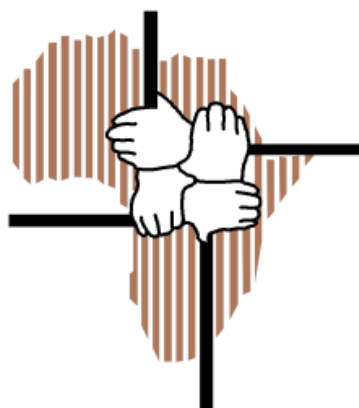


## Publication & Media Human Rights Situation Violations in Lesotho



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**Covid19: TRC's Human Rights Commentary on Violation of Human Rights during the Lockdown in Lesotho**

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## **ACRONYM**

- ACHPR =African Charter on Human and Peoples Rights
- COVID 19 = Corona Virus
- HURISA =Human Rights Institute of South Africa
- ICJ =International Commission of Jurist
- LLHR =Lesotho Lawyers For Human Right
- TRC = Transformation Resource Centre
- UN =United Nations
- WHO = World Health Organisation

## Human Rights during the Lockdown in Lesotho

Mr Mokitimi Ts'osane on behalf of the Transformation Resource Centre (TRC)

### 1. Introduction

The Government of Lesotho under its duty of guarantee stemming from the Constitution, human rights treaties and conventions has a duty and obligations to protect its citizens from any threat to their **Fundamental Human Rights under Chapter II** of the **Constitution of Lesotho** and socio-economic rights termed **“Principles of State Policy” under Chapter III**. It is this duty of guarantee which prompted the government to undertake extraordinary measures curb the spread of the novel Covid-19 which presented imminent and uncompromising threat to human life, health and well-being. The virus was ravaging first world countries and it exposed the inefficiencies of the system in the health sector.

In response, on the 27<sup>th</sup> March 2020 the Right Honourable Prime Minister of Lesotho declared a State of Emergency which was deemed to have come into effect on 18<sup>th</sup> March 2020. The State of Emergency proclamation was published a Gazette in accordance with **section 23(1) and (7)** of the Constitution. The State of Emergency also corresponded with the dictates of **Public Health Order No 12 of 1970** under **section 16(2)(a)** which mandates enforcement and imposition of isolation during surveillance of infections. The Magistrate court also has to be applauded for the release of prisoners in order to ensure the reduction of numbers of prisoners during this desperate time of crisis.

On the 29<sup>th</sup> March 2020, the government published another gazette which ordered a stringent lockdown as recommended by the World Health Organisation (W.H.O). This nationwide lockdown was for a period of 21 days which were to commence on the 1<sup>st</sup> April 2020 and was to be enforced by the army and the police. On the 22<sup>nd</sup> April, the lockdown was extended for a further 2 weeks.

Our Commentary as TRC covers and takes cognizance of the security agencies excesses against the citizens in the course of the enforcement of the nationwide lockdown to curb the spread of the novel Covid-19. We also cover Covid-19 used as a pretext to undermine parliament and

to disregard the fundamental constitutional and political values in a representative democracy. Additionally, our commentary notes that apart from the induced health crisis, the pandemic has rapidly ignited a colossal economic crisis and the Government of Lesotho under its duty of guarantee has an obligation to protect its citizens from the economic impact of this crisis.

It is against the background of this economic crisis that governments, including that of Lesotho, have had to formulate fiscal, monetary and macro-financial relief measures aimed at mitigating the socio-economic impact of Covid-19 and to provide support to individuals, households, firms and the markets crucial for a recovery. Ultimately, the fiscal and macro-economic relief measures guarantee citizens' right to life, well-being and health. The existence of these policy measures were engineered for effective softening of the economic impact of Covid-19.

## **2. Human Rights Violations**

We welcome the drastic measures with which the government responded to Covid-19 to enforce social distancing and deploying the army and the police to break the chain of viral transmission which greatly mitigated the risk of the spread of the virus. Further, we welcome the Right Honourable Prime Minister and the Police Commissioner Holomo Molibeli's respective appeals to the police and army to observe human rights and refrain from acts of brutality against citizens during the nationwide lockdown. The police had also promised take action against officers who did not heed this call. However, we cannot turn a blind eye to the material that went viral on electronic and social media platforms that pointed to the excesses committed by the security agencies in course of discharging their noble duties during the lockdown.

