

Appendix Two

Country Survey: Malawi

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1. Introduction

The events related to Covid-19 and associated government restrictions in Malawi are closely bound up with politics.¹ The former government was in favour of lockdown-type restrictions and the incoming government, as opposition, was initially against such restrictions. Malawi experienced few known cases of Covid-19 during most of 2020 (fewer than 7000 and fewer than 200 known deaths by the end of the year).² This began to change in late December 2020, thought to be the result of residents returning from South Africa.

Despite the initial low number of cases in 2020, then President Mutharika declared a State of Disaster on 20 March 2020.³ In April 2020, Mutharika announced a 21-day nationwide lockdown to take effect until 9 May 2020 to prevent, contain and manage the further spread of COVID-19, using provisions of the Public Health Act. This was overturned by the courts via judicial review process, which ultimately affirmed the unconstitutionality of the lockdown provisions in September 2020.⁴

A change of government occurred in mid-2020. Further regulations containing restrictions were issued in August 2020, which did not provide for a lockdown. On 12 January 2021 a state of disaster was again declared⁵ and on 17 January 2021⁶ it was reported that a state of emergency was being considered by President Chakwera after cases and hospitalisations increased and some members of government died; no such declaration has yet occurred. Amendments to the Public Health Act Regulations were however published in the Gazette on 18 January 2021, which made changes to curfew and market hours, but did not amount to a lockdown.

¹ See Kaunga, SB 'How have Malawi's courts affected the country's epidemic response?' available at <https://blogs.lse.ac.uk/africaatlse/2020/11/13/how-have-malawis-courts-law-affected-epidemic-response/>

² See the World Health Organisation (WHO) Health Emergency Dashboard (Malawi) available at <https://covid19.who.int/region/afro/country/mw>

³ In terms of section 32 Disaster Preparedness and Relief Act 1991 (Disaster Act); President Mutharika Declaration of State of Disaster 20 March 2020 available at <https://malawi.un.org/en/46778-declaration-state-disaster-malawi-president-peter-mutharika>

⁴ *The State on application of Kathumba and others v President of Malawi and others* (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 (03 September 2020)

⁵ President Chakwera Special Address 12 January 2021 available at https://www.scotland-malawipartnership.org/files/4416/1046/6500/H.E._Special_Address_12_Jan_2021.docx.pdf

⁶ President Chakwera National Address 17 January 2021 available at <https://malawi.un.org/sites/default/files/2021-01/H.E.%20COVID%20SPEECH%202.pdf>

1.1. Legal mechanisms available for lockdown-type restrictions

A State of Emergency, a State of Disaster, and rules in terms of the Public Health Act are legal mechanisms available, which may limit rights, available to the Malawi government in addressing the pandemic. The latter two have been used.

1.2. State of Emergency

A State of Emergency was not declared in Malawi ahead of its first attempt at lockdown in 2020. In early 2021, it was reported that a State of Emergency was being considered, but at the time of writing had not yet been imposed. Malawi's Constitution authorises the President to declare a state of emergency in certain situations.⁷ Such a declaration may occur only with the approval of the Defence and Security Committee of the National Assembly.⁸ A declaration may only be made in times of war, threat of war, civil war or widespread natural disaster.⁹ The declaration may only be made with regard to the specific location where that emergency exists¹⁰, and must be publicly announced before taking effect.¹¹

A state of emergency permits a derogation from some but not all of the rights enumerated in the Constitution. No derogation is permitted in respect of the right to life; the prohibition of torture and cruel, inhuman or degrading treatment or punishment; the prohibition of genocide; the prohibition of slavery, the slave trade and slave-like practices; the prohibition of imprisonment for failure to meet contractual obligations; the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts; the right to equality and recognition before the law; the right to freedom of conscience, belief, thought and religion and to academic freedom; and the right to habeas corpus.¹²

Derogation from other Constitutional rights is only permissible to the extent that such derogation is consistent with the obligations of Malawi under international law.¹³ In the case of a widespread natural disaster, the derogation must be strictly required for the protection and relief of those people and facilities whether in or outside the disaster area.¹⁴ A state of emergency may only be

⁷ Section 45(3) Constitution of the Republic of Malawi 1994 (Constitution).

⁸ Section 45(3)(b) Constitution.

