AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: MJ Nkhata & AW Mwenifumbo 'Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi' (2020) 20 *African Human Rights Law Journal* 512-539
http://dx.doi.org/10.17159/1996-2096/2020/v20n2a7

# Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi

*Mwiza Jo Nkhata**
Extraordinary Professor, Free State Centre for Human Rights, University of the Free State South Africa; Principal Legal Officer, African Court on Human and Peoples' Rights
https://orcid.org/0000-0002-7695-5503

*Anganile Willie Mwenifumbo***
Human Rights Officer, United Nations Office of the High Commissioner for Human Rights (OHCHR)
https://orcid.org/0000-0002-7836-8636

**Summary:** *Malawi's COVID-19 response has evinced a measure of fluidity. This has been manifested by, among other things, the adoption of two sets of subsidiary legislation on COVID-19, the judicial intervention striking down proposed lockdown measures and the constant change in the institutional arrangements meant to spearhead the country's response. A key challenge that the response has had to contend with is the balance between saving lives and preserving livelihoods. This article analyses Malawi's response to COVID-19 and establishes that aside*

* LLB (Hons) (Malawi) PGCHE LLM LLD (Pretoria); mwizankhata@gmail.com. The views expressed in this article are entirely those of the author and do not represent those of the African Union.

** LLB (Hons) (Malawi) LLM (Pretoria); kyalanganile@gmail.com. The views expressed in this article are entirely those of the author and do not represent those of the United Nations.

*from its rather haphazard nature, serious questions of legality have been implicated by the measures adopted. Specifically in relation to lives and livelihoods, the articles focuses on the right to economic activity, to highlight some of the challenges that Malawi's response generated to the preservation of livelihoods. The human rights implications of some of the measures adopted are also briefly analysed.*

**Key words**: *livelihoods; state of disaster; promulgation of subsidiary legislation; limitation of rights; right to economic activity; socio-economic rights*

## 1 Introduction

While the World Health Organisation (WHO) declared COVID-19 a pandemic on 11 March 2020, Malawi only announced its first COVID-19 cases on 2 April 2020. Malawi thus became one of the last six African countries to formally announce COVID-19 cases.[1] It is not clear whether there were no cases prior to the announcement of the first three cases or if the lack of cases was due to inadequate testing. Ironically, at the time when Malawi's official count remained at zero, all its neighbouring countries continued to report cases. Given the rather porous borders with its neighbours – Mozambique, Tanzania and Zambia – and the intense cross-border movement, the possibility that infected persons were criss-crossing the borders during the time when no official cases were being registered remains real.[2]

On 20 March 2020, 12 days before the announcement of the first cases, Malawi declared a state of disaster on account of COVID-19.[3] The early declaration of a state of disaster, coupled with patent testing challenges, lends credence to the speculation that COVID-19 cases existed even before the official announcement of the first cases.

At the core of Malawi's legal response to the COVID-19 pandemic are two statutes, the Public Health Act[4] and the Disaster Preparedness

1 See 'These six countries in Africa have no reported cases of Coronavirus', https://www.trtworld.com/africa/these-six-countries-in-africa-have-no-reported-cases-of-coronavirus-34999 (accessed 9 July 2020).
2 G Munthali & W Xuelian 'COVID 19 outbreak on Malawi perspective', https://www.researchgate.net/publication/340425842_Covid-19_Outbreak_on_Malawi_Perspective (accessed 15 July 2020).
3 R Kondowe 'A country with no Coronavirus cases has declared a national disaster and shut schools, large gatherings', https://qz.com/africa/1824465/coronavirus-malawi-with-no-cases-declares-national-disaster/ (accessed 9 July 2020).
4 Ch 34:01 Laws of Malawi.

and Relief Act (DPRA).[5] Equally important are the Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (Corona Virus Rules I) and the Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules 2020 (Corona Virus Rules II).

Bearing in mind this legal framework, this article analyses the legality and human rights implications of some of the measures put in place to prevent, contain and manage COVID-19. Among other things, the article argues that it was unreasonable and unjustifiable to propose strict national lockdown measures at a time when confirmed cases were concentrated in one geographic location. The article also argues that containing the spread of COVID-19 necessitates the consideration of multiple policy factors and the striking of a proper balance between protecting lives and livelihoods. Central to this argument is the understanding that it is possible to protect both lives and livelihoods without undermining human rights. The article also demonstrates that socio-economic realities, and the absence of a comprehensive social security system in Malawi, compound the challenges related to the imposition of strict lockdown measures. The article, therefore, posits that Malawi's post-COVID-19 recovery policies and plans should focus on addressing existing socio-economic inequalities and building a more egalitarian society.

The article is divided into five parts with this background being the first. The second part presents the legal framework for dealing with public health emergencies in Malawi. The third part explores Malawi's response to COVID-19. This part chronicles all the major developments, including the judicial interventions, in the COVID-19 response. The legality of some of the measures implemented is also analysed in this part. The fourth part of the article scrutinises the human rights implications of the COVID-19 response for livelihoods. In illustrating these implications, it focuses on the impact of the COVID-19 response measures on the 'right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi'.[6] It also explores how these measures relate to the exercise of other rights such as the right to fair and safe labour practices; freedom of movement; the right to food, health and housing; and the right to education. The last part concludes the article.

5 Ch 33:05 Laws of Malawi.
6 Sec 29 of the Constitution.

## 2 Stuck in the past? The legal framework for dealing with public health emergencies in Malawi

The legal framework for dealing with public health emergencies in Malawi is undergirded by the Public Health Act and the DPRA. Although other statutes also have relevance, these two remain pivotal.[7] As will be demonstrated shortly, all statutory standards dealing with public health emergencies must also be considered in light of the provisions of the Constitution of the Republic of Malawi (Constitution). This part of the article canvasses some elements of Malawi's legal framework for the management of COVID-19 as a public health emergency, starting with the Constitution.

The Constitution is the supreme law of Malawi. It stipulates that 'any act of government or any law that is inconsistent with [its provisions] shall, to the extent of such inconsistency, be invalid'.[8] In section 4 the Constitution confirms that it 'binds all executive, legislative and judicial organs of the state at all levels of government and all the peoples of Malawi are entitled to the equal protection of [the] Constitution, and laws made under it'. Given the supremacy of the Constitution, all COVID-19 response measures must pass the test of constitutional validity, which applies at two levels. First, any such measures should not contravene the procedures established by the Constitution. Second, such measures must substantively not undermine any entitlements conferred by the Constitution. This article's assessment of Malawi's COVID-19 response touches on the scheme for the limitation of rights under the Constitution, the procedure for the declaration of a state of emergency and the requirements for promulgating subsidiary legislation. These areas have featured prominently in the COVID-19 response and, therefore, deserve further analysis and discussion.

