

# Emergency Powers and Human Rights Derogations under the Constitution of Lesotho

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## Abstract

Constitutions worldwide occasionally encounter moments of public emergency when deviation from the ordinary normative framework becomes inevitable. Hence, constitutions have provisions that regulate public emergencies. The *Constitution of Lesotho* is no exception: it has provisions for derogation from its ordinary constitutional framework. Section 21 read with section 23 provides substantive and procedural requirements for the declaration of a state of emergency and derogation from human rights. This constitutional framework exists alongside four incoherent pieces of legislation: the *Public Health Order* of 1970, the *Internal Security Act* of 1984, the *Emergency Powers Order* of 1988 and the *Disaster Management Act* of 1997. Three of these pieces of legislation predate the 1993 *Constitution of Lesotho*. Consequently they are not in harmony with the Constitution. This disharmony creates uncertainty in the legal system and negatively impacts on the rights of citizens during emergencies. The pieces of legislation grant the government a leeway to derogate from human rights standards without following the Constitution's stringent substantive and procedural requirements. The purpose of this article is to shine the spotlight on this discordance. The article's central argument is that the country needs a new emergency powers legal regime. This will involve reviewing the Constitution and aligning legislation on emergency powers with the Constitution.

## Keywords

*Constitution of Lesotho*; human rights derogations; state of emergency; Prime Minister's Powers; emergency powers.

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## 1 Introduction

Emergencies always present significant challenges to the human rights discourse because they temporarily discharge governments and public functionaries from their obligations to uphold, fulfil, promote and respect human rights or to comply with the normative framework that constitutions generally create.<sup>1</sup> Therefore, constitutional scholarship has always been preoccupied with how emergencies can be regulated to ensure that the suspension, derogation or limitation of human rights during emergencies happens only in terms of the law and to the extent necessary. Human rights instruments at all levels – international, regional, and national – have long recognised the need for a tenuous balance between human security and respect for human rights.<sup>2</sup> In keeping with this paradigm, Lesotho has a legal regime for the exercise of emergency powers. The framework for emergency powers in Lesotho, as would be expected, starts with the Constitution.<sup>3</sup> The Constitution provides for procedural and substantive requirements for invoking emergency powers.<sup>4</sup> In addition to the Constitution, emergency powers are found in several pieces of legislation: the *Public Health Order* of 1970,<sup>5</sup> the *Internal Security Act* of 1984,<sup>6</sup> the *Emergency Powers Order* of 1988<sup>7</sup> and the *Disaster Management Act* of 1997.<sup>8</sup> Most of these pieces of legislation, except the *Disaster Management Act*, predate the Constitution. Consequently there is a glaring disharmony between these pieces of legislation and the Constitution. This disharmony creates uncertainty in the legal system and negatively impacts on the rights of citizens as various repositories of emergency powers – the Prime Minister, the Minister of Health or the Commissioner of Police – may arbitrarily choose which legislation to use depending on the expediencies of the government.

The purpose of this article is to shine the spotlight on this discordance. The central argument is that the country needs a new emergency powers legal regime, including reviewing the Constitution and aligning the subordinate legislation with the Constitution. The article comprises six substantive parts.

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1 Ferejohn and Pasquino 2004 *ICON* 210; Lobel 1988 *Yale LJ* 1385; Fombad 2004 *J Afr L* 62.

2 McGoldrick 2004 *ICON* 380.

3 *Constitution of Lesotho*, 1993.

4 Sections 21 and 23 of the *Constitution of Lesotho*, 1993.

5 *Public Health Order* 12 of 1970.

6 *Internal Security (General) Act* 24 of 1984.

7 *Emergency Powers Order* 4 of 1988.

8 *Disaster Management Act* 2 of 1997.

The first part is the introduction, which sketches the nature of the problem, the purpose of the article and its structure. The second section provides a brief context of emergencies in Lesotho. Its purpose is to place the analysis of emergency powers in Lesotho into context. The third part revisits the theory of derogations in human rights discourse. Its purpose is to lay the theoretical framework for the analysis. The fourth part analyses the legal framework for emergencies – both constitutional and legislative – in Lesotho. The fifth part assesses the country's measures in the three recent invocations of emergency powers: the Covid-19-induced state of emergency and the Tenth Amendment to the Constitution-induced state of emergency, and the 2023 imposition of the national curfew by the Commissioner of Police. The last part is the conclusion and makes recommendations.

## 2 A brief historical context of emergency powers in Lesotho

Lesotho has a sad and chequered history with its use of emergency powers.<sup>9</sup> Throughout its chequered constitutional history,<sup>10</sup> various governments have used emergency powers and created emergency power laws for one reason or another. As far back as 1970 – hardly five years after independence – the then Prime Minister, Leabua Jonathan, suspended the country's independence Constitution and simultaneously declared a state of emergency.<sup>11</sup> Instead of using the emergency powers provisions of the 1966 Constitution,<sup>12</sup> the Prime Minister opted to use the extra-legal route. He suspended the entire Constitution and seized power. The context of this spectacle was that the Prime Minister had lost an election and was not ready to hand over the reigns of government to his arch-rival, Ntsu Mokhehle.<sup>13</sup> The courts of law confirmed that the seizure of powers by the Prime Minister was a successful coup: he successfully toppled the 1966 constitutional order and introduced the new order,<sup>14</sup> which was characterised by terror,

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<sup>9</sup> Coplan 1995 *Transformation* 26; Weisfelder 1976 *African Issues* 22.

<sup>10</sup> Read 1991 *J Afri L* 209; Machobane 1988 *Journal of Commonwealth and Comparative Politics* 185; Machobane *Government and Change in Lesotho*.

<sup>11</sup> Upon the suspension of the Constitution Prime Minister Jonathan boldly stated that: "I, the Prime Minister of Lesotho, in terms of the constitution hereby declare the state of emergency. The decision I and my ministers have just taken is in full consideration of the interests of the nation. This drastic step has been taken in order to protect not only the liberty of the individuals but also law and order. The nation requires the maintenance of law and order ... I hereby suspend the constitution, pending the drafting of the new one ...". See Sixishe *But Give Him an Army Too* 67.

<sup>12</sup> *Constitution of Lesotho*, 1966.

<sup>13</sup> Macartney 1973 *Government and Opposition* 473; Pherudi and Barnard 2001 *Southern African Journal of Contemporary History* 69.

