' (2020) *European Journal of International Law* 18.

rule of law by acting within the confines of just laws and acting with caution so that the extraordinary powers are not abused. It remains ever important for the state not to dismantle the human rights gains that had been realised before the crisis. The regulations in force must therefore be revised so that, while the state promotes the right to life and health, the response measures are less intrusive or disruptive to people's livelihoods, are aligned or balanced with other rights, are responsive to the evolving situation, and are promulgated with the much-required clarity and certainty.

In as much as the pandemic has demonstrated more clearly that no right is absolute, the exceptional legislative measures through which the response has been formulated and implemented should not be allowed to become the new normal. Many of the COVID-19 response measures that have had a negative impact on rights are by their nature temporary, and must be removed in the long term so that the human rights protective norms remain in force.