The Constitution has recognised that rights may be limited.[9] Under section 44(1), the Constitution stipulates that any limitation of a constitutional right is valid only if it is prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society. These four conditions are cumulative and to be valid any limitation must fulfil all. Further, under section 44(2), any law prescribing a limitation on a right must

7 Other statutes include the Immigration Act, Cap 15:03, Laws of Malawi and the Local Government Act, Cap 22:01, Laws of Malawi.
8 Sec 5 of the Constitution.
9 For an insightful analysis of the limitation and derogation of rights in Malawi, see DM Chirwa 'Upholding the sanctity of rights: A principled approach to limitations and derogations under the Malawian Constitution' (2007) 1 *Malawi Law Journal* 3.

not negate the essential content of the right and must be of general application. The Constitution has also granted the High Court the power to invalidate any law that contravenes it.[10]

The procedure for the declaration of a state of emergency is contained in section 45 of the Constitution. The President can declare a state of emergency only upon the approval of the Defence and Security Committee of the National Assembly. The Constitution circumscribes the exercise of emergency powers and limits their invocation only in times of war, threat of war, civil war or widespread natural disaster.[11] While derogation from some rights is permissible during a state of emergency, some rights are non-derogable even during a state of emergency, namely, the right to life, the right to equality and recognition before the law and the prohibition of torture and cruel, inhuman or degrading treatment or punishment.[12] The Constitution in section 44(1) emphasises that any derogation from rights must be consistent with Malawi's obligations under international law. As a safety valve, the Constitution has granted the High Court the power to entertain challenges to the validity of the declaration of a state of emergency, any extension thereof, and any action taken thereunder.[13] Notably, no state of emergency has ever been declared since the adoption of the Constitution in 1994 and, thus, the High Court's power of review has yet to be tested.

The authority to adopt subsidiary legislation is contained in section 58 of the Constitution. This section provides for the delegation of powers to enact subsidiary legislation to the executive and the judiciary in accordance with specific Acts of Parliament. It restricts this power by prohibiting the delegation of legislative powers, which would 'substantially and significantly affect the fundamental rights and freedoms recognised' in the Constitution. Section 58 is an exception to section 48 of the Constitution, which vests all legislative powers in the National Assembly. For this reason, its terms must be construed strictly in order to ensure the constitutionality of subsidiary legislation.

Although enacted in 1948, the Public Health Act remains the primary law for dealing with the preservation of public health. Section 11 of the Public Health Act provides a list of 'notifiable diseases'[14] –

10 *Jumbe & Mvula v Attorney-General* Constitutional Cases 1 and 2 of 2005 (unreported) and *Republic v Chinthiti & Others* (1997) 1 Malawi Law Reports 59.
11 Sec 45(3)(c) of the Constitution.
12 Sec 45(2) of the Constitution.
13 Sec 45(6) of the Constitution.
14 Among the diseases listed are the following: anthrax; blackwater fever; cerebro-spinal meningitis or cerebro-spinal fever; cholera; diphtheria or membranous

not surprisingly, COVID-19 is not listed. However, section 12 permits the Minister, by a notice published in the *Gazette*, to declare as a notifiable disease any infectious disease not mentioned in section 11. Part IV of the Act deals with the prevention and suppression of infectious diseases. This Part also prescribes the powers of medical officers (section 16); the cleansing and disinfection of premises (section 17); the provision of means of disinfection (section 19); the provision for conveyance of infected persons (section 20); and the provision for removal to hospital of persons suffering from infectious diseases where there is a risk of infection (section 21). Part V of the Act deals with formidable epidemic or endemic diseases and a list of such diseases is provided in section 30.[15] Under section 31 the Minister may, if it appears that a part of Malawi is threatened by any formidable epidemic or endemic disease, declare any such part an infected area. The Minister may then make rules pertaining to, among other things, the speedy interment of the dead; the removal of corpses; the regulation of persons entering or leaving the infected area; and the registration of persons residing there.

The Public Health Act is antiquated and many of its provisions are obsolete and of dubious practicability. It was drafted to deal with nineteenth century infectious diseases, many of which were caused by poor sanitation, water, housing and sewerage. It largely focuses on communicable diseases, thereby excluding non-communicable diseases such as cardiovascular diseases and diabetes.[16] Also excluded from the Act's definition of infectious diseases are viral haemorrhagic fevers such as Ebola and SARS. The Act is oblivious to current trends on the prevention, treatment and eradication of various diseases and overemphasises mandatory vaccination. Although a process to review the Act was initiated, this seems to have stalled.[17] The outdated nature of this Act has created complications as far as the COVID-19 response is concerned.

The other statute of relevance is the DPRA of 1991. It provides for the coordination and implementation of measures to alleviate the effects of disaster and the establishment of an institutional

croup; dysentery (bacillary); encephalitis lethargica; enteric or typhoid fever (including paratyphoid); erysipelas; hydrophobia or human rabies; influenza; measles; plague; acute primary pneumonia; and yellow fever.

15 The diseases listed include smallpox; plague; cholera; yellow fever; cerebro-spinal meningitis; and any other disease which the Minister may by notice declare to be a formidable epidemic or endemic disease.

16 E Sambala et al 'A review of the Public Health Act in Malawi: A case for reform and consolidation', https://www.preprints.org/manuscript/202004.0017/v1 (accessed 15 July 2020).

17 See F Mkandawire 'Public Health Act, outdated', https://www.manaonline.gov.mw/index.php/national/health/item/9249-public-health-act-outdated-madise (accessed 15 July 2020).

framework for disaster management, the declaration of a state of disaster and the creation and management of a disaster appeal fund. A disaster under the DPRA includes a 'plague or epidemic disease that threatens life or wellbeing of the community'.[18] The coordination of disaster preparedness and disaster relief activities rests with the Commissioner for Disaster Preparedness and Relief established under section 3 of the Act. Part III of the Act deals with, among others, the establishment, composition and functions of the National Disaster Preparedness and Relief Committee.

Under Section 32(1) of the DPRA, if 'any disaster is of such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected by the disaster in any area within Malawi or that circumstances are likely to arise making such measures necessary', the President may declare a state of disaster. The declaration can be made through a notice in the *Gazette*. If it is not made through a notice in the *Gazette*, the President must expeditiously arrange for the declaration to appear in the *Gazette*. Once pronounced, the declaration remains in force for three months unless withdrawn earlier. The President may extend it by a notice published in the *Gazette* for further periods of three months at a time.[19] Once a state of disaster is declared, the primary responsibility for managing the response vests in the Minister responsible for disaster preparedness and relief, the National Disaster Preparedness and Relief Committee and the Commissioner for Disaster Preparedness and Relief.[20] The DPRA terms the response to a disaster 'civil protection'.[21] It is the Minister's responsibility to communicate the declaration of a state of disaster to the National Assembly.[22]

The DPRA predates the Constitution. Nonetheless, constitutional supremacy requires any interpretation of the DPRA to uphold the Constitution. As a corollary, any provisions of the DPRA that contradict the Constitution are invalid by operation of section 5 of the Constitution.

Two developments are worth noting in relation to the DPRA. First, section 47 envisages that the responsible Minister would 'make regulations providing for all matters which, in his opinion, are necessary or expedient for giving effect' to the DPRA. Although

18 Sec 2 DPRA.
19 Sec 32(2) DPRA.
20 Secs 3, 4, 5 & 13 DPRA.
21 Sec 2 DPRA.
22 Sec 33 DPRA.

the DPRA has been in force for almost 30 years, no regulations have been adopted. This has made the Act less attuned to responding to the minute details relating to its implementation. Second, in 2014 a review of the DPRA led to the development of a draft replacement Bill.[23] However, the National Assembly is yet to consider this Bill. As a result, the country is left with a law that has largely been overtaken by time and events, thereby complicating national responses to emerging challenges.

Having sketched the legal framework for dealing with public health emergencies, the next part of the article chronicles Malawi's response to COVID-19.