<sup>14</sup> *R v Moerane* 1974-75 LLR 212; *Khaketla v The Honourable Prime Minister* (CIV/APN/145/85) [1985] LSCA 118 (24 July 1985).

the abuse of power and the flagrant violation of human rights.<sup>15</sup> According to Mothibe, instead of handing over power after losing the elections, Prime Minister Jonathan Leabua "declared a state of emergency, arrested and detained leaders of the opposition and established a mono-party state. That action set in motion an authoritarian agenda characterised by brute force, naked oppression and *de facto* one-party rule that lasted sixteen years".<sup>16</sup>

In 1970 the country entered a period of political dictatorship which extended until 1986, when the army toppled Leabua's government.<sup>17</sup> The constitutional profile of the country did not improve during the reign of the military junta: declarations of emergency and wanton violations of human rights continued unabated. The junta's most infamous instrument of suppression was the promulgation of the *Suspension of Political Activities Order* of 1986: the law colloquially known as "Order No 4".<sup>18</sup> The prime purpose of this order was to "[t]o suspend all party political activities until such time as the goals of national reconciliation shall have been achieved and a new constitution shall have been agreed upon, and for connected purposes".<sup>19</sup> In 1988 the military junta adopted the *Emergency Powers Order* in response to international pressure.<sup>20</sup> The Act repealed the *Emergency Powers Act* of 1982.<sup>21</sup> When the country returned to constitutional democracy in 1993, the Constitution established a new emergency powers regime. Despite the existence of the new emergency powers regime envisaged by the Constitution,<sup>22</sup> the *Emergency Powers Act* of 1988 remained valid and unrepealed.

Since the country returned to constitutional democracy in 1993 the use of emergency powers significantly decreased. Emergency powers were used in less controversial situations like disasters or famines,<sup>23</sup> but the use of emergency powers started becoming politically and legally contentious again in 2020 when the country had to tap into its legal regime for emergency powers to respond to the global pandemic of Covid-19.<sup>24</sup> In 2022 Prime Minister Majoro again stoked controversy when he used his authority

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<sup>15</sup> Weisfelder 1976 *African Issues* 22; Khaketla *Lesotho, 1970*; Pherudi 2001 *South African Historical Journal* 266.

<sup>16</sup> Mothibe 1999 *Lesotho Social Science Review* 47.

<sup>17</sup> For the analysis of this coup, see Matlosa and Pule 2001 *African Security Review* 62; Mothibe 1990 *Africa Insight* 242.

<sup>18</sup> *Suspension of Political Activities Order* 4 of 1986.

<sup>19</sup> Preamble of *Suspension of Political Activities Order* 4 of 1986.

<sup>20</sup> *Emergency Powers Order* 4 of 1988.

<sup>21</sup> *Emergency Powers Act* 7 of 1982.

<sup>22</sup> Sections 21 and 23 of the *Constitution of Lesotho*, 1993.

<sup>23</sup> Anon 2002 <https://www.thenewhumanitarian.org/news/2002/04/23/prime-minister-declares-famine-emergency>; Kabi 2021 <https://allafrica.com/stories/202102230576.html>; Reuters 2004 <http://edition.cnn.com/2004/WORLD/africa/02/11/lesotho.food.reut/>.

<sup>24</sup> Maerz *et al* 2020 <https://ssrn.com/abstract=3701720>.

to declare a state of emergency so that he could recall a dissolved parliament to pass the reforms flagship law colloquially known as the "omnibus bill". The latest incident was in 2023 when the Commissioner of Police, somewhat unexpectedly, imposed a national curfew to deal with what he styled "danger or harm to public safety order".<sup>25</sup>

These recent invocations of emergency powers have generated immense controversy about the emergency powers regime in Lesotho. In a country whose history is punctuated by the abuse of emergency powers, the slightest resort to emergency powers always triggers old and unpalatable memories. It may therefore be fruitful to revisit the framework for exercising emergency powers in the country.

### 3 Conceptual and theoretical framework

Sections 21 and 23 of the *Constitution of Lesotho* provide an archetypal framework for using emergency powers. These provisions are located in the existing broader theoretical framework for derogation from or the suspension of human rights during emergencies. Invariably the constitutional theory has to grapple with the deviation from normal constitutional and human rights normative frameworks due to emergencies.<sup>26</sup> While there is a consensus that deviations from the normative constitutional frameworks are inevitable in the life of any polity,<sup>27</sup> the regulation of such deviations continues to be a subject of intense disagreement.<sup>28</sup> Since it is widely accepted that derogations are part of constitutional and human rights regimes, the theoretical contestations around them no longer concern whether they are acceptable. Instead, two main contestations about derogations in contemporary human rights discourse exist.<sup>29</sup> The first is that derogations are part of human rights' usual limitations and qualifications. This is called the "limitation model".<sup>30</sup> The second one conceives derogations in extra-legal terms, which means that derogations are measured beyond the legal framework necessitated by an emergency.<sup>31</sup>

The limitation model conceives derogations as part of the broader legal framework, which includes mechanisms for the limitation of or derogation from human rights. Under this theoretical conception, derogations are an admission that human rights cannot be absolute – they have limitations and

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<sup>25</sup> See Preamble to the *Internal Security Curfew Order* Legal Notice 53 of 2023.

<sup>26</sup> Crocker "Constitutionalizing Necessity through Suspension" 59.

<sup>27</sup> Tyler 2008 *Yale LJ* 600.

<sup>28</sup> Higgins 1976 *BYIL* 281; McDougal *Human Rights and World Public Order* 37.

<sup>29</sup> Hickman 2005 *MLR* 655.

<sup>30</sup> Higgins 1976 *BYIL* 281.

<sup>31</sup> Gross 2002 *Yale LJ* 1011.

qualifications in appropriate circumstances.<sup>32</sup> The ultimate basis for this approach to derogations is that the law does not cease to operate during a state of emergency.<sup>33</sup> There are no two different human rights systems – one applicable under normal circumstances and one during emergencies.<sup>34</sup> There is one set of human rights norms, regardless of whether the situation is normal or abnormal. Viewed from this perspective, derogations "are not threats to the system of international human rights protection but, conversely, hallmarks of respect for treaty norms by states that 'take human rights seriously'".<sup>35</sup> This approach contrasts sharply with the idea that rulers have unfettered discretion to determine what should happen during emergencies. It is in sync with the other principles that always undergird modern constitutionalism – such as the rule of law and legality – and that place government under limitations.<sup>36</sup> That is why many human rights systems – at the international and domestic levels – have provisions for the regulation of derogations. The limitations model, or what Gross calls the "business as usual model", has been criticised for naiveté and for disregarding life's realities. Therefore, "[a]dopting the business as usual model means either being unaware of the reality of emergency management or ignoring it and knowingly maintaining an illusory facade of normalcy".<sup>37</sup>

The limitation model is, however, in stark contestation with the extra-legal model.<sup>38</sup> The extra-legal model is directly linked to the Lockean view that when an impending threat confronts a country, the Executive has the power to do anything good for the country, even if this means operating beyond the country's legal framework.<sup>39</sup> According to this model, "a constitutional regime should allow for exceptional measures to be taken outside the legal regime in times of public emergency and that such measures should be subject to political and not judicial accountability".<sup>40</sup> The extra-legal model draws a sharp distinction between limitations and derogations.<sup>41</sup> Limitations

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<sup>32</sup> Sommario "Limitation and Derogation Provisions" 98.

<sup>33</sup> Mavi 1997 *Acta Jur Hung* 107.

<sup>34</sup> Gross 2002 *Yale LJ* 1011.

