IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CONSTITUTIONAL REFERENCE NO. 1 OF 2020

BETWEEN

THE STATE (On the application of)

ESTHER CECILIA KATHUMBA..... 1ST CLAIMANT

MONICA CHNAG'ANAMUNO ..... 2ND CLAIMANT

HUMAN RIGHTS DEFENDERS COALITION ..... 3RD CLAIMANT

CHURCH AND SOCIETY PROGRAM OF THE

LIVINGSTONIA SYNOD OF THE CHURCH OF

CENTRAL AFRICA PRESBYTERREAN ..... 4TH CLAIMANT

PASTOR DAVID MBEWE ..... 5TH CLAIMANT

AND

PRESIDENT OF MALAWI ..... 1ST RESPONDENT

MINISTER OF MALAWI GOVERNMENT

RESPONSIBLE FOR HEALTH ..... 2ND RESPONDENT

INSPECTOR GENERAL OF MALAWI ..... 3RD RESPONDENT

COMMANDER OF THE MALAWI DEFENCE

FORCES ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

MALAWI COUNCIL OF CHURCHES ..... 6TH RESPONDENT

THE SOCIETY OF MEDICAL DOCTORS..... 1ST AMICUS CURIAE

THE LAW SOCIETY ..... 2ND AMICUS CURIAE

THE WOMEN LAWYERS ASSOCIATION ..... 3RD AMICUS CURIAE

CORAM : Honourable Justice KT Manda

: Honourable Justice FA Mwale

: Honourable Justice DA DeGabriele

: Mr. Kagundu, & Mr. Chitukula, Clarkes Attorney of Counsel for the 1st, 2nd and 3rd Claimants

: Mr. Mwafulirwa & Mr. Chiwaya, Kawelo Lawyers of Counsel for 4th and 5th Claimants

: Mr. Chisiza for The Attorney General

: Mrs. Namagonya, Court Reporter

: Mr. Mpandaguta, Court Clerk

Honourable Justice Manda, Justice Mwale, Honourable Justice DeGabriele:

JUDGMENT

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1. Introduction: Factual Context of the Constitutional Referral

1.1. Coronavirus disease 2019 (COVID-19) is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). It was first identified in December

2019 in Wuhan, Hubei Province in China, and has resulted in an ongoing global pandemic. The first confirmed case has been traced back to 17 November 2019 in Hubei. As of 30th August 2020, 25,187,765 cases have been reported across the world, with 847,043 deaths.

1.2. It goes without saying that the impact and effect of COVID-19 as a public health concern is unprecedented, at least for our time. The submissions of the Society of Medical Doctors, Amicus Curiae, cite the World Health Organization (WHO which declared the COVID-19 outbreak a due to the rapid increase in the number of cases outside China. A pandemic is an epidemic occurring world-wide, spread over multiple countries and continents (See Last JM, (ed.), A *D*ictionary of *E*pidemiology, 4th edition. New York: Oxford University Press; 2001). What makes this virus (SARS-COV-2) even more serious, according to the Society of Medical Doctors, is its novelty. Knowledge of the spectrum of the effect of SARS-COV-2 infections on human health is still evolving. Further, no effective cure has been found for SARS-COV-2 or for the patients who develop COVID-19 disease. There is also no vaccine yet although vaccine research is currently underway. COVID-19 disease is manifesting in many people who cannot be cared for and looked after in existing health system infrastructure. The severe form of COVID-19 disease is claiming the lives of many economically and socially productive adults. Consequently, COVID-19 disease has negatively impacted the socio-economic status of any society.

1.3. Malawi has not been spared from the pandemic. She registered her first COVID-19 case on 2nd April 2020. The pandemic's manifestation in the country prompted the then State President, Prof. Arthur Peter Mutharika, to declare a State of National Disaster throughout Malawi on 20th March 2020 ostensibly pursuant to section 32 of the Disaster Preparedness and Relief Act (Cap 33:05). This was followed by a declaration of the Corona Virus Disease as a formidable disease on 1st April 2020, pursuant to the Public Health Act and subsequently to the promulgation of subsidiary legislation, namely the Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (herein after the COVID-19 Rules) under section 31 of the Public Health Act by the 2nd Respondent, the Minister of Health, and the Chairperson of a special cabinet committee on COVID-19 empaneled by the 1st Respondent at the time.