⁹ Section 45(3)(c) Constitution.

¹⁰ Section 45(3)(d) Constitution.

¹¹ Section 45(3)(d) and (e) Constitution.

¹² Section 45(2) (a)-(i) Constitution.

¹³ Section 45(4)(a) Constitution.

¹⁴ Section 45(4)(b)(ii) Constitution.

declared for a maximum of three weeks, after which it may be extended by three months at a time, by resolution of the National Assembly.¹⁵

1.3. State of Disaster

Although Malawi has legislation which provides for a State of Disaster, such a declaration does not empower lockdown-type restrictions. Malawi did make use of this legislation in 2020, and again in 2021.

The Disaster Preparedness and Relief Act 1991 provides for the declaration of a State of Disaster by the President if it appears to the President that extraordinary measures are necessary to protect and assist the persons affected or likely to be affected by a disaster.¹⁶ A disaster is defined to include ‘plague or epidemic disease that threatens the life or well-being of the community’.¹⁷ Such a declaration remains in force for three months, but may be extended, and there is no requirement for the National Assembly to affirm the State of Disaster, only that the President communicates to it the declaration.¹⁸

The most significant rights-limiting implication is that while a State of Disaster is in play, a Civil Protection Officer (CPO) (provided for by region in the Act) may take possession of or control any land or other properties for the purpose of dealing with the disaster.¹⁹ Further, the Minister may take over the powers of CPO’s, if they are unable to meet the demands of the disaster.²⁰

Compensation to the owner of such forfeited property may be paid out of the National Disaster Preparedness and Relief Fund (Disaster Fund).²¹ The Disaster Fund does not require a declaration of Disaster for Funds to be accessed in general; the funds may be accessed on an ongoing basis for the purpose of furthering civil protection generally.²²

¹⁵ Section 45(5) Constitution.

¹⁶ Section 32 Disaster Act.

¹⁷ Section 2 Disaster Act.

¹⁸ Section 33 Disaster Preparedness and Relief Act 1991 (Disaster Act).

¹⁹ Section 31 Disaster Act.

²⁰ Section 42 Disaster Act.

²¹ Section 32(6) Disaster Act.

²² Section 38 Disaster Act.

1.4. Public Health Act

The Public Health Act 1948 provides for the Minister to be able to make special rules in respect of 'formidable' epidemic and endemic diseases, including a catch-all in terms of s31(t), which provides for rules 'for any other purpose ... having for its object the prevention, control, or suppression of infectious diseases'.²³ Further, the Minister may also regulate and restrict entry into Malawi or any part of it.²⁴ It is this provision which the Malawi state relied on in 2020 in applying lockdown-type restrictions.

2. Restrictions imposed by the state in relation to COVID-19

The Malawi State has used the State of Disaster and Public Health Act Rules to impose restrictions.

2.1. Special Cabinet Committee established 7 March 2020

President Mutharika established a special cabinet committee on COVID-19 on 7 March 2020, before any cases of Covid-19 were recorded.²⁵ Chief Secretary to the Government, Lloyd Muhara, said the special committee is "to assess the impact of the COVID-19 and oversee a Cross-Government response to the threat posed by the disease". The cabinet committee was chaired by Minister of Health and Population, Jappie Mhango, and had other eight cabinet ministers as members. 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.²⁶

²³ Section 31(t) Public Health Act.

²⁴ Section 38 Public Health Act.

²⁵ CGTN Africa 8 March 2020 available at <https://africa.cgtn.com/2020/03/08/malawi-president-establishes-special-cabinet-committee-on-covid-19/>.

²⁶ Nkhata MJ & Mwenifumbo AW 'Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi' *Afr. hum. rights law j.* vol.20 n.2 Pretoria 2020 available at <http://dx.doi.org/10.17159/1996-2096/2020/v20n2a7>

2.2. Court challenge to expulsion of foreign nationals

Ten Chinese nationals sought an order preventing the Director-General of Immigration Services and the Attorney-General from either expelling or preventing their entry to Malawi on a valid visa, after they were refused entry on 18 March 2020.²⁷ 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.²⁸ The Court confirmed its interlocutory order preventing the defendants from expelling the applicants pending the hearing of the substantive judicial review on 3 April 2020.