<sup>35</sup> Hafner-Burton, Helfer and Fariss 2011 *Int'l Org* 673; International Commission of Jurists *States of Emergency* 1.

<sup>36</sup> Lobel 1989 *Yale LJ* 1385; Allan 2011 *ICON* 155; Allan 1985 *CLJ* 111.

<sup>37</sup> Gross 2002 *Yale LJ* 1045.

<sup>38</sup> Criddle and Fox-Decent 2009 *ASIL Proc* 71.

<sup>39</sup> Justice Story in *The Apollon* 22 US 362 (1824) para 6 said: "It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws."

<sup>40</sup> Hickman 2005 *MLR* 658.

<sup>41</sup> The UN Human Rights Committee has stated in relation to the *International Covenant on Civil and Political Rights* (1966) (the ICCPR) Art 4, that "Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of

are considered part of the legal system, while derogations are not. In this formulation, "[d]erogation is understood as a mechanism to provide for governmental freedom of action by releasing states from their obligation to observe protected rights. It provides governments with an emergency exit from treaty obligations, which has the effect of placing rights in abeyance".<sup>42</sup> The extra-legal theory has received fervent support from whirlwinds like Carl Schmitt, who argue that the rule of law cannot remove a state's discretion during emergencies.<sup>43</sup> In the end, the thrust of the extra-legal theory is that executive power, by its nature, cannot reasonably be constrained by law during emergency situations.<sup>44</sup> The extra-legal model is often the most convenient avenue for governments confronted by emergencies, yet it is the most dangerous model. Allowing the government a free hand to determine what is good for the country is counterintuitive – it borders on absolutism.<sup>45</sup>

## 4 The constitutional and legal framework for emergency powers in Lesotho

### 4.1 *The Constitution and international instruments*

The 1993 *Constitution of Lesotho* provides for the derogation of human rights in situations requiring the regulation of emergencies.<sup>46</sup> Section 21(1) provides that derogations can be done only by an Act of parliament, and only three rights may be derogated from in situations of a declared state of emergency: the right to personal liberty (section 6), the right to freedom from discrimination (section 18), and the right to equality before the law (section 19).<sup>47</sup> Since the section is drafted in an unusual manner, it is important to quote it verbatim. Section 21(1) provides that:

Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 6, section 18 or section 19 of this Constitution to the extent that the Act authorises the taking during any period when Lesotho is at war or when a declaration of emergency under section 23 of this Constitution is in force of measures that are necessary in a practical sense in a democratic society for dealing with the situation that exists in Lesotho during that period.

Section 21(2) catalogues the rights of a person detained pursuant to section 21(1). Such rights are (a) the right to be informed of the grounds for detention as reasonably practicable; (b) such detention must be published

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the Covenant", although it has also stated that the strictly required standard reflects the proportionality principle which is common to both. Human Rights Committee *General Comment 29: States of Emergency (Article 4)* UN Doc CCPR/C.21.Rev.1/Add.11 (2001) (hereafter *General Comment 29*).

<sup>42</sup> Hickman 2005 *MLR* 658.

<sup>43</sup> Schmitt *Political Theology* 8-9.

<sup>44</sup> Hartz "The Extra-Legal Model" 25.

<sup>45</sup> Margulies 2006 *U Miami L Rev* 309.

<sup>46</sup> Sections 21 and 23 of the *Constitution of Lesotho*, 1993.

<sup>47</sup> Section 21 of the *Constitution of Lesotho*, 1993.

in a gazette within fourteen days; (c) the right to be investigated by an independent and impartial tribunal; and (d) the right to legal representation. The section further dictates that the declaration of emergency in question must be done pursuant to section 23 and only to the extent that it is necessary for an open, democratic society.

Section 23 of the Constitution embodies substantive and procedural provisions for a derogation from human rights during a state of emergency. Section 23(1) provides that if the country is at war or "other public emergency which threatens the life of the nation", the Prime Minister may, acting in accordance with the advice of the Council of State, declare a state of emergency. Such a declaration of emergency by the Prime Minister must be published in the Gazette. Substantively, it means that before the Prime Minister can declare a state of emergency there must be a "war or other public emergency which threatens the life of the nation".<sup>48</sup> The phrase "war or other public emergency which threatens the life of the nation" is not defined in the Constitution. However, the phrase is not unique to Lesotho: it seems to have been taken verbatim from Article 15 of the *European Convention on Human Rights* (ECHR) and Article 4 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>49</sup> The Constitutional Court of Lesotho had a rare opportunity to investigate the content of this phrase in the case of *Boloetse v His Majesty the King*.<sup>50</sup> In this case the court noted that section 23 of the *Constitution of Lesotho* is cast on Article 15 of ECHR and Article 4 of the ICCPR.<sup>51</sup> After an extensive tour of the jurisprudence of these two international instruments,<sup>52</sup> it concluded that a public emergency that threatens the life of the nation must have at least four features: (a) it must be actual or imminent; (b) its effects must involve or affect the whole nation; (c) it must threaten the continuance of the organised life of communities in that normal day-to-day life must be impossible; d) the crisis

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<sup>48</sup> Section 23(1) of the *Constitution of Lesotho*, 1993.

<sup>49</sup> And Art 27 of the *American Convention on Human Rights* (1969). Several other constitutions make use of this phrase. See Greene "Types and Effects of Emergency" online. Art 4 of ICCPR resembles Art 15 of the *European Convention on Human Rights* (1950) (ECHR).<sup>49</sup> Art 15 of the ECHR also provides the three main prerequisites for a valid derogation. The first one is that there must be a "war or other public emergency threatening the life of the nation". The second one is that the derogation must be "strictly required by the exigencies of the situation". The third one is that the derogation must "not [be] inconsistent with [the state's] other obligations under international law".

<sup>50</sup> *Boloetse v His Majesty King Letsie III* (Constitutional Cases No 0013/0015/2022) [2022] LSHC 100 (12 September 2022).

<sup>51</sup> *Boloetse v His Majesty King Letsie III* (Constitutional Cases No 0013/0015/2022) [2022] LSHC 100 (12 September 2022) para [50]; the Court said: "Section 23 (1) is worded similarly with Article 15 (1) of the European Convention of Human Rights, 1950 and Article 4 (1) of the International Covenant on Civil and Political Rights, 1966 which Lesotho ratified on 9 September 1992."

<sup>52</sup> Lehmann 2011 *Essex Human Rights Review* 103.



or danger must be of an exceptional nature in that the normal measures permitted by the Constitution to deal with it are plainly inadequate.<sup>53</sup> While these features are not exhaustive, they go a long way toward giving content to the constitutional expression, "war or other public emergency which threatens the life of the nation".