In response, TRC launched an online human rights violations register, which is undergoing evaluation in the Human Rights Department as the Lockdown has been lifted. TRC acted on the basis that all state's measures and responses to Covid-19, including the enforcement of the lockdown, should be proportionate, within the context and ambits of the rule of law, legal and necessary to protect public health in accordance with the constitution and international human rights instruments. We also hold a firm view that the security agencies' should have

been cognisant of the cross-cutting principle of respect to human dignity and integrity hence our condemnation of the brutal acts of torture, degrading and inhuman treatment on the citizens.

A local human rights organisation, Lesotho Lawyers for Human Rights (LLHR) through its president, Advocate Zwelakhe Mda KC also weighed in on the instances of the police and army excesses and in letter urged the Law Society of Lesotho to file an urgent application in the High Court interdicting the army commander and the police commissioner from assaulting people. The LLHR further urged the Prime Minister Thomas Thabane to 'exact accountability from the said public officers in terms of the relevant legislative framework'. The LLHR further said it would be in the interest of justice for the rogue soldiers and police officers to be suspended from their official duties pending determination of their criminal cases. LLRH has about 10 cases of excesses committed by the security agencies in course of discharging their noble duties during the lockdown.

Up to this day the government had not acted on the letter and we have no reports of any investigations to bring the perpetrators to account despite the availability of materials which pin point the aggressors. It was reported on government website that eleven people were arrested for disregarding the lockdown protocols in the Maseru and Berea districts. The suspects were charged for contravening **Section 3(14) read with Section 10(2) of Public Health Regulation COVID-19 Legal Notice 27 of 2020**. We are of a view that apprehension should be applied equally between members of the security agencies and private. The culture of the members of the security agencies flouting the law with impunity has to end.

We note that under the **Penal Code, 2010**, the charges would be assault with intent to cause grievous bodily. We find this too insufficient given the magnitude of the torture, degrading and inhuman treatment that individuals suffered in the hands of the security agencies.

### 3. Covid-19 as a pretext: Prorogation of Parliament

On the 18<sup>th</sup> March 2020 the Cabinet met and decided that COVID-19 be declared a national emergency. On the 20<sup>th</sup> March 2020 the four leaders of the political parties which have formed Government attended a meeting at the Royal Palace at 18H00 whereat the Prime Minister advised the King to prorogue Parliament and was given an ultimatum to act by 21H00. This move was opposed by 2(two) other coalition partners in Chief 'Maseribane, the Minister of Communications and Miss K. Rants'o, Minister of Labour and Employment.

Three(3) hours later, when the King had not acted in terms of the Prime Minister advise, the Prime Minister proceeded to prorogue Parliament and issued **Legal Notice No.21 of 2020**. The Prime Minister's prime reason was "due to prevalence of Corona Virus (Covid-19) which has been declared a pandemic by the World Health Organization (WHO) it is advisable not to have large gatherings of people in order to avoid the spread of the virus."

Notably, this move was condemned the National Executive Committee of the party the Prime Minister leads being All Basotho Convention, political parties in parliament (mainly opposition), civil society organisations and most prominently from one of the coalition partners in Basotho National Party (BNP). At the time the Prime Minister prorogued Parliament he was facing an imminent motion of no confidence launched by Members of Parliament of the party he leads and was supported by ABC's National Executive Committee. The move by Prime Minister was also condemned for the apparent unjustifiable involvement of the King in the Prime Minister's political battles as he was facing an imminent motion of no confidence in the National Assembly. One of the Applicants' prayers in **ABC & 6 Ors and Prime Minister & 4 Ors Constitutional Case No. 0006/2020** be declared that the Prime Minister and the Deputy Prime Minister have put the office of His Majesty the King (Head of State) into disrepute and lowered its esteem.

Proroguing parliament signalled a desperate move by the Prime Minister to frustrate the enactment of the **Ninth Amendment to the Constitution** which would strip him off the unilateral option of advising His Majesty to dissolve parliament in case he is faced with motion of no confidence. The motion simply means that to advise His Majesty on the particular issue,

the PM will need to command the two third majority of Parliament for approval. The net effect of prorogation is termination of the life of bills that lay before parliament. In this context, this could have included a bill of the magnitude of the **Ninth Amendment to the Constitution**.

A constitutional challenge was launched against the Prime Minister by All Basotho Convention and Basotho National Party together with 4 Members of Parliament and one member of the Senate. One of the reliefs sought was for the decision to prorogue parliament pursuant to the provisions of **section 91 (3) of the Constitution of Lesotho 1993 (as amended)** be reviewed, corrected and/or set aside. As alluded to at **paragraph 76** of the **ABC judgement** the constitutional court was called upon to audit the legality of prorogation as a means to implement the Government's policy to contain COVID-19.