3. Disaster Declaration 20 March 2020

A State of Disaster was declared in March 2020. All schools, colleges (including technical colleges), both public and private universities were ordered to be closed,²⁹ and public gatherings were restricted to less than 100 people. It is unclear under what powers the President made these executive orders; this may have been in terms of the Public Health Act, which requires publication in the Gazette after the fact. In April 2020 explicit rules in terms of section 31 of the Public Health Act were promulgated in the Gazette by the Minister of Health.

3.1. Court challenge to closure of universities

Applicants who were students at the University of Malawi approached the Court for judicial review after the announcement to close the University as a precautionary measure against COVID-19.³⁰ The applicants were denied judicial review on the basis that, amongst others, the applicants had alternative remedies.³¹

²⁷ 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) Judicial Review Case 19 of 2020, HC LL (unreported), <https://malawilii.org/mw/judgment/high-court-general-division/2020/5>

²⁸ Nkhata MJ & Mwenifumbo AW.

²⁹ Declaration of State of Disaster by Malawi President Peter Mutharika, 20 March 2020 available at <https://malawi.un.org/en/46778-declaration-state-disaster-malawi-president-peter-mutharika>

³⁰ *The State and The President of the Republic of Malawi & Others Ex Parte Steven Mponda & Others (Ex Parte Steven Mponda & Others) 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>

³¹ *Mponda 17*.

4. Nationwide 21-day lockdown in terms of Public Health Act 9 April 2020

On 1 April 2020 the Minister of Health declared COVID-19 a formidable disease under section 30 of the Public Health Act.³² The Public Health Act Rules promulgated on 9 April 2020 (the April Rules) state that “in pursuance of the object of these rules and in addition to the powers granted to the minister under section 31 of the Act, the minister may, in consultation with any line minister, and in conformity with any directions the line minister may give, *impose additional measures* in order to prevent, contain and manage covid-19.”³³ Rule 11 went further, claiming that s31(t) implies that “in furtherance of the measures imposed under section 31 of the Act, *the minister may declare a lockdown.*”³⁴ Lockdown is defined as “the restriction of movement of persons declared under rule 11.” Rule 11(3) provided that all persons be confined to their place of residence, except in order to perform or access an essential service, medical attention, pharmacies, food stores, courts or banks; or to exercise in a group of fewer than three persons. All other businesses including informal markets and alcohol stores were closed.

5. Court challenge and provisional injunction against the lockdown April 2020

The civil rights group Human Rights Defenders Coalition (HRDC) challenged the April Rules, on the basis *inter alia* that the Malawi state should not prevent people such as informal vendors from working without providing for their needs, or starvation would result. They sought judicial review of the following decisions:

- The decision to declare a lockdown without the attendant state of emergency, where a lockdown amounts to a substantial derogation of rights;
- The decision to declare a lockdown without providing for social security interventions;

³² 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>.

³³ Rule 5(2) Public Health (Coronavirus Prevention, Containment and Management) Rules April 2020 (April Rules) available at 2020mw-government-gazette-supplement-dated-2020-04-09-no-4A.

³⁴ Rule 11(1) April Rules.

- The decision to promulgate Public Health Act Rules by the Minister without Parliamentary oversight;
- The decision to promulgate rules outside the scope of the parent Act.³⁵

The court granted an injunction on the same day of the application to block the lockdown, pending a judicial review.³⁶ On 23 April 2020 the state withdrew its opposition to the injunction; the court viewed this withdrawal dimly and on 28 April the court, on the basis that a matter on the interpretation or application of the Constitution had arisen which requires certification, stayed the proceedings pending the decision on certification by the Honourable Chief Justice and determination of the constitutional issues by the High Court Panel to be constituted under section 9(3) of the Courts Act.³⁷

6. Task Force replaces Presidential Committee, May 2020

President Mutharika appointed a 21-member Presidential Task Force on Covid-19, which replaced the Special Cabinet Committee on Covid-19 chaired by Minister of Health, Jappie Mhango in May 2020.³⁸ The cabinet committee had faced growing criticism over its handling of Covid-19.³⁹ Mutharika dissolved it and selected a more inclusive 21-member Presidential Task Force, co-chaired by a public health expert from the Malawi College of Medicine, which included the nine cabinet ministers from the Special Cabinet Committee, alongside other key stakeholders, including the influential Christian Health Association of Malawi (CHAM) and Chiefs Council.⁴⁰

³⁵ As summarised in *The State on application of Kathumba and others v President of Malawi and others (Constitutional Reference Number 1 of 2020)* [2020] MWHC 29 (03 September 2020) page 6.