## 3 Malawi's response to the COVID-19 pandemic: A tale of fits and starts?

On 7 March 2020 the former President of Malawi, Peter Mutharika, established a Special Cabinet Committee on Corona Virus (Committee).[24] The Committee's mandate included receiving updates about COVID-19 and relaying these to the public; recommending proactive measures to prevent the occurrence and spread of COVID-19; facilitating oversight for cross-government initiatives on COVID-19; and facilitating the implementation of activities aimed at mitigating the impact of COVID-19 on the socio-economic development of the country. On 28 April 2020 the President reshuffled the Committee, allegedly to make it more inclusive, and decided to co-opt the then leader of the opposition in Parliament, among others.[25] The Committee was also renamed the Presidential Task Force on Corona Virus (Task Force).

On 20 March 2020 Mutharika, ostensibly acting under section 32 of the DPRA, declared a state of disaster for a period of three months.[26] He also announced several measures, including the redeployment of health personnel to all border posts to continue the screening and surveillance of persons; the suspension of the hosting of international meetings and banning civil servants from attending both regional and international meetings; advising the general public to avoid

23 See https://www.unisdr.org/files/globalplatform/malawi[1].pdf (accessed 20 July 2020).
24 See https://www.manaonline.gov.mw/index.php/sports/item/13723-statement-on-coronavirus-outbreakcovid-19 (accessed 7 July 2020).
25 Z Chilunga 'Mutharika shakes up Malawi's COVID 19 Committee: Opposition leader Lowe drafted in' 28 April 2020, https://allafrica.com/stories/202004290084.html (accessed 7 July 2020).
26 See https://malawi.un.org/en/46778-declaration-state-disaster-malawi-president-peter-mutharika (accessed 7 July 2020).

non-essential travel to affected countries; the restriction of public gatherings to fewer than 100 people; and the closure of all schools and colleges by 23 March 2020.[27]

Although the President announced these measures on 20 March 2020, the declaration of a state of disaster was only gazetted on 3 April 2020.[28] This triggered debate regarding the President's failure to comply with section 32 of the DPRA. A correct interpretation of this section, however, reveals that the President has latitude to declare a state of disaster and arrange for gazetting later. As a result, the failure to immediately gazette the declaration did not affect its legality.

On 1 April 2020 the Minister of Health, acting under the Public Health Act, declared COVID-19 a formidable disease. As pointed out earlier, under section 30 of the Public Health Act the Minister is empowered to declare a formidable epidemic or endemic disease by notice. The scheme under the Public Health Act envisages three steps for dealing with a formidable epidemic or endemic disease. First, the Minister is empowered to declare a formidable epidemic or endemic disease. Second, under section 31 the Minister can pronounce as an affected area any part of Malawi threatened by a formidable epidemic or endemic disease. Third, once an affected area has been declared such, the Minister may make rules, among others, for the interment of the dead or the provision of medical aid or accommodation. Thereafter, it becomes the responsibility of the applicable local authority to coordinate the response to the formidable epidemic or endemic disease.

On 9 April 2020 the Minister of Health, acting under section 31 of the Public Health Act, promulgated the Corona Virus Rules I. Subsequently, on 14 April 2020 the Minister of Health announced a planned national lockdown from 18 April 2020 to 9 May 2020 to be governed by the Corona Virus Rules I.[29] Some of the proposed measures included the requirement that all essential services be obtained within the locality of one's residence or, if not, a person would be required to first obtain a permit from the local government authority or any delegated person; a stay-at-home order except for those listed under Rule 11(3)(a)(i) of the Corona Virus Rules I; the closure of all central markets; and the suspension of all non-essential

27 As above.
28 J Chauluka 'Government backs Peter Mutharika's declaration' 7 April 2020, https://times.mw/government-backs-peter-mutharikas-declaration/ (accessed 15 July 2020).
29 See https://malawi.un.org/en/46796-speech-minister-healths-additional-measures-covid-19, 14 April 2020 (accessed 7 July 2020).

businesses or services.[30] It was also announced that a breach of these measures was an offence punishable by a fine. As explained later in the article, the planned lockdown never materialised since the High Court issued an order barring its implementation.

It also is important to note that on 23 June 2020 Malawi elected a new President, Lazarus Chakwera, following the nullification of the May 2019 presidential election. Meanwhile, during the intervening period when Malawians went to the polls, the state of disaster declared on 20 March 2020 expired on 20 June 2020 and no extension was announced. In a press statement issued on 14 July 2020 the Secretary to the President and Cabinet announced the creation of a COVID-19 office within the Office of the President and Cabinet as 'the governance structure for the management of the COVID 19 pandemic compris[ing] a reconstituted Presidential Task Force and a national secretariat'. [31] The press statement neither specified the law under which the President acted in creating this office nor provided any direction on the intention of the government to renew the expired state of disaster despite a surge in COVID-19 cases.

On 10 July 2020 the Task Force announced several measures to contain the spread of COVID-19. The introduction of new measures, it was stated, was spurred by the escalation of COVID-19 infections and deaths.[32] Strangely, these measures were based on the Corona Virus Rules I despite a prevailing High Court order that suspended their implementation. It is also striking that these measures mirrored the very measures that were part of the halted lockdown. In yet another twist of events, on 13 July 2020 the Attorney-General wrote to the Chairperson of the Task Force advising him to reverse the decision to implement the Corona Virus Rules I since the High Court had suspended these.[33] This effectively halted the second attempt at a lockdown.

On 7 August 2020 the government adopted the Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules, 2020 (Corona Virus Rules II). These Rules revoked the Corona Virus Rules I and created a new COVID-19 response framework. The Corona Virus Rules II were adopted under

30 As above.
31 See W Maingo 'Government reorganises COVID-19 governance structure' 15 July 2020, https://allafrica.com/stories/202007160124.html (accessed 17 July 2020).
32 See https://www.nyasatimes.com/attorney-general-advises-against-enforcing-stricter-covid-19-measures/ (accessed 17 July 2020).
33 As above.

section 31 as read with section 29 of the Public Health Act. Although the Corona Virus Rules II retain some features from the predecessor rules, they marked a new approach to dealing with COVID-19. For example, they make no provision for a lockdown and expand the list of essential services. They also contain detailed provisions for the management of suspected COVID-19 patients and deaths, the management of education institutions and guidelines for managing workplaces.

Overall, it is clear that since the COVID-19 pandemic is an evolving public health emergency, further developments are to be expected. Alongside the developments outlined above, the courts were also involved in assessing the various aspects of the COVID-19 response measures. In the next part, the article explores the judicial intervention in Malawi's COVID-19 response.

### 3.1 Judicial intervention in Malawi's COVID-19 response

Thus far, three High Court cases have dealt with Malawi's response to COVID-19. First, on 6 April 2020 the High Court delivered its ruling in *The State (on application of Lin Xiaoxiao, Liu Zhigin, Wang Xia, Tian Hngze, Huang Xinwang, Zheng Zhouyou, Zheng Yourong, Jia Huaxing, Lin Shiling and Lin Tingrong) and The Director-General, Immigration Services and Attorney-General (Ex Parte Lin Xiaoxiao & Others)*.[34] In this case the applicants sought an order preventing the defendants from either expelling or preventing them from entering Malawi. The applicants, all Chinese nationals, challenged the decision of the Director-General, Immigration Services, refusing their entry into Malawi on 18 March 2020 notwithstanding the fact that they had visa approval letters. The applicants also challenged the decision to book them on a flight out of Malawi subsequent to the entry refusal. Notably, at the time an interim order was granted to prevent the defendants from expelling the applicants, only four of the ten applicants remained in the country as the others had already been expelled.