In the end, the High Court sitting as the Constitutional Court found that the Prime Minister did not apply his mind to the issue of proroguing Parliament by not taking into account the role of Parliament to allocate resources to deal with the health emergency posed by COVID-19. In his response to the originating application, the Prime Minister failed to respond to the averment that he failed to take into account importance of Parliament in fighting COVID-19 and that failure amounted to an admission and the Prime Minister's version was palpably implausible considering that it is needed most to authorise emergency funding to deal with the pandemic. The Court found that the Prime Minister by ignoring the fact that by “proroguing Parliament, its constitutional financial-resources-allocative capacity which is crucial to fighting the scourge of COVID-19, would be virtually crippled, and, therefore, render his decision irrational.”

The Prime Minister's decision to prorogue parliament was ultimately controversial. It elicited a clear disregard of the fundamental values which are crucial to the operation of the constitutional system. The actions added fire to constitutional and political crises which have been engineered by a prime minister who "has the propensity and has persistently displayed some modus operandi to damage critical arms of government" and demonstrated a "persistent behaviour of indulging in unconstitutional decisions compromising the Kingdom of Lesotho" as noted at para. 26 of **ABC's judgement**.



The prorogation of parliament indicated an unambiguous disregard for fundamental tenets of democracy and an abominable disregard of constitutional values from a pair, the PM and DPM, which should be the embodiment of the highest values. The use of Covid-19 as pretext to sideline parliament for 3 months came at a moment when political decisions of immense importance regarding the pandemic and governance were to be made. Prorogation challenged the core democratic constitutional concept of checks and balances, disregarded the importance of separation of powers and was an attempt to erode the executive's accountability to parliament and. It was also a sheer overreach of the Prime Minister which would have embroiled the Office of the King in political battles. This was also violation of the right of citizens to participate in the conduct to of public affairs their democratically elected representatives as per **section 20(a) of the Constitution**.

As noted by the Court, it was undeniable that the Prime Minister used Covid-19 as his reason for prorogation but at the end it was ostensibly clear that it was just a pretext to hold onto power by a complicit collusion between the Prime Minister who is facing a murder charge and his Deputy who would qualify for lifetime deputy ministerial benefits in July 2020. The court has to be applauded for saving the core values of democracy on which the Constitution of Lesotho was developed.

#### **4. Fiscal, Monetary and Macro-financial reliefs**

While still awaiting the development of National Covid-19 Response Integrated Plan 2020 in collaboration with development partners, the government of Lesotho on the 13<sup>th</sup> day of April 2020 rolled out fiscal, monetary and macro-financial reliefs to bail out the economy with stimulus packages. Among a host, the government promised wage subsidies to the factories and textile workers for a 3(three) months period. The government rolled out Disaster Relief Fund, Relief Fund for the Private Sector, 3 months grants for those aged 60 years and above but below the qualifying age of 70 years, orphans and informal traders.

The tax relief proposed is primarily a 3(three) months deferment of PAYE, VAT and CIT to ease the burden on those vulnerable firms and individuals. However, this is only deferred for a period of 3 months. Other measures include credit facilities and 3(three) months deferment period on

payment of existing facilities from banks. Due to the local currency's peg to South Africa's Rand, no exchange rate and balance of payments measures were proposed.

## 5. Concerns

- a. While we acknowledge that the government had to act with urgency, it was important for the government to engage the business sector and all other stakeholders before announcing any policy interventions as failure to consult can lead to unintended consequences.
- b. No plan of action was laid down on how the relief measures were to be implemented. There were shocking stories which featured on online media platform where the poor were subjected to so much hunger and reliefs mostly came from either private citizens or business persons because the government had not delivered on its promises. Workers were starving due to the government delays the implementation of the COVID-19 Private Sector Relief Fund to rescue businesses that were affected by the national lockdown.
- c. There were reports on retrenchments from such companies as MG Health Ltd, a cannabis facility company formerly known as Medigrow Ltd. It reported a retrenchment 70 workers. The oil companies were under a lot of strain due to the fall in the oil price. The government has rolled out rescue plan for retrenchments.
- d. The government has not laid down any plan of action to curb the widened and deepening economic inequality. It has not acknowledged that despite Lesotho being Covid-19 free as at this moment, a large majority of people are vulnerable to poverty, there is no food security, that there is lack of infrastructural development.
- e. There was no clear plan for people living with disabilities in line with the UN Convention on the Rights of Persons Living with Disabilities which placed them at the risk of contracting the virus and ensuring that they had access to food and their essential needs during the lockdown.
- f. There were no clear mechanisms laid down to ensure that women and children who were prone to domestic violence were protected and where there were cases of domestic violence, they could be reported urgently and conveniently.
- g. We further note with dismay the now overturned prorogation of Parliament by the Prime Minister for a period of 3(three) months from 20<sup>th</sup> March 2020 until 19<sup>th</sup> June 2020 under the