³⁶ *S v President of Malawi and Others; Ex Parte: Kathumba and Others* (Judicial Review Cause No. 22 of 2020) [2020] MWHC 7 (17 Apr. 2020).

³⁷ *The State on the application of Kathumba & Ors v The President & Ors* (Judicial Review Cause No. 22 of 2020) [2020] MWHC 8 (28 April 2020)

³⁸ Nation Publications Limited, 6 May 2020.

³⁹ Kao K et. al. 'The ABCs of Covid-19 prevention in Malawi: Authority, benefits, and costs of compliance' Published online 28 August 2020 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7455236/>

⁴⁰ Kao K.

7. Elections and change of government in June 2020

Before the Panel delivered its judgment, there was a change of government. The Malawi High Court had annulled the so-called “Tipp-ex” 2019 elections in February 2020⁴¹ and new presidential elections had been ordered by the court; this decision was challenged in the Supreme Court of Appeal, which in May 2020 concurred with the High Court and ordered new elections to be held.⁴² In making their decision, the courts broke with precedent in not requiring those contesting the elections to prove not only that irregularities occurred, but that these would have substantially affected the result.⁴³ The opposition had claimed the March lockdown measures were a ploy by the then ruling Democratic Progressive Party (DPP) to delay presidential elections.⁴⁴ Elections were finally held on 23 June 2020. Lazarus Chakwera became President on 28 June 2020 after defeating Mutharika with 59 percent of votes, leading the Tonse Alliance, a coalition of parties. The lockdown constitutional case remained pending.

8. Lapse of State of Disaster, new structure, attempt at lockdown

The state of disaster declared on 20 March 2020 expired on 20 June 2020 and no extension was announced.⁴⁵ On 10 July 2020 the Task Force announced several measures to contain the spread of COVID-19, which were based on the April Rules despite a prevailing High Court order that suspended their implementation.⁴⁶ On 13 July 2020 the Attorney-General wrote to the Chairperson of the Task Force advising him to reverse the decision to implement the new Rules based on the April Rules since the High Court had suspended these.⁴⁷ This effectively halted the second attempt at a lockdown.⁴⁸ 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

⁴¹ *Chilima and Another v Mutharika and Another* (Constitutional Reference No. 1 of 2019) [2020] MWHC 2 (03 February 2020).

⁴² *Mutharika and Another v Chilima and Another* (Msca Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 (08 May 2020).

⁴³ Kaunga SB.

⁴⁴ Kaunga SB.

⁴⁵ Nkhata MJ & Mwenifumbo AW.

⁴⁶ Nkhata MJ & Mwenifumbo AW.

⁴⁷ Maingo W ‘Government reorganises COVID-19 governance structure’ 15 July 2020 available at <https://allafrica.com/stories/202007160124.html>

⁴⁸ Nkhata MJ & Mwenifumbo AW.

governance structure for the management of the COVID 19 pandemic compris[ing] a reconstituted Presidential Task Force and a national secretariat'.⁴⁹

9. Revised Public Health Act Rules August 2020

On 7 August 2020, new Public Health Act rules were promulgated (the August Rules).⁵⁰ The August Rules did not provide for lockdown as such but instead sought to regulate the way in which people behaved in public, including requiring of the wearing of a mask, regulating the way in which businesses operate⁵¹, the prohibition of public gatherings,⁵² the closure of educational institutions⁵³ and restrictions on entry into Malawi, with returning citizens having to provide a negative test and also be tested on arrival.⁵⁴ Extensive provisions related to persons testing positive or suspected of being ill of Covid-19, including that an enforcement officer may order the on-site detention, quarantine or isolation of an individual or his or her removal to such a place.⁵⁵ Anyone disobeying such an order is liable to a fine of 100 000 Kwacha (US\$ 125.00) or three months' imprisonment.⁵⁶

10. Judgment on the judicial review of April lockdown September 2020

The constitutional issues referred to the Constitutional Panel were finalised in September 2020.⁵⁷ The Panel did not refer the matter back to the referring court after determining the issues, because it was of the view that resolving the constitutional issues settled the matter.⁵⁸ Despite the April Rules having been revoked in August 2020, the Court opined that it was possible for the Rules to be imposed again, and therefore it was desirable for the court to decide on them: "the court will look at the continuing or potential continuing effect of the government action in issue" in deciding whether

⁴⁹ Maingo W.