This case commenced as a judicial review application, which follows a two-stage process.[35] The first stage is the application for permission to move for judicial review and the second is the substantive judicial review application. The Court is yet to pronounce itself in respect of the substantive judicial review application. In the

34 Judicial Review Case 19 of 2020, HC LL (unreported), https://malawilii.org/mw/judgment/high-court-general-division/2020/5 (accessed 18 August 2020).
35 AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 765-767.

course of delivering its interim ruling, however, the Court flagged several issues regarding the handling of national disasters and states of emergency in the context of Malawi's COVID-19 response. For example, the Court highlighted the fact that the President only has the power to do that which he or she has been expressly authorised by the Constitution. In relation to a derogation from constitutional rights and the declaration of a state of emergency, the Court questioned whether the COVID-19 pandemic could be classified a 'widespread natural disaster' as envisaged by section 45(3)(c) of the Constitution. Although the Court did not provide a definitive answer to this question, it conceded that it is normal for a country to face a situation requiring emergency powers. The Court emphasised, however, that emergency powers must be exercised within the framework of the law.

In the end the Court confirmed its interlocutory order preventing the defendants from expelling the applicants pending the hearing of the substantive judicial review. Although the Court raised many issues about the legality of the COVID-19 response, being a ruling on an interlocutory application, no answers were provided to the questions raised. Procedurally, the judgment after the substantive hearing of the judicial review application will provide answers to all the questions raised by the application. The Court's ruling, however, was such that it hinted at procedural flaws in Malawi's COVID-19 response.

Second, on 7 April 2020 the High Court delivered another ruling, in yet another application for judicial review, challenging measures taken under the DPRA in response to COVID-19, in *The State and The President of the Republic of Malawi & Others Ex Parte Steven Mponda & Others (Ex Parte Steven Mponda & Others)*.[36] The applicants were students from the University of Malawi who approached the Court after the announcement to close the University as a precautionary measure against COVID-19. The applicants challenged the constitutionality of the presidential declaration of a state of disaster for allegedly violating their right to education. They argued that while the President had issued various directives during the declaration of a state of disaster, the DPRA did not empower him to do so. The applicants further argued that section 29(a) of the Public Health

36 Judicial Review 13 of 2020, HC, ZA, https://malawilii.org/system/files/judgment/high-court-general-division/2020/6/Ex%20parte%20Steven%20Mponda%20et%20al%20%20President%20and%20UNIMA%20-%20COVID%2C%20school%20closure%2C%20JR%20leave.pdf.pdf (accessed 18 August 2020).

Act was unconstitutional as it empowers a Minister to derogate constitutional rights.[37]

The Court dismissed the applicants' request for judicial review. It reasoned that the President's declaration of 20 March 2020 was that of a state of disaster and not a state of emergency. The Court held that while the state of disaster did affect the applicants' right to education, any limitation thus inflicted was justifiable under section 44 of the Constitution. Interestingly, the Court highlighted, albeit *obiter*, the need to 'have a comprehensive discussion on the important matter of the law on states of disaster *vis-à-vis* states of emergency'. This concession, it is contended, speaks to problems of congruence between the Constitution and the DPRA, partly attributable to the fact that the DPRA predates the Constitution. Notably, in both *Ex Parte Lin Xiaoxiao & Others* and *Ex Parte Steven Mponda & Others*, the High Court suggested that there is a lack of clarity in terms of the distinction between a state of disaster and a state of emergency.

The last case is *The State (on application of Esther Cecilia Kathumba, Monica Chang'anamuno, Human Rights Defenders Coalition, Church and Society Programme of the Livingstonia Synod of the Church of Central African Presbyterian and Prophet David F Mbewe) and The President of Malawi, Ministry of the Malawi Government Responsible for Health, Inspector-General of the Malawi Police Service, Commander of the Malawi Defence Force, Attorney-General, Malawi Council of Churches* (*Ex Parte Esther Kathumba & Others*).[38] The applicants challenged the proposed lockdown discussed earlier, and the decision to promulgate the Corona Virus Rules I. Specifically, the applicants questioned four decisions: first, the decision to declare a lockdown without declaring a state of emergency; second, the decision to declare a lockdown without first providing for social security interventions for marginalised groups; third, the decision to promulgate the Corona Virus Rules I and to implement these without parliamentary oversight; and, finally, the decision to promulgate and implement measures under the Corona Virus Rules I in excess of the powers under the parent Act.

37 Sec 29(a) provides: 'The Minister may make Rules applicable to all infectious diseases or only to such infectious diseases as may be specified therein, regarding the following matters: (a) the closing of any school or any place of public entertainment, where deemed necessary for the purpose of preventing the spread of any infectious disease, and the regulation and restriction of school attendance.'

38 Judicial Review Cause 22 of 2020, HC, LL, https://malawilii.org/mw/judgment/high-court-general-division/2020/8 (accessed 18 August 2020).

This case was also a judicial review application. When the application was lodged on 17 April 2020, the Court granted permission for the applicants to file for judicial review and simultaneously issued a seven-day interlocutory injunction prohibiting the implementation of the lockdown. During a subsequent hearing, to determine whether to sustain or discharge the interlocutory injunction, the Court noted that the application raised several critical issues, which required further judicial interrogation, for example, whether the Minister of Health could impose a lockdown without declaring a state of emergency. The Court thus extended the interlocutory injunction granted on 17 April 2020 until the determination of the substantive judicial review proceedings or a further order of the Court. Effectively, this ruling indefinitely suspended the implementation of the planned lockdown.

The judgment on the substantive judicial review application, in *Ex Parte Esther Kathumba & Others,* was delivered on 4 September 2020.[39] By the time of the judgment, however, the Corona Virus Rules I, which were at the centre of the challenge, had been repealed. The Court nevertheless felt that the matter was not moot given the likelihood of repeated and continuous violations of rights under the Corona Virus Rules II. In its judgment the Court faulted the Corona Virus Rules I on several fronts. The essence of the Court's findings was that the provisions of the Corona Virus Rules I exceeded the authority provided by the parent Act, namely, the Public Health Act. The Court specifically highlighted the absence of justification for a lockdown under the Public Health Act. It also found that the Corona Virus Rules I unjustifiably purported to make provision for matters that fell under the authority of local councils. In its concluding remarks the Court made a raft of recommendations to the government for dealing with COVID-19. These included the need to pass a new law on public health with comprehensive provisions for dealing with pandemics; that any future lockdown should be preceded by cogent research and consultations; and that there should be civic and health education at all levels of society about the COVID-19 pandemic.

The tale being told by the developments discussed above reveals a yet to be crystallised approach to dealing with COVID-19. As a prelude to the discussion on the human rights implications of the measures adopted to deal with COVID-19, the next part assesses the legality of some of the interventions adopted.

39 The matter having been certified as constitutional, it was heard by a panel of three judges pursuant to sec 9 of the Courts Act, Cap 3:02 Laws of Malawi.