Since the draftsmanship of section 23 of the Constitution is based on international human rights instruments, the scanty jurisprudence of the section, which started with the case of *Boloetse*, is by international jurisprudence. To that end, the jurisprudence of the Human Rights Committee on Article 4 of the ICCPR can come in handy.<sup>54</sup> The Committee has attempted to crystallise Article 4 jurisprudence through General Comment 29.<sup>55</sup> The most fundamental aspect of the jurisprudence is that "not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by Article 4".<sup>56</sup> The Committee provides an inexhaustive list of possible emergencies that may qualify under Article 4: "a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident".<sup>57</sup> Interestingly, there is no health emergency or instance of terrorism on the initial list. However, it is not inconceivable that emergencies that the Committee does not necessarily mention may qualify since the Committee has never claimed that the list is exhaustive. The emergency does not need to geographically cover the entire country for it to threaten the nation's life, as long as it is assessed to be serious.<sup>58</sup>

Although the ICCPR permits derogations, certain rights have been rendered non-derogable.<sup>59</sup> These rights are the right to life (Article 6), the prohibition of torture or cruel, inhuman or degrading punishment (Article 7), the prohibition of slavery, the slave trade and servitude (Article 8, paragraphs 1 and 2), the prohibition of imprisonment because of an inability to fulfil a contractual obligation (Article 11), the principle of legality in the field of

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<sup>53</sup> *Boloetse v His Majesty King Letsie III* (Constitutional Cases No 0013/0015/2022) [2022] LSHC 100 (12 September 2022) para [56].

<sup>54</sup> Lesotho is a state party to the ICCPR. See OHCHR date unknown [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=97&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=97&Lang=EN). For the extensive jurisprudence of the Committee on the subject, see McGoldrick *Human Rights Committee*; Gandhi 1989 *German YB Int'l L* 323; Walkate 1982 *Yale J World Pub Ord* 133. Also see UN Commission on Human Rights *Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc EICN.4/1985/4 (1984), drafted and adopted by a conference of non-governmental organisations in 1984. In connection with the Siracusa Principles, see Hartman 1985 *Hum Rts Q* 89.

<sup>55</sup> *General Comment 29*.

<sup>56</sup> *General Comment 29* para 3.

<sup>57</sup> *General Comment 29* para 5.

<sup>58</sup> *General Comment 29* para 4. Also see Joseph and Castan *International Covenant on Civil and Political Rights* para 25.44; Sarah 2002 *HR L Rev* 81.

<sup>59</sup> Article 4(2) of the ICCPR.

criminal law (Article 15), the recognition of everyone as a person before the law (Article 16), and freedom of thought, conscience and religion (Article 18). Most of these non-derogable rights are the peremptory norms of international law.<sup>60</sup> Indeed, non-derogability does not mean non-limitability.<sup>61</sup> The non-derogable rights can be limited if the measure meets the requirements for a permissible limitation.<sup>62</sup>

Lesotho is also a party to the *African Charter on Human and Peoples' Rights* (ACHPR). The ACHPR does not have a derogation clause.<sup>63</sup> This is not inadvertent. The African Commission provided the following rationale for the chapter's not having the derogations clauses in the *Nigeria* case:

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.<sup>64</sup>

Arguments have been raised in favour of the absence of such a derogation clause. The most pronounced reason is that derogations are inherently contrary to the *jus cogens*. It is contended that a derogation provision is, in effect, counterintuitive. This approach is inspired by the US Supreme Court's dictum in *Ex Parte Milligan* that "the same law applies in war as in peace".<sup>65</sup> However, the ACHPR's failure to include a derogation article has been criticised.<sup>66</sup> The strongest criticism is that this lack of a derogation clause may negatively influence state parties, which may be encouraged not to include such clauses in their domestic constitutions.<sup>67</sup>

Besides its substantive content, section 23 of the Constitution includes procedural components for declaring an emergency. The essential procedural requirement is that the emergency must be published in the gazette. This is the requirement of legality. To this end, the Committee instructively observes that: "[s]afeguards related to derogation, as embodied in Article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole".<sup>68</sup> Hence, there are three key procedural requirements for the state of emergency. The first one

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<sup>60</sup> Criddle and Fox-Decent 2009 *ASIL Proc* 71; Sarah 2002 *HR L Rev* 81.

<sup>61</sup> Marks 1995 *OJLS* 69.

<sup>62</sup> Sarah 2002 *HR L Rev* 81.

<sup>63</sup> Ali 2013 *LDD* 78.

<sup>64</sup> *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Comm No 140/94 (1999) para 42.

<sup>65</sup> *Ex Parte Milligan* 71 US (4 Wall) 2 (1866).

<sup>66</sup> Sermet 2007 *AHRLJ* 142.

<sup>67</sup> Sermet 2007 *AHRLJ* 153.

<sup>68</sup> *General Comment 29* para 16.

is that the Council of State must advise the Prime Minister of the state of emergency.<sup>69</sup> The second requirement is that it must be published in a gazette.<sup>70</sup> The third one is that the declaration of emergency can last for only fourteen days; thereafter, Parliament may approve the extension of the state of emergency declaration for a renewable period of six months.<sup>71</sup>

#### **4.2 Legislative framework: The discord between the Constitution and other pieces of legislation**

As indicated earlier, the Lesotho emergency legal regime is inconsistent. The regime established by the Constitution is in strident discord with the several pieces of legislation seemingly establishing independent emergency regimes. Whenever there is an emergency the government arbitrarily chooses any of the existing legal regimes. Since the Constitution imposes stringent procedural requirements for a declaration of emergency, there has been a steady tendency by the government to invoke the ordinary pieces of legislation as they impose relaxed procedure requirements.<sup>72</sup> This section aims to analyse these four pieces of legislation *seriatim*.

The first legislation is the *Public Health Order* of 1970.<sup>73</sup> In terms of the Order, the Minister of Health may make regulations applicable to all communicable diseases.<sup>74</sup> The Order gives the Minister wide-ranging powers, including the power to impose the "measures to be taken for preventing the spread of or eradicating smallpox, typhus fever, typhoid fever, cholera, yellow fever, plague, poliomyelitis, tuberculosis or any other communicable disease requiring to be dealt with in a special manner".<sup>75</sup> There is no doubt that novel diseases such as Covid-19 would fit into the list of communicable diseases listed by the Act. In terms of the *ejusdem generis* rule of statutory interpretation,<sup>76</sup> the disease fits squarely within the stipulated genus.

The *Public Health Order* empowers the Minister of Health to impose restrictive emergency measures. On the other hand, the Constitution gives the Prime Minister the power to declare emergencies, regardless of the nature of the emergencies. The Constitution, as demonstrated above, vests

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<sup>69</sup> Section 23(1) of the *Constitution of Lesotho*, 1993.

<sup>70</sup> Section 23(1) of the *Constitution of Lesotho*, 1993 provides that: "[e]very declaration of emergency shall lapse at the expiration of fourteen days, commencing with the day on which it was made, unless it has in the meantime been approved by a resolution of each House of Parliament".

<sup>71</sup> Section 23(5) of the *Constitution of Lesotho*, 1993.

<sup>72</sup> Shale 2020 AHRLJ 462

<sup>73</sup> *Public Health Order* 12 of 1970.

<sup>74</sup> Section 71 of the *Public Health Order* 12 of 1970.