⁵⁰ The Malawi Gazette Supplement 7 August 2020 (August Rules).

⁵¹ Rule 13 August Rules.

⁵² Rule 11 August Rules.

⁵³ Rule 12 August Rules.

⁵⁴ Rule 14 August Rules.

⁵⁵ Rule 8(1)(d) August Rules.

⁵⁶ Rule 8(4) August Rules.

⁵⁷ *The State on application of Kathumba and others v President of Malawi and others* (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 (03 September 2020) (*Kathumba*) available at <https://malawilii.org/mw/judgment/high-court-general-division/2020/29>.

⁵⁸ *Kathumba* page 8.

the matter is moot or not.⁵⁹ The court ultimately declared the lockdown provisions of the April Rules unconstitutional, on a number of bases.

The court found that the Public Health Act does not appear to authorise a lockdown scenario and thus the April Rules were void *ab initio*.⁶⁰ The Rules should have faced Parliamentary scrutiny⁶¹ and thus their promulgation was in contravention of section 58 of the Constitution, which provides for the delegation of powers to enact subsidiary legislation in accordance with specific Acts of Parliament. Any subsidiary legislation so made shall be laid before Parliament in accordance with its Standing Orders; 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.

Further, the court found that while the state is entitled to enact pandemic measures, the limitation on rights contained in the April Rules "went beyond limiting the rights (in terms of the limitations clause) ... as the impact of the restrictions was to actually negate the essential content of these rights."⁶² Further, the impugned lockdown fundamentally restricted rights which do not permit derogation in the Constitution, including the right to life and to equality; derogation is only permissible in a State of Emergency.⁶³

The court further found a right to social security implicitly provided for in section 13 of the Constitution, and found the measures by government to offset lockdown which would reach only 200 000 people, to be woefully inadequate, given that 89 percent of Malawians are in the informal workforce.⁶⁴

11. Declaration of Disaster and proposed State of Emergency 12 January 2021

On 12 January 2021, President Chakwera declared a State of Disaster to apply in all 28 districts of Malawi, for the following 90 days. He further announced that he had begun the process for a

⁵⁹ Kathumba page 13

⁶⁰ Kathumba p26

⁶¹ Kathumba p27

⁶² Kathumba p32

⁶³ Kathumba p33.

⁶⁴ Kathuma p39.

declaration of a State of Emergency through this public declaration, as required by the Constitution.⁶⁵ Such a State of Emergency has not yet been declared (May 2021).

12. Further measures 17 January 2021

President Chakwera announced that further rules would be gazetted “tomorrow” (18 January) which would include: closure of drinking places and all other businesses at 8 pm; closure of markets at 5 pm; compulsory wearing of masks; no socialising between 9 pm and 5 am; shift work or working from home for businesses able to do so; and a limit of 50 on religious gatherings.⁶⁶ These rules were duly gazetted in terms of Public Health Act rules⁶⁷; although far less restrictive than the April Rules, some may still fall foul of the September 2020 judgment. At the time of writing no state of emergency had been declared.

13. Conclusion

Lockdown-type rules in Malawi are particularly abhorrent because of widespread poverty in the country and the inability of the state to provide social security to those who would be unable to earn an income. The *Kathumba* cases has established that any such rules which affect in particular non-derogable rights should be in terms of properly empowering state, should be within a State of Emergency situation, should be overseen by Parliament, and should ensure adequate social security.

⁶⁵ UM Malawi Covid-19 Update 29 January 2021 available at <https://reliefweb.int/report/malawi/un-malawi-covid-19-update-situation-update-no-36-29-january-2021>

⁶⁶ President Dr Lazarus Chakwera National address, 17th January 2021 available at <https://www.facebook.com/malawigovernment/photos/a.247499418769893/1682811408572013/?type=3>

⁶⁷ Public Health (Corona Virus and Covid 19) (Prevention, Containment and Management) (Amendment) Rules, 2021, Government Notice 2, Gazette Extraordinary 18 January 2021.