### 3.2 Skirting around the borders of (il)legality?

Malawi's response to COVID-19 reveals a tension between using the law to regulate conduct during a pandemic and the need to take action to protect lives. This, however, need not be the case. It is possible to both protect lives and to act within the law. As a manifestation of the tension, the discussion in this part focuses on the manner in which the subsidiary legislation on COVID-19 was enacted and the difference between a state of disaster and a state of emergency, and their respective implications.

As noted earlier, the power to pass delegated legislation, and the limits thereto, are prescribed in section 58 of the Constitution. The judgment in *Ex Parte Esther Kathumba & Others* confirmed that the Corona Virus Rules I had not been lawfully promulgated. The Minister of Health exceeded the authority conferred on him by section 31 of the Public Health Act in promulgating these Rules. It must be recalled that section 58 of the Constitution requires that any subsidiary legislation must be 'within the specification and for the purpose laid out' in the parent Act. This edict finds further fortification in section 21(1)(b) of the General Interpretation Act, which states that 'no subsidiary legislation shall be inconsistent with the provisions of any Act and any such legislation shall be of no effect to the extent of such inconsistency'.

The sequence of events leading up to the promulgation of the Corona Virus Rules I is illuminative of the challenges encountered. The President declared a state of disaster on 20 March 2020, which is a power under section 32 of the DPRA. On 1 April 2020 the Minister of Health declared COVID-19 a formidable disease under section 30 of the Public Health Act.[40] The declaration of a state of disaster was gazetted on 3 April 2020 and the Corona Virus Rules I were adopted on 8 April 2020. The inter-relationship between the Public Health Act and the DPRA suggests that once the President had declared a state of disaster, the COVID-19 response no longer was simply a matter of dealing with a formidable disease under the Public Health Act but also a question of 'civil protection' under the DPRA. Jurisdiction for managing civil protection primarily vests in the Minister of Disaster Preparedness and Relief. In the circumstances, it is arguable that at the time the Minister of Health promulgated the Corona Virus Rules I, he did not have the authority to do so since the same was vested in the Minister of Disaster Preparedness and Relief. Additionally, since

40 See J Mhango 'Speech by Minister of Health on additional measures on COVID-19' 14 April 2020, https://malawi.un.org/en/46796-speech-minister-healths-additional-measures-covid-19 (accessed 19 August 2020).

the Corona Virus Rules I followed from the declaration of a state of disaster, the correct statute for their promulgation was the DPRA and not the Public Health Act. Overall, it is clear that the promulgation of the Corona Virus Rules I was laced with illegality, especially for failing to follow the correct procedure.

Even assuming that the Corona Virus Rules I were properly promulgated, additional challenges arise in considering their relationship to the parent Act.[41] For example, the Corona Virus Rules I in Rule 2 designated an 'enforcement officer' as part of the response for dealing with COVID-19 as a formidable disease. This approach ignored the fact that a structure for dealing with a formidable disease already existed under the Public Health Act, which empowers local authorities to deal with exigencies arising from a formidable disease. The structure under the Public Health Act does not recognise an enforcement officer as created under the Corona Virus Rules I. In this sense, therefore, the Corona Virus Rules I contradicted the Public Health Act, making them invalid to that extent. It is clear, therefore, that the relationship between the measures prescribed in the Corona Virus Rules 1 and the DPRA was not well thought out.

The Corona Virus Rules II were adopted under sections 31 as read with section 29 of the Public Health Act. Combining sections 31 and 29 was a creative way of widening the ambit for the adoption of subsidiary legislation. Although there is a significant difference in approach between the two sets of Corona Virus Rules, some elements of the old Rules have been carried over, including the designation of an 'enforcement officer'. The later Rules even broaden the category of individuals who can be designated as 'enforcement officers'. The legal complexities in relation to the position of 'enforcement officers', therefore, persist. Additionally, there are inconsistencies with regard to the definition of a gathering. For instance, while Rule 2 prohibits any gathering of more than ten people whether 'wholly or partially in open air or building', it appears that markets (open air or in buildings) remain open unless the Minister of Health under Rule 17 declares a particular location a restricted area. Furthermore, under Rule 7(2)(b), a community health worker is under an obligation to ensure that no more than ten people attend the burial of a person who dies from COVID-19. However, Rule 11(4) provides that not more than 50 people may attend the funeral of a person who dies of any

41 In a letter dated 20 April 2020 sent to the Office of the President and Cabinet, the Malawi Law Society comprehensively reviewed the Corona Virus Rules I and concluded that they were invalid and illegal since they attempted to usurp the provisions of the parent legislation and also because they, in parts, undermined fundamental rights (copy of letter on file with authors).

cause other than COVID-19. This distinction is irrational because if the Rules assume that it is possible to ensure social distancing during a funeral attended by 50 people, then it should be possible to do so at any funeral irrespective of whether or not the deceased died of COVID-19. The same logic should apply to any gathering other than a funeral. Furthermore, under Rule 17, hospitality and recreational events are subjected to restrictions provided for in the sixth schedule of the Rules. While Rule 17 lists sporting facilities as subject to the restrictions in the sixth schedule, the latter only prescribes restrictions applicable to bars, restaurants and food outlets and does not provide guidance on the management of sporting facilities. The logic for this arrangement is unclear.

It should also be noted that two expressions have been widely used in relation to COVID-19 in Malawi. These are 'state of disaster' and 'state of emergency', which regimes are governed by the DPRA and the Constitution, respectively. The DPRA in section 2 defines a disaster as

> an occurrence (whether natural, accidental or otherwise) on a large scale which has caused or is causing or is threatening to cause –
>
> (a) death or destruction of persons, animals or plants;
> (b) disruption, pollution or scarcity of essential supplies;
> (c) disruption of essential services;
> (d) influx of refugees into or out of Malawi;
> (e) plague or epidemic of disease that threatens the life or well-being of the community.

Under section 32 of the DPRA, therefore, a state of disaster is any disaster, as defined under section 2, of 'such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected'. However, under section 45(3) of the Constitution, the President can declare a state of emergency only 'in times of war, threat of war, civil war or widespread natural disaster'.[42]

The High Court in *Ex Parte Steven Mponda & Others* held that the COVID-19 pandemic fell under the DPRA as it does not qualify as a natural disaster within the context of section 45(3) of the Constitution. *Ex Parte Steven Mponda & Others* reveals the potential contradictions in the usage of the terminologies 'state of disaster' and 'state of emergency'. Although no definite judicial clarification as yet exists, it is clear that a 'state of disaster' is different from a 'state of emergency' and not simply because the DPRA predates the Constitution. Under the Constitution, the conditions necessitating the pronouncement of

42 Sec 45(3)(c) of the Constitution.

a state of emergency are more circumscribed than those for a state of disaster under the DPRA. The Constitution is also clear on which rights may be derogated from subsequent to the pronouncement of a state of emergency. Legally, a state of disaster is different from a state of emergency because the former takes place under a state of normalcy where it is impermissible to derogate or suspend the exercise of rights although certain human rights may be limited.[43] However, President Mutharika's declaration of a state of disaster, especially considering the breadth of the measures announced, namely, closure of all schools, banning all public gatherings of more than 100 people and deploying the security services to enforce these measures, legitimately raised concern as to whether Malawi fell under a state of emergency or a state of disaster. The litigation that subsequently challenged the proposed lockdown highlighted the challenges of differentiating between a state of disaster and a state of emergency. As alluded to earlier, the difference between the two is substantive and not simply nomenclative. For example, the powers given to the government during a state of emergency are more far-reaching than during a state of disaster. In practice, however, the lack of clarity creates the risk that a crafty government may impose a state of emergency surreptitiously even when the situation only necessitates the declaration of a state of disaster. Additionally, there is also the danger that the government could implement measures applicable only during a state of emergency even when what has been declared is a state of disaster.