<sup>75</sup> Section 16 of the *Public Health Order* 12 of 1970.

<sup>76</sup> See, for instance, *Buglers Post (Pty) Ltd v SIR* 1974 3 SA 28 (A); *Southern Life Association v CIR* 1985 2 SA 267 (C).

the entire constitutional regime for regulating emergencies on the Prime Minister.<sup>77</sup> To that extent, therefore, there is consequently an internecine tension between the Order and the Constitution. When the pandemic broke out in the country in May 2020,<sup>78</sup> an attempt was made to harmonise the *Public Health Order* with the Constitution. The Prime Minister declared rolling states of emergency in terms of the Constitution. The Minister of Health, in turn, invoked the Order to impose wide-ranging and severe derogations through the rolling regulations, sometimes placing the entire country into "hard lockdown".<sup>79</sup> It became clear that the two regimes do not co-exist harmoniously.

The second piece of legislation is the *Internal Security Act* of 1984. It is imperative to note that in its original version the Act did not empower the Commissioner of Police to impose a curfew.<sup>80</sup> Granting the Commissioner of Police the power to impose a curfew is an innovation that came with the 1991 Amendment to the Act.<sup>81</sup> The Amendment was promulgated in 1991 following the nationwide riots that were sparked by the merciless assassination of a Mosotho woman Manthabiseng Senatsi by an Asian shopkeeper and security guards for alleged shoplifting. The incidents caused widespread outrage, seeing no fewer than thirty people die.<sup>82</sup> The Amendment provides that: "[i]f in the opinion of the Commissioner it is necessary in order to prevent danger or harm to public safety or order, he may by order impose a curfew upon the inhabitants of any area specified in that order".<sup>83</sup> The Act does not oblige the Commissioner to observe the substantive and procedural requirements laid out in either section 21 or section 23 of the Constitution. This is unsurprising since the parent legislation – the *Internal Security Act* of 1984 – and the 1991 Amendment predate the current constitution.

The third legislation is the *Emergency Powers Order* of 1988. In like manner, it is not in keeping with the Constitution. The legislation does not necessarily define an emergency, but interestingly, the emergency is associated with safety and security. Its preambular statement provides that its purpose is to "make provision in the interests of public safety and public order, during any period when a declaration of emergency is in force, for measures that are necessary for dealing with the situation...". Unsurprisingly, the legislation was inclined to the emergency created by the political situation at the time.

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<sup>77</sup> Section 23 of the *Constitution of Lesotho*, 1993.

<sup>78</sup> Ngatane 2020 <https://ewn.co.za/2020/03/19/lesotho-declares-national-emergency-over-covid-19-outbreak>.

<sup>79</sup> *Public Health (COVID-19) Regulations* Legal Notice 41 of 2020 commenced on 6 May 2020.

<sup>80</sup> See *Internal Security (General) Act* 24 of 1984.

<sup>81</sup> *The Internal Security (General) (Amendment) Order* 14 of 1991.

<sup>82</sup> *Mokoatle v Senatsi* (CIV/APN 163 of 91) [1991] LSCA 66 (14 June 1991) para 11.

<sup>83</sup> Section 3 of the *Internal Security (General) (Amendment) Order* 14 of 1991.

One of the declared intentions of the legislation was to proclaim a state of emergency from February-August 1988. The state of emergency was declared pursuant to what was styled "a politically inspired crime wave".<sup>84</sup> There was context to it: ever since the country had been placed under military rule in January 1986, a growing alliance of political players has been calling for a return to civilian rule. The military government's response has always been through declarations of rolling states of emergency and proclamation of laws restricting political activity and brutally suppressing dissent.<sup>85</sup> The year 1988 was the year of the papal visit to Lesotho. A few hours before the arrival of Pope John Paul II a bus carrying pilgrims was hijacked by four armed men. The hijackers held seventy-one people hostage and demanded to meet the Pope and King Moshoeshe about the same issue: returning the country to civilian rule. According to Macgregor, the four men were "[t]hought to be members of the banned Lesotho Liberation Army"<sup>86</sup> – a militia wing of one of the main political parties vying for civilian rule at the time, Basutoland African Congress (BCP).<sup>87</sup>

The legislation was made against this backdrop. The regime established by this legislation differs from that established by the Constitution. In section 3 of the legislation the King declares a state of emergency without being advised by anyone.<sup>88</sup> The maximum period for a state of emergency is six months, revocable by the King at any time.<sup>89</sup>

The fourth statute, which is post-constitutional but still struggles to harmonise with the Constitution, is the *Disaster Management Act* of 1997.<sup>90</sup> The Act attempts to distinguish between a disaster and an emergency. It defines a disaster as any "progressive or sudden, widespread or localised, natural or man-made event including not only prevalent drought but also heavy snowfalls, severe frosts, hailstorms, tornadoes, landslides, mudslides, floods, serious widespread fires and major air or road traffic accidents".<sup>91</sup> While the list is by no means exhaustive, the *ejusdem generis* rule of statutory interpretation may exclude health from the list as it arguably does not fall within the same genus as the items listed.<sup>92</sup> Therefore, the High

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<sup>84</sup> Anon 1988 <https://www.latimes.com/archives/la-xpm-1988-04-30-mn-2088-story.html>.

<sup>85</sup> Matlosa and Pule 2001 *African Security Review* 62.

<sup>86</sup> Macgregor 1989 *Africa Insight* 49.

<sup>87</sup> Pherudi 2001 *South African Historical Journal* 266.

<sup>88</sup> Section 3(1) of the *Emergency Powers Order* 4 of 1988. This directly contradicts s 23 of the Constitution, which vests such powers in the Prime Minister.

<sup>89</sup> Section 3(3) of the *Emergency Powers Order* 4 of 1988.

<sup>90</sup> *Disaster Management Act* 2 of 1997. See Kabi 2021 <https://allafrica.com/stories/202102230576.html>.

<sup>91</sup> Section 2 of the *Disaster Management Act* 2 of 1997.

<sup>92</sup> *Santam Versekerings Maatskappy v Kruger* 1978 3 SA 656 (A). Edgar Craies *Statute Law* 181 points out: "To invoke the application of the *ejusdem generis* rule there must be a distinct genus or category. The specific words must apply not to different

Court was incorrect to suggest, obiter, in *Mochochoko v The Prime Minister*,<sup>93</sup> that Covid-19 would fall within this genus.<sup>94</sup> As demonstrated above, although Covid-19 is novel, it may fit squarely within the genus of the *Public Health Order* rather than within the ambit of the *Disaster Management Act*. On the other hand, section 2 of the *Disaster Management Act* defines an emergency as:

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

Clearly, there is not much difference between the two definitions save to say that an "emergency" is that which the Prime Minister says it is. It is, therefore, possible that the Prime Minister may "determine" that any natural phenomenon included in the list for the definition of a "disaster" is an emergency.