pretext of the novel COVID-19. In Court, the Prime Minister answer failed to address the averment that he failed to apply his mind by not taking into account or by ignoring the fact that by proroguing Parliament, its constitutional financial-resources-allocative capacity which is crucial to fighting the scourge of COVID-19, would be virtually crippled and, therefore, render his decision irrational. (SEE: ABC & 6 Ors and Prime Minister & 4 Ors Constitutional Case No. 0006/2020).

- h. We note with much regret that on the 18<sup>th</sup> April 2020, a day after Constitutional Court judgement, the Prime Minister ordered it to restore law and order, and to rein-in individuals and some institutions that he accused of abusing the courts. Further, the Prime Minister on the 22<sup>nd</sup> of April 2020 purported to extend the lockdown by 2 (two) weeks to the 5<sup>th</sup> of May 2019 without approval of Parliament through a resolution in terms of section 23(2) of the Constitution despite incessant and repeated pleas from TRC for the Prime Minister to open Parliament in order for Prime Minister to enforce the lockdown within the ambits of the rule of law and not to risk it being overturned or the government being held liable for any misconduct due to a defective, illegal or irrational state of emergency which was not properly declared.
- i. We note with concern that the National Emergency Command Centre was never gazetted from the beginning of the Lockdown to the end. There were allegations of misuse of funds to sponsor lavish lifestyles for public officials working for the National Emergency Command Centre. A leaked document had shown how the COVID19 funds were used to sponsor meals and other expenditures in the midst of medical professionals' (nurses and doctors) dissatisfaction with working conditions characterised by lack of protective equipment in the face of Covid-19.

## **6. Conclusion**

It is important to note that the Lockdown was lifted with effect from the 6<sup>th</sup> May 2020 with the government urging adherence to social distancing measures. However, the government has not, through the police, issued any statement to the effect that the gross violations of citizens' rights were investigated and perpetrators to be prosecuted accordingly. We cannot turn a blind eye to the material that went viral on electronic and social media platforms that

pointed to the excesses committed by the security agencies in course of discharging their noble duties during the lockdown.

The government failed in its duty of guarantee stemming from the Constitution, human rights treaties and conventions to protect its citizens from torture, degrading and inhuman treatment. It is worth reiterating that that the fundamental rights to life and freedom from torture, degrading treatment cannot be suspended or deviated from under the pretext of either the lockdown or the State of Emergency.

With no appropriate support mechanisms and access to resources to the marginalised or vulnerable groups as persons with disabilities, elderly and child-headed families' before and during the implementation of the lockdown, the government failed its duties and obligations under various international instruments.

## **7. Recommendations**

In recommendations we urge the state to be accountable and transparent putting in mind the cross-cutting principle of respect to human dignity and integrity and equality before the law.

1. The government has to ensure that all measures adopted in relation to Covid-19 comply with states national and international obligations and that all necessary restrictions on human rights are justified, proportionate and applied equally.
2. The Prime Minister and his government should cease from using Covid-19 as a pretext to adopting measures which undermine the fundamental tenets of democracy.
3. The government must ensure independent investigations of the alleged human rights violations which occurred during the lockdown and ensure indictment of the perpetrators. The government further has to ensure the independence of the judiciary so as to ensure fair and transparent trials of human rights abusers.
4. The government has a duty to pay special attention to the rights of the vulnerable and marginalised groups and to ensure that the relief measures intended to assist them are sped up.
5. The government has to ensure and draw up an action plan for the widened and deepening economic inequalities which are resultant from the financial meltdown of the economy due to

Covid-19. In the process, the government has to ensure inclusive consultations with relevant stakeholders for an inclusive action plan.

6. The Parliament is urged to criminalise torture, inhuman and degrading treatment in order for the law to reflect the magnitude of cases which go beyond mere assault to those which reflect the psychological trauma citizens undergo in the hands of the security agencies.

## **8. Acknowledgements**

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