The legal status of the various bodies charged with spearheading the COVID-19 response also is not very clear. The failure to refer to the specific law(s) under which such bodies have been established adds to the confusion. For example, former President Mutharika first created the Committee to coordinate the COVID-19 response, which he subsequently reconstituted and renamed the Task Force. After the change of government, an office within the Office of the President and Cabinet was created to coordinate the response. All these efforts do not correspond with any structures under either the DPRA or the Public Health Act. While the Constitution vests extensive powers in the presidency, it is important to bear in mind that the President only has such power to act within the law. There is, therefore, a fundamental question of legal propriety in respect of the various COVID-19 response bodies.

43 *Freedom Front Plus v The President of South Africa*, Case 22939/2020 (High Court, Gauteng Division) para 63, http://www.saflii.org/za/cases/ZAGPPHC/2020/266.pdfhttp://www.saflii.org/za/cases/ZAGPPHC/2020/266.pdf (accessed 21 July 2020).

The emerging picture suggests that overall, limited attention has been paid to constitutional and legal imperatives in framing the COVID-19 response. Given the dangers and public health challenges of COVID-19, the rather chaotic response is surprising. The answer to this, arguably, lies in the recent political dynamics in Malawi. The presidential declaration of a state of disaster came on the heels of a High Court judgment delivered on 3 February 2020, which nullified the May 2019 presidential election and ordered a fresh presidential election within 150 days.[44] As a result, all political parties started posturing for the fresh election and proceeded on this path when the Supreme Court of Appeal affirmed the order to hold a fresh presidential election.[45] It is arguable, therefore, that all major political actors singularly focused on the presidential elections such that the COVID-19 pandemic became a tangential issue.[46] The fresh election created uncertainty about the presidency which, arguably, contributed to a failure to meaningfully coordinate the COVID-19 response. Not surprisingly, while the number of COVID-19 infections was relatively low between February 2020 – when the presidential election was annulled – and June 2020, when a new President was elected, subsequent to the change of government, the infection rates spiked. This spike, arguably, was simply due to the fact that national attention had finally returned to dealing with the pandemic and that testing for COVID-19 had improved. In the same vein, the Corona Virus Rules II should be seen as an attempt by the new government to shape its own COVID-19 response, thereby marking a break with the efforts by the predecessor regime.

## 4 Livelihoods and the human rights implications of Malawi's response to COVID-19

The COVID-19 pandemic is a threat to human rights but it also highlights the interdependent character of human rights and their utility in addressing the pandemic in a holistic manner that is respectful of human dignity.[47] Integrating human rights into COVID-19 responses is critical to meaningfully addressing any emerging public

44 *Chilima & Chakwera v Mutharika & Electoral Commission*, Constitutional Reference 1 of 2019, HC, LL (unreported).

45 *Mutharika & Electoral Commission v Chilima & Chakwera*, Constitutional Appeal 1 of 2020, MSCA (unreported).

46 See, eg L Masina 'Malawi politicians ignore COVID-19 measures for elections', https://www.voanews.com/africa/malawi-politicians-ignore-covid-19-measures-elections (accessed 17 September 2020).

47 A Spadaro 'COVID-19: Testing the limits of human rights' (2020) 11 *European Journal of Risk Regulation* 317 318.

health and other concerns.[48] It is also important to reflect on the human rights implications of COVID-19 responses since these of necessity affect the enjoyment of several rights.[49] A focus on human rights allows states to adopt responses that maximise benefits for the populace while minimising any negative effects.

The discussion below focuses on the impact of the Corona Virus Rules I and II on the right to economic activity as enshrined in the Constitution and its implications for other human rights that affect people's livelihoods, such as the right to food, work, health, housing and education. Central to the exercise of the right to an economic activity is the freedom of movement, which the proposed lockdown measures sought to significantly curtail. In this context, the argument advanced in *Ex Parte Esther Kathumba & Others* regarding the lack of efforts to provide for social security measures to cushion people's livelihoods during the lockdown is germane to the analysis regarding the government's responsibility to ensure the protection of the core content of the affected rights.

International human rights law permits the limitation of human rights.[50] Limitations to civil and political rights are permissible only if they are provided by law, necessary, proportional and non-discriminatory.[51] With respect to socio-economic rights, any limitations must be necessary, reasonable and proportionate.[52] However, the core content of socio-economic rights prescribes the minimalist standard below which states cannot fall in their efforts to progressively realise these rights.[53] The proportionality test requires the adoption of the least intrusive measures if they can achieve the same objective being pursued.[54] These prescriptions from international human rights law conform to the general limitation

48 WHO 'Addressing human rights as key to the COVID-19 response' 21 April 2020, https://www.who.int/publications/i/item/addressing-human-rights-as-key-to-the-covid-19-response (accessed 16 July 2020).

49 United Nations 'COVID-19 and human rights: We are all in this together' April 2020, https://unsdg.un.org/resources/covid-19-and-human-rights-we-are-all-together (accessed 16 July 2020).

50 Certain human rights cannot be limited under any circumstances, such as rights related to the prohibition of torture, slavery and on retroactive criminal laws. See United Nations Civil and Political Rights: The Human Rights Committee, Fact Sheet 15 (Rev1), https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (accessed 18 July 2020).

51 United Nations (n 50).

52 ESCR Committee 'Statement on the Coronavirus disease (COVID-19) pandemic and economic, social and cultural rights', https://undocs.org/E/C.12/2020/1 (accessed 18 July 2020).

53 L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 742 753.

54 United Nations 'The Siracusa principles on the limitation and derogation of provisions in the International Covenant on Civil and Political Rights', https://undocs.org/pdf?symbol=en/E/CN.4/1985/4 (accessed 18 July 2020).

scheme in the Constitution, which provides that no restrictions on any rights and freedoms may be placed 'other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society'.[55]

According to Section 29 of the Constitution, '[e]very person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi'. Section 29 protects a compound right which subdivides into three interrelated but separable rights, namely, the right to pursue a livelihood; the right to engage in economic activity; and the right to work.[56] Following this typology, the right to pursue a livelihood, at a minimum, imposes a duty on the state not to interfere with the means by which people earn a living.[57] Economic activity embraces work and employment, but it also extends to business ventures, enterprises and various trades through which people eke out their living.[58] The duty on the state is not to interfere with people's legitimate economic activities and the means by which they undertake those activities. The right to work is a species of economic activity and a means of earning a living. Under the Constitution, the right to work has both vertical and horizontal applicability.[59] The state has the duty to promote, protect and respect the right to work, to facilitate its realisation including the realisation of rights that are dependent on the right to work, such as the right to education, housing, food and health.

While COVID-19 primarily is a public health challenge, the crisis also has economic and social dimensions. The various response measures have revealed the socio-economic inequalities and other vulnerabilities in society.[60] The lives over livelihoods debate best captures the quagmire engendered by the crisis, which offers very dire options in an impoverished country such as Malawi.