It is, therefore, clear that there is a discord between the Constitution and the various pieces of legislation regulating emergencies in Lesotho. This does not bode well for the derogation of human rights. The ICCPR, to which Lesotho is a party, envisages one framework in the country for regulating derogations from human rights and imposes strict requirements for permissible derogations.<sup>95</sup>

## **5 The practical use of emergency powers: the three recent incidents**

The three recent incidents – the 2020 Covid-19-induced state of emergency, the 2022 state of emergency related to the failure to pass reforms law and the 2023 imposition of a national curfew by the Commissioner of Police – have shone a spotlight on the deficiencies in the emergency powers legal regime in Lesotho. The purpose of this section is to analyse these incidents to fortify the argument of this article: that there is a discord between the Constitution and the four statutes that deal with emergency powers.

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objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply ...". For instance, in February 2021 the Prime Minister declared a state of emergency which falls within this genus. Prime Minister Moeketsi Majoro declared a six-month state of emergency after heavy rains caused massive damage to farms, roads and bridges.

<sup>93</sup> *Mochochoko v The Prime Minister* (CIV/APN/141/20) [2020] LSHC 35 (26 June 2020).

<sup>94</sup> *Mochochoko v The Prime Minister* (CIV/APN/141/20) [2020] LSHC 35 (26 June 2020) para 4.

<sup>95</sup> Article 4 of ICCPR.

### 5.1 *The Covid-19-induced state of emergency since 2020*

Lesotho started introducing measures to combat Covid-19 before officially registering its first case.<sup>96</sup> The former Prime Minister of Lesotho, Thomas Motsoahae Thabane, first addressed the nation on 12 March 2020 regarding the spread of Covid-19 worldwide. He did not declare an emergency at the time. His second public address was on 18 March 2020, when he announced that the government had decided to declare a state of emergency. This declaration of a state of emergency was pre-emptive as the country had not at the time reported any Covid-19 cases.<sup>97</sup> The first case was recorded in May 2020,<sup>98</sup> yet the strict measures were pre-emptively instituted in March 2020. On 19 March 2020 the Government Secretary published a memorandum styled "National Emergency Response to the Coronavirus (Covid-19)".<sup>99</sup> This memorandum communicated the decisions of the Cabinet on measures intended to contain the spread of the virus. These were far-reaching measures such as but not limited to the imposition of limitations on meetings, the closure of schools, the closure of borders, and the reduction of working hours.

In communicating these measures the Government Secretary did not refer to any provision of law permitting such drastic human rights derogations. The government departments responded immediately to these Cabinet decisions. For instance, the Ministry of Education and Training immediately closed schools.<sup>100</sup> At this time, the Prime Minister had not declared an emergency or made the regulations. Mindful of this lapse, the Prime Minister officially declared the state of emergency in terms of section 23(1) of the Constitution on 27 March 2020.<sup>101</sup> Since the emergency was declared long after the "lockdown" was imposed by the Cabinet, the Prime Minister tried to cover up this glaring illegality by rendering his declaration of a state of emergency retroactive – effective from 18 March 2021. In any event, the declaration of a state of emergency in terms of section 23(1) of the Constitution, which the Prime Minister had purportedly invoked, did not cover the wide-ranging derogations resulting from the "lockdown". As indicated above, in terms of section 21(1) of the Constitution the rights that can be derogated from when a state of emergency has been declared in terms of section 23(1) of the Constitution are only the right to personal liberty (section 6), freedom from discrimination (section 18), and the right to

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<sup>96</sup> Ngatane 2020 <https://ewn.co.za/2020/03/19/lesotho-declares-national-emergency-over-covid-19-outbreak>.

<sup>97</sup> Ngatane 2020 <https://ewn.co.za/2020/03/19/lesotho-declares-national-emergency-over-covid-19-outbreak>.

<sup>98</sup> Lesotho recorded the first imported Covid-19 case on 13 May 2020. NECC 2020 <https://www.gov.ls/health-experts-confirm-lesothos-first-covid-19-case/>.

<sup>99</sup> Government Secretary 2020 <https://lesotholii.org/ls/Cabinet%20decision.pdf>.

<sup>100</sup> Ministry of Education and Training 2020 <https://lesotholii.org/ls/schools.pdf>.

<sup>101</sup> See *Declaration of Covid-19 State of Emergency* Legal Notice 26 of 2020.

equality before the law (section 19). Furthermore, another constitutional problem that confronted the Prime Minister was that the Constitution provides unequivocally that "[e]very declaration of emergency shall lapse at the expiration of fourteen days, commencing with the day on which it was made, unless it has in the meantime been approved by a resolution of each House of Parliament".<sup>102</sup> Hence, when he declared a state of emergency on 27 March 2020 and rendered it retroactively effective from 18 March 2020, the emergency was about to expire. In a way, this was a legal quagmire for him. The legal woes of the Prime Minister were compounded by the fact that he had prorogued Parliament on 20 March 2020.<sup>103</sup> Hence, the Prime Minister found himself in a rabbit hole. As Mhango and Maqakachane correctly observe, "[t]he implementation of these measures has been marred with some constitutional controversies".<sup>104</sup> Mindful of this entrapment, the Prime Minister tried to seek recourse in the *Disaster Management Act* and declared a new state of emergency in terms of the Act on 15 April 2020.<sup>105</sup> By this time it was clear that the Prime Minister and the government were clutching at straws. Similarly, the Court invalidated his purported prorogations of Parliament because of Covid-19 in *All Basotho Convention v The Prime Minister*.<sup>106</sup> The Court found that the prorogation was irrational.<sup>107</sup>

On 6 May 2020 the Minister of Health issued the *Public Health (Covid-19) Regulations* of 2020.<sup>108</sup> The Minister stated that he was making the regulations in terms of the *Public Health Order* of 1970 and "in respect of the disaster-induced state of emergency declared by ... the Prime Minister under section 3 and 15 of the Disaster Management Act, 1997 against the COVID-19 pandemic".<sup>109</sup> The regulations imposed wide-ranging derogations from human rights. The constitutionality of the regulations has not been tested in the courts of law.

Nevertheless, it is apparent that the derogations of human rights in line with the declarations of emergency by the Prime Minister and the successive regulations promulgated by the Ministers of Health have not been in keeping with the prescripts of the Constitution of Lesotho and the derogations

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<sup>102</sup> Section 23(2) of the *Constitution of Lesotho*, 1993.

<sup>103</sup> *Prorogation of Parliament* Legal Notice 21 of 2020.

<sup>104</sup> Mhango and Maqakachane 2020 <https://ancl-radc.org.za/node/631>.

<sup>105</sup> Mhango and Maqakachane 2020 <https://ancl-radc.org.za/node/631>.

<sup>106</sup> *All Basotho Convention v The Prime Minister* (Constitutional Case No 0006/2020) [2020] LSHCONST 1 (17 April 2020).

<sup>107</sup> *All Basotho Convention v The Prime Minister* (Constitutional Case No 0006/2020) [2020] LSHCONST 1 (17 April 2020). For an analysis of the case see Nyane 2021 LDD 193.