A review of the COVID-19 response measures and the Corona Virus Rules I reveals the extent of the tension between Malawi's response and the right to economic activity, which is a pivotal vector right that facilitates the enjoyment of numerous other rights. The totality of the proposed lockdown measures, for example, drastically reduced economic activity making it difficult for people to pursue livelihoods. It is clear from the response that the state's primary objective was

55 Sec 44(1) of the Constitution.
56 DM Chirwa *Human rights under the Malawian Constitution* (2011) 304.
57 *Du Chisiza v Minister of Education and Culture* [1993] 16(1) Malawi Law Reports 81.
58 Chirwa (n 56) 305.
59 Chirwa 310-311.
60 United Nations (n 49).

to curb the spread of COVID-19. It seems to have been forgotten, however, that any measures limiting the exercise of the right to economic activity must be necessary to combat the public health crisis posed by COVID-19 and be reasonable as well as proportionate to the pursued objective. The constant starting point is to pursue the least intrusive measures that attain the same objective, in this case, containing and managing the spread of COVID-19.

The Corona Virus Rules I prescribed measures that, among other things, would necessitate the closure of all central markets and the suspension of all non-essential businesses or services, and the closure of informal trading activities, entertainment places and restaurants, fast food outlets, cafes and coffee shops except for the purpose of providing take-away services.[61] While these measures are necessary to curb the spread of COVID-19, they fail to pass the proportionality test on different fronts.[62] First, at the time of their promulgation, there were only three recorded cases in one district, yet the geographical scope of the measures was not circumscribed.[63] The government opted to limit the exercise of the right to economic activity of everyone, including the closure of all schools irrespective of their location. Critical to efforts to reduce the spread of COVID-19 are measures that restrict the movement of people. There was no effort to restrict movement in the district(s) with positive cases and to subject some of the proposed lockdown measures to a specific geographic location. This is also the case with the Corona Virus Rules II which, although introducing less restrictive measures, subject every geographic location declared a 'restricted area' to the same restrictions without adopting a precisely segregated approach to the imposition of restrictions.[64] It is also not insignificant that the term 'restricted area' does not appear in the Public Health Act, which instead employs the term 'infected area'. The difference in terminology creates uncertainty as to whether the Rules and the Act are referring to the same thing.

Second, the list of essential services allowed to operate excluded equally important sectors that could have operated without

61 Rule 11, Corona Virus Rules I.

62 The proportionality test as applied in Malawian constitutional law requires, among others, that any measure limiting a right be rationally connected to the objective sought to be achieved and to impair as little as possible the right at issue; see *Mayeso Gwanda v The State* Constitutional Cause 5 of 2015 HC PR, https://malawilii.org/mw/judgment/high-court-general-division/2017/23 (accessed 16 September 2020).

63 The first three cases were all recorded in Lilongwe District and were connected to one family; see https://medicalxpress.com/news/2020-04-malawi-coronavirus-cases.html (accessed 24 July 2020).

64 Rule 17, Corona Virus Rules II.

stymieing the objective of containing the spread of COVID-19. These included players in agricultural production that are critical for food security.[65] Instead, the measures unreasonably subjected everyone to a stay-at-home order irrespective of whether or not the nature of their work exposed them to COVID-19. Arguably, the least intrusive measure at this stage was to promote social distancing, mask wearing, handwashing and other health protocols recommended by the WHO to attain the same protective function instead of sledgehammer restrictions. On this score, the Corona Virus Rules II are a clear improvement and correctly include among essential services 'agricultural produce and products supplies, farming supplies'.[66]

The potential impact of the lockdown measures on rights and livelihoods should also be understood in the context of Malawi's socio-economic situation. Poverty is widespread with 51 and 70 per cent of Malawians living below the national and international poverty line respectively.[67] The closure of enterprises and workplaces could have led to lay-offs, and informal traders who live off daily earnings would not be able to sustain their livelihoods. The overall supply chain disruptions due to the lockdown measures would further stifle the struggling industries, thereby pushing livelihoods into serious precarity. Economic activity enables people to access other rights such as that to food, housing, health care and education which are intrinsically linked to people's everyday survival. For instance, the closure of schools not only affects the earning capacity of workers at educational institutions due to the risk of lay-offs, but also a large proportion of children who benefit from the school feeding programme.[68] In South Africa, for example, the High Court drew an ineluctable link between the right to education and the school feeding programme, which threatened to deprive around nine million children from a daily nutritious meal due to COVID-19.[69] The Court ordered the Department of Basic Education to ensure that the National School Nutrition Programme continued to provide a daily

65 United Nations Secretary-General Policy Brief 'The Impact of COVID-19 on Food Security and Nutrition', https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_covid_impact_on_food_security.pdf (accessed 18 July 2020).

66 Seventh Schedule, Corona Virus Rules II.

67 World Bank, http://documents1.worldbank.org/curated/en/723781545072859945/pdf/malawi-scd-final-board-12-7-2018-12122018-636804216425880639.pdf, December 2018 (accessed 18 July 2020).

68 See K Nanchukwa & B Mphande 'Piloting a sustainable model for home-grown school meals in Malawi' May 2015, https://www.ennonline.net/nex/5/pilothomegrownmealmalawi (accessed 18 July 2020).

69 *Equal Education & Others v Minister of Basic Education & Others* (High Court, Gauteng Division) Case 22588/2020, https://equaleducation.org.za/wp-content/uploads/2020/07/Judgment-Equal-Education-and-others-v-Minister-of-Basic-Education-and-others-22588-2020.pdf (accessed 18 July 2020).

meal to all qualifying learners whether or not they were attending school.[70]

While the Corona Virus Rules II impose less restrictive measures than the predecessor Rules, the closure of all educational institutions across the country is unreasonable. For example, geographic locations that are remotely located and have limited intercourse with urban areas are subjected to the same restrictions as locations that have recorded COVID-19 cases. Rationality would demand the adoption of guidelines and restrictions applicable to specific geographic locations to ensure the continuation of education and normal economic activities. It is in this regard that Rule 17 of the Corona Virus Rules II may become handy as it would permit the Minister to declare specific locations restricted areas and impose necessary restrictions, including the movement of people therein, while opening up unaffected districts or locations to education and other activities.

Stay-at-home orders are just as fatal as COVID-19 itself for low wage earners, particularly those in the informal sector of employment. Inflexible lockdown measures also create a high risk of non-compliance that would lead to the uncontrollable spread of COVID-19 as people pursue all means possible to sustain livelihoods. As a recent study has established, most Malawians are more afraid of hunger than of contracting COVID-19, which is indicative of the likelihood of non-compliance if the state introduced strict measures that ground economic activity to a halt.[71] Equally, the strict enforcement of a hard lockdown would push a large population into extreme poverty and starvation, which the state cannot support considering the limited coverage of its social security programmes.[72]

It is important that both a special social safety net programme, and the tempering of strict lockdown measures to designate certain sectors as essential service providers, should guide policy decisions on the COVID-19 response. This is because social safety net measures can only cover a small proportion of poor people due to fiscal constraints,[73] which makes it imperative to introduce specific

70 As above.
71 See C Adriaanse 'Over 80% of Malawians fear hunger more than COVID-19, study shows' 2 June 2020, https://www.iol.co.za/news/africa/over-80-of-malawians-fear-hunger-more-than-covid-19-study-shows-48878410 (accessed 17 July 2020).
72 See Government of Malawi et al 'Social protection in Malawi: Summary of the assessment based national dialogue report', https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-lusaka/documents/publication/wcms_493326.pdf, December 2018 (accessed 18 July 2020).
73 As above.

interventions that protect people's health as they continue to engage in economic activity. Human rights law provides tools to ensure the protection of people from the pandemic while upholding their rights. For instance, section 31(1) of the Constitution provides that '[e]very person shall have the right to fair and safe labour practices and to fair remuneration'. Three critical components are highlighted in this provision, namely, fair labour practices, safe labour practices and equal remuneration.[74] The constitutional safeguard for fair labour practices protects employees' welfare and interests in a broad sense, covering contracts of employment and general workplace ethos. This includes occupational safety, health and working environment. The duty is on the employer to provide a working environment free of hazards and on the state to develop a comprehensive framework for regulating the same.