<sup>108</sup> *Public Health (COVID-19) Regulations* Legal Notice 41 of 2020. These were the initial regulations made by the Minister of Health. They have since been slightly adjusted depending on the rate of infections in the country.

<sup>109</sup> Preamble to *Public Health (COVID-19) Regulations* Legal Notice 41 of 2020.



framework provided by the ICCPR.<sup>110</sup> Be that as it may, people generally complied with the measures instituted by the government because Covid-19 undoubtedly poses an existential threat to the life of the nation. Therefore, it may be argued that the model of derogations, although it purported to use available legal instruments, was substantively extra-legal. The government's measures could be justified using the extra-legal model of derogations.

## **5.2 The 2022 recall of parliament during a state of emergency**

The year 2022 was eventful. Besides being an election year it was also the year when the country was expected to pass law reforms: the Tenth Amendment to the Constitution, 2022. Colloquially known as the "Omnibus Bill",<sup>111</sup> the Bill was the flagship for the reforms that started in earnest in 2012. This law was the flagship for the reform that had held the country to ransom virtually since 2012. It was widely expected that before its dissolution for the purposes of the election Parliament would have passed the reforms bill. At midnight on 13 July 2022 – its final day – the Parliament had not yet completed the enactment of the reforms. The King officially dissolved Parliament on 14 July 2022.<sup>112</sup> Mindful of this political catastrophe, the Prime Minister issued the gazette in which the Prime Minister lamented that "since Parliament has failed on account of lapse of time to pass the Eleventh (*sic*) Amendment to the Constitution Bill, 2022 and National Assembly Electoral Amendment Bill ... failure to pass the bills constitutes public emergency".<sup>113</sup> Consequently, the Prime Minister went on to proclaim that:

I, Moeketsi Majoro, Prime Minister of Lesotho, pursuant to section 23 (1) of the Constitution of Lesotho, 1993 and acting in accordance with the advice of the Council of State, and recognising that failure to pass the bills constitutes public emergency, by proclamation, declare the state of emergency to exist in Lesotho, from the 16th to 29th August, 2022.<sup>114</sup>

As indicated, section 23(1) of the Constitution empowers the Prime Minister to declare a state of emergency "[i]n time of war or other public emergency which threatens the life of the nation". As expected, the King subsequently recalled the Parliament from dissolution in terms of section 84(2) of the Constitution.<sup>115</sup> The section empowers the King, on the advice of the

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<sup>110</sup> See Art 4 of the ICCPR.

<sup>111</sup> Referring to this Bill as an omnibus bill was a misnomer because, although the Bill covered several aspects of the Constitution, it was not a consolidation of many bills. An omnibus bill is a bill that consolidates several bills for them to be passed at the same time. The Tenth Amendment to the Constitution Bill was a normal constitutional amendment, not an omnibus bill.

<sup>112</sup> *Dissolution of Parliament* Legal Notice 61 of 2022.

<sup>113</sup> *Declaration of a State of Emergency Proclamation* Legal Notice 79 of 2022.

<sup>114</sup> *Declaration of a State of Emergency Proclamation* Legal Notice 79 of 2022.

<sup>115</sup> *Recall of the Tenth Parliament* Legal Notice 82 of 2022.

Council of State, to recall Parliament from dissolution "owing to a state of war or of a state of emergency in Lesotho, it is necessary to recall Parliament".

The vexed question was whether the failure to pass the two bills constituted a public emergency threatening the life of the nation. The matter received the attention of the two superior courts – the High Court and the Court of Appeal. In the case of *Boloetse v His Majesty the King*<sup>116</sup> the Court did not enter into the definitional exercise of finding what substantively constitutes a state of emergency in terms of the Constitution. Instead the Court opted to take the procedural rather than a substantive approach to section 23 and section 84 of the Constitution. To that end the Court said that what sections 23 (1) and 84 (2) dictate is that in the exercise of their respective powers to declare a state of emergency and to recall Parliament, His Majesty and the Prime Minister do not act of their own volition and judgment but act in accordance with the advice of the Council of State.<sup>117</sup> The Court indicated further that: "the trigger for the declaration of a state of emergency and the recall of Parliament is the advice tendered by the Council of State to the Prime Minister and His Majesty. The jurisdictional fact for the exercise of section 23 and 84 (2) power is the advice that there exists a state of emergency in Lesotho".<sup>118</sup>

It would have been helpful for the Court to define what constitutes an emergency in terms of the Constitution. Even if such a pronouncement would not be conclusive, at least it would have gone a long way, given the facts of that case, towards defining the constitutional construct of a state of emergency. The jurisprudence of article 4, as developed by General Comment No 29, is essential to find the content of the state of emergency. As discussed above, the General Comment is very forthright that care must be taken not to style every disturbance abnormality or even a catastrophe as an emergency. Governments exercise restraint before declaring states of emergency because such declarations have far-reaching implications for the fundamental rights of citizens. This is a principle that militates against the abuse of emergency powers. The General Comment sheds some helpful light on the issue in that if States intend to invoke the right to derogate from Article 4 of the Covenant, "they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation". This is profound, as it provides

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<sup>116</sup> *Boloetse v His Majesty King Letsie III* (Constitutional Cases No 0013/0015/2022) [2022] LSHC 100 (12 September 2022).

<sup>117</sup> *Boloetse v His Majesty King Letsie III* (Constitutional Cases No 0013/0015/2022) [2022] LSHC 100 (12 September 2022) para 45

<sup>118</sup> *Boloetse v His Majesty King Letsie III* (Constitutional Cases No 0013/0015/2022) [2022] LSHC 100 (12 September 2022) para 45.

a test for what can constitute an emergency – a test that can help the interpretation of the same construct under the *Constitution of Lesotho*.

At the Court of Appeal the government sought to argue that determining what constitutes a state of emergency is in the province of the Executive: it is not a juridical question. As such, the courts should desist from interfering with the executive determination of what constitutes an emergency. To that end reliance was placed on its earlier decision in the case of *Tšepe v Independent Electoral Commission*,<sup>119</sup> whose gravamen is that:

In treating the administrative agencies with appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so, a Court should be careful not to attribute superior wisdom to matters entrusted to other branches of government. A Court should thus give due weight to the findings of fact and policy decisions made by those with special expertise and experience in the field.<sup>120</sup>

The Court of Appeal was not persuaded to adopt this deferential approach. Instead, the Court said that a state of war or a state of emergency are conditions necessary before a state of emergency is declared; a state of emergency must exist as a matter of fact. To that end the Court of Appeal said: "[the] situation [of emergency] does not exist merely by reason of the Prime Minister's declaration or the Council of State's advice to that effect without a factual foundation". The Court further invoked the reasonableness test thus: "the court shall not shy away from reviewing a decision which is not reasonably supported by the facts or not reasonable in light of the reasons given for it".<sup>121</sup>

It seems that the Court largely accepts what the Constitution says pertaining to the broad procedural contours, that the declaration of a state of emergency is an executive function. The judiciary will come into the picture only to review the reasonableness of the executive decision. This approach may be sound, but it is symptomatic of timidity on the side of the Court. The Court may not just say a state of emergency is an executive function. A state of emergency is a juridical concept: jurisprudence has evolved on its substantive and procedural aspects. It is risky for a court of law to relinquish its duty to lay down the principles governing states of emergency in cases such as that in point.