Rule 13 of the Corona Virus Rules I recognised the need to ensure a safe working environment when it provided that the Minister may prescribe measures to employers and employees such as the operation of shifts for employees; the spacing between shifts for employees at a workplace; and restrictions on the number of persons at a workplace at any time. A similar concession is made in Rule 13 and the fourth schedule of the Corona Virus Rules II, which recognise a number of obligations and responsibilities of employers and employees. These provisions can be utilised to effect the least intrusive measures on the exercise of rights by employees and employers and provide the option to protect both people's health and livelihoods. Similarly, the introduction of open-air and spaced-out market stalls to permit informal and other traders to eke out a living, in strict compliance with enforceable health protocols, would mitigate the challenges presented by hard lockdowns that require every person to stay at home where they risk starvation and evictions. The lack of household income, which stay-at-home orders would engender for many families, limits people's capabilities to access a wide range of socio-economic rights, including those to food, health care and education.

Prevailing scientific knowledge posits that controlling COVID-19 requires breaking the chain of infections, and restricting people's movement and contact is critical to attaining this objective.[75] While clearly valuable in containing the spread of COVID 19, strict stay-at-home orders constrict the exercise of the right to economic activity. Many Malawians, the majority of whom work in the informal sector,

74 Chirwa (n 56) 318-325.
75 See 'COVID-19: Breaking the chain of infection', https://ph.ucla.edu/news/fsph-news/covid-19-breaking-chain-infection (accessed 16 September 2020).

need to constantly travel out of their homes as a matter of necessity.[76] A failure to leave home for any extended period of time would be akin to a death sentence by starvation. There was, therefore, a need to rethink restrictions to movement as other less restrictive measures exist that would have attained the same objective while people exercised the right to economic activity. For example, under Rule 15 of the Corona Virus Rules I, the Minister of Health could have prescribed measures for the operation of public transportation and the regulation of traffic.[77] Instead of a blanket stay-at-home order, the Minister could have prescribed applicable rules regarding public transport and the movement of people that comply with health protocols on containing the spread of COVID-19. Such measures could have included the mandatory wearing of masks, reduced capacity for purposes of social distancing, regular disinfection of vehicles and monitoring compliance. On this score, the Corona Virus Rules II offer a complete departure from the previous Rules. Rule 15 and the fifth schedule in detail prescribes guidelines on the provision of transport services. Since the sustenance of livelihoods hinges on people's ability to move and engage in economic activity, the imposition of certain minimum restrictions in order to adhere to COVID-19 health protocols are preferable to those that immobilise the entire country.

In Malawi the complexity of defining the appropriate COVID-19 response that protects both lives and livelihoods is principally due to the socio-economic realities. COVID-19 has exposed the depth of the fissures of socio-economic inequality neglected over the years by successive governments that have failed to deliver on the constitutional promise to realise socio-economic rights.[78] According to Oxfam, in 2004 the 'richest 10 per cent of Malawians consumed 22 times more than the poorest 10 per cent. By 2011 this had risen to see the richest 10 per cent spending 34 times more than the poorest.'[79] Dysfunctional systems in the labour, education, health and other sectors, *inter alia*, are responsible for poor outcomes in these areas that continue to push more people into extreme poverty. It is not surprising that social security programmes are limited and cannot possibly sustain all that need support during a pandemic. The Corona Virus Rules II are to be commended for attempting to strike

76 Over 89% of the labour force in Malawi is in the informal sector. National Statistical Office 'Malawi labour force survey 2013', http://www.nsomalawi.mw/index.php?option=com_content&view=article&id=209&Itemid=97 (accessed 24 July 2020).

77 Under the Corona Virus Rules II the corresponding provision is Rule 15 and the Fifth Schedule.

78 See https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-inequality-in-malawi-261115-en.pdf (accessed 18 July 2020).

79 As above.

a meaningful balance by introducing necessary restrictions to curb the spread of COVID-19 while facilitating the exercise of economic activity.[80]

While COVID-19 threatens to substantially shrink the economy, it provides an opportunity to build back better by rethinking the developmental trajectories previously pursued that have succeeded only in widening the gulf of inequality. There is a need to ensure inclusive development guided by the principles enshrined in the Constitution and various international standards and frameworks, including the Sustainable Development Goals, in order to bridge the gap between the rich and the poor. This requires efforts to harness all available resources at the national, regional and international levels to deliver on the promises of the Constitution and international human rights law to realise socio-economic rights, particularly for those farthest behind. The government should focus on key socio-economic rights that spur immediate growth and development, including education and skills development; the strengthening of healthcare and food security systems; and, most importantly, democratising wealth within communities to enhance peoples' capabilities to access a whole range of socio-economic rights.[81]

## 5 Conclusion

The challenges brought about by COVID-19 are unprecedented even at the global level. Due to resource constraints, countries such as Malawi find themselves faced by additional challenges in devising appropriate measures to both contain COVID-19 and to uphold human rights. An obsolete legal and institutional framework for responding to pandemics complicates an already dire situation. There clearly is tension between the DPRA and the Public Health Act when a pandemic also requires the declaration of a state of disaster. The haphazard response witnessed this far is partly due to the lack of clarity regarding the appropriate legal regime that the authorities ought to apply in addressing a pandemic, which would require the invocation of both the Public Health Act and the DPRA.

The announcement of a lockdown that ordered a national stay-at-home except for a few essential service providers at a time when the country had only recorded three cases was disproportional. The lockdown sought to subject everyone to a straightjacket measure

80 From the first schedule through to the seventh schedule an attempt has been made to navigate the balance between lives and livelihoods.
81 As above.

when COVID-19 was confined to a specific geographic location. Therefore, it is not surprising that the threat that the lockdown presented to people's livelihoods and the absence of appropriate social security interventions to alleviate the impact of restrictions on economic activity led to litigation that sought to remind the government of its constitutional obligations towards people's livelihoods.

An effective COVID-19 response requires the adoption of appropriate strategies that not only conform to the Constitution but also protects lives and livelihoods. This necessitates a delicate balancing act since, in the absence of a comprehensive social protection system, strict lockdown measures would render a significant proportion of the population destitute. Any health response that neglects the protection of livelihoods reduces people's capabilities to access various socio-economic rights, such as rights to health, housing, education and food, the consequences of which for an impoverished country are as fatal as the COVID-19 pandemic itself. The respect of human rights should be at the centre of the response, including any recovery plans in order to uphold the right to live in dignity which finds expression in the right 'to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi'. The COVID-19 pandemic has not only exposed the dire socio-economic conditions prevalent in Malawi but also the limited options for enforcing a hard lockdown that would require hefty social security investments to sustain a large number of livelihoods.