### **5.3 The 2023 imposition of a curfew by the Commissioner of Police**

In May 2023 the Commissioner of Police invoked the 1991 Amendment of the *Internal Security Act* of 1984 to impose a night curfew to curb gun violence following the assassination of the prominent radio presenter,

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<sup>119</sup> *Tšepe v Independent Electoral Commission* LAC (2005-2006) 169.

<sup>120</sup> *Tšepe v Independent Electoral Commission* LAC (2005-2006) 169 para 48.

<sup>121</sup> *Attorney General v Boloetse* (C of A (CIV) 55/2022) LSCA 32 (11 November 2022).

Ralikonelo Joki.<sup>122</sup> On 16 May 2023 the Commissioner of Police promulgated the *Internal Security Curfew Order*.<sup>123</sup> The Order imposed a curfew on "all persons throughout the Kingdom from 22:00 hours [*sic*] in the evening to 04:00 hours [*sic*] in the morning".<sup>124</sup> It further created an offence for failure to comply, punishable by imprisonment of a maximum period of two years or a fine not exceeding Ten Thousand Maloti. In terms of empowering legislation, the Commissioner does not have the power to create offences. However, a much bigger question is whether the Commissioner can declare a curfew throughout the country or whether his powers are confined to a "the inhabitants of any area" as the Amendment dictates. The question is given more weight by the fact that unlike the situation in 1991 when the Amendment was promulgated, the Constitution now expressly grants the power to declare emergencies in the country to the Prime Minister. A semantic contestation about whether a curfew is a state of emergency is inconsequential: a curfew falls under Article 4 of the ICCPR. A curfew is a measure that derogates from fundamental human rights and is therefore covered by the ambit of section 21, read with 23, of the *Constitution of Lesotho*. Hence, the imposition of a curfew by the Commissioner in terms of the *Internal Security (General) (Amendment) Order* of 1991 highlights another discord between the constitutional framework for emergency and ordinary legislation.

## 6 Conclusion and recommendations

This article set out to analyse the emergency powers regime established by the Constitution and other legislation. An emphasis was placed on the three most recent incidents of using emergency powers: the 2022 Coronavirus-induced state of emergency, the 2022 recall-of-parliament-induced emergency, and the May 2023 imposition of a national curfew by the Commissioner of Police. The above discussion has laid bare the fact that the *Constitution of Lesotho*, like most liberal constitutions, has a framework for human rights and derogations from such rights during emergencies.<sup>125</sup> While constitutional development in Lesotho has a history of the extra-legal usage of emergency powers, the current Constitution adopts a legal approach to derogations from human rights.<sup>126</sup> In addition to the Constitution, the *Public Health Order* of 1970, the *Internal Security Act* of 1984, the *Emergency Powers Order* of 1988 and the *Disaster Management Act* of 1997 also have a bearing on the regulation of emergencies.<sup>127</sup> As

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<sup>122</sup> Aljazeera 2023 <https://www.aljazeera.com/news/2023/5/17/curfew-in-lesotho-to-tackle-gun-crime-after-journalist-killed>.

<sup>123</sup> *Internal Security Curfew Order* Legal Notice 53 of 2023.

<sup>124</sup> Section 1 of *Internal Security Curfew Order* Legal Notice 53 of 2023.

<sup>125</sup> Sections 21 and 23 of the *Constitution of Lesotho*, 1993.

<sup>126</sup> See Art 4 of the ICCPR.

<sup>127</sup> IFRC 2021 [https://disasterlaw.ifrc.org/media/2117?language\\_content\\_entity=en](https://disasterlaw.ifrc.org/media/2117?language_content_entity=en).

demonstrated above, this legislation is not in harmony with the Constitution. In particular, the *Emergency Powers Order* of 1988 was promulgated by the military junta and intended to create a framework for the exercise of emergency powers at the time when the country had no constitution *stricto sensu*. Upon adopting the Constitution in 1993, the Act should have been automatically revoked.

The emergency that started in March 2020 exposed the underlying reality that the existing legislation on public emergencies is not necessarily in keeping with the Constitution. The Prime Minister began with a state of emergency in terms of section 23 of the Constitution, and later, when he could not comply with the Constitution's stringent substantive and procedural requirements, he resorted to a state of emergency in terms of the *Disaster Management Act* of 1997. As Shale aptly contends, "[t]his duplication of approaches does not comply with the rule of law principle, giving the impression that the state of emergency declared under section 23 remains indefinite and risks abuse".<sup>128</sup> This is unhealthy for any legal framework, and the country ought to streamline its emergency laws into one legal framework that cascades seamlessly from the Constitution.

Due to the legally clumsy way the government approaches derogations from human rights under the state of emergency, it may be concluded that government prefers to apply the extra-legal theory of derogations to the country's measures. As demonstrated earlier, this approach derives its legitimacy from the Lockean concept of executive prerogative. The Executive, it is often contended, is "charged with the task of protecting the state's national security interests, even by acting extralegally".<sup>129</sup>

Furthermore, in the long run Lesotho must consider revising the derogations regime *in toto*. This will involve harmonising the regime envisaged by the Constitution and the four statutory regimes created by the *Public Health Order*, *Internal Security Act*, the *Emergency Powers Oder*, and the *Disaster Management Act*. The international regime provided by the ICCPR may offer a useful guide<sup>130</sup> to the legislators as they attempt to create a single derogation regime.

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<sup>128</sup> Shale 2020 *AHRLJ* 475.

<sup>129</sup> Gross 2002 *Yale LJ* 1122.

<sup>130</sup> See Art 4(2) of the ICCPR and *General Comment 29*.

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## List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
Acta Jur Hung	Acta Juridica Hungarica
AHRLJ	African Human Rights Law Journal
ASIL Proc	American Society of International Law Proceedings
BYIL	British Yearbook on International Law
CLJ	Cambridge Law Journal
ECHR	European Convention on Human Rights
German YB Int'l L	German Yearbook of International Law
Hum Rts Q	Human Rights Quarterly
HR L Rev	Human Rights Law Review
ICCPR	International Covenant on Civil and Political Rights
ICON	International Journal of Constitutional Law

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IFRC	International Federation of the Red Cross and Crescent
Int'l Org	International Organization
J Afr L	Journal of African Law
LDD	Law, Democracy and Development
MLR	Modern Law Review
NECC	National Emergency Command Centre, Lesotho
OHCHR	Office of High Commissioner for Human Rights
OJLS	Oxford Journal of Legal Studies
U Miami L Rev	University of Miami Law Review
Yale J World Pub Ord	Yale Journal of World Public Order
Yale LJ	Yale Law Journal