1.4. On 13th April 2020, the 2nd Respondent conducted a press briefing during which he announced that the total number of confirmed COVID-19 cases had reached 16 and 2 deaths had been confirmed. On 14th April 2020, the 2nd Respondent went further to declare a 21-

day lockdown that was to be guided by the COVID-19 Rules made under section 31 of the Public Health Act, that had been *gazetted* by Government on 9th April 2020. The lockdown was to take effect on the expiry of 18th April 2020 until after midnight on 9th May 2020. At the time the announcement to implement the COVID-19 Rules was made, Parliament had not exercised its powers of scrutiny on the COVID-19 Rules, even though the Rules had been *gazetted*.

1.5. The office of the 3rd Respondent, the Inspector General of Police, is established under section 152 of the Constitution with a mandate to provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of the Constitution and any other law. The office of the 4th Respondent is established under section 159 of the Constitution with the function, *inter alia*, of upholding the sovereignty and territorial integrity of the Republic and guarding against threats to the safety of its citizens by force of arms; upholding and protecting the constitutional order in the Republic and assisting the civil authorities in the proper exercise of their functions under the Constitution; providing technical expertise and resources to assist the civilian authorities in the maintenance of essential services in times of emergency as well as other duties. At a joint press briefing on the 16th of April 2020, both the 3rd and 4th Respondents announced that they were ready to deploy police officers and soldiers to enforce the lockdown that was declared by the 2nd Respondent.

1.6. The 5th Respondent, is the Attorney General whose office is established under section 98 of the Constitution. The office of Attorney General is the principal legal adviser to the Government. The powers vested in the office of the Attorney General may be exercised by the person appointed to that office or such other persons in the public service, acting as subordinates of that person and in accordance with his or her general and specific instructions.

1.7. The 6th Respondent, the Malawi Council of Churches was founded in 1942 as Christian Council of Nyasaland and its name was changed to Malawi Council of Churches in 1998. The members of the Malawi Council of Churches are united in confessing the faith to which the church, the body of Christ, has ever witnessed in the one triune God, Father, Son and Holy Spirit; worshipping the Father revealed to humanity in Jesus Christ by the power of the Holy Spirit, owing obedience to Jesus Christ as the way, the truth and the life, trusting the guidance of the Holy Spirit and labouring for the advancement of the Kingdom of God

through the Word of God. The Council accepts the holy scriptures of the Old and New Testaments as the record of God's revelation of Himself to humanity, as containing all things necessary for salvation, and as being the ultimate standard of faith and conduct.

1.8. On 17th April 2020, the implementation of the lockdown was challenged by the Claimants in two separate applications for judicial review. The 1st to 4th Claimants filed their application in Blantyre and the 5th Petitioner filed in Lilongwe. As both applications arose from the same set of facts and related to the same questions of law, the actions were consolidated in proceedings registered as Judicial Review Cause No. 22 of 2020 before Justice Kenyatta Nyirenda. The "without notice" application for permission to apply for judicial review was coupled with an application for an interlocutory injunction.

1.9. The injunction was initially granted for a period of 7 days pending a full hearing with all the parties in attendance. On 24th April 2020, the High Court heard the application for judicial review and in its final order made on 28th April 2020 sustained the injunction for a further 5 days, and further restrained the Respondents from suspending or implementing the complete closure of all religious gatherings against the 5th Petitioner or any church within Malawi until the determination of the main matter. The Court then proceeded to refer the matter to the Honourable the Chief Justice to consider certifying it as a constitutional matter in accordance with section 9(3) of the Courts Act (Cap 3:02) and Order 19 rule 2 of the Courts (High Court) (Civil Procedure) Rules, 2017.

1.10. The Honourable the Chief Justice, certified the matter as falling within the purview of section 9(2) of the Courts Act, on 30th April 2020. This Panel of three High Court Judges was constituted in consequence.

1.11. There was also an application filed in the proceedings by the 6th Respondent to be removed as a party, based on the grounds, among others, that it is not a Government body, and does not have authority to issue orders or directives complained about by the 5th Petitioner. The fate of this application is not known. Our observation though, on the face of it, is that the 6th Respondent was indeed wrongfully added as a party to the matter and find accordingly.

1.12. We are extremely indebted to all parties and amici curiae who have presented this Court with carefully analysed and well researched submissions within a ten-day period. The Society of Medical Doctors has gone to considerable length to review a wide range of data and information including published and grey literature, documents and minutes from the

Public Health Institute of Malawi (PHIM), public COVID-19 minutes from the Blantyre District Health Office and College of Medicine COVID-19 Taskforce, cluster meetings of the various committees of the COVID-19 National Response, medical journal articles, and relevant court documents. Their conclusions are based on their expertise and knowledge and the available data present, the current state of knowledge, as well as the scope and trajectory of the COVID-19 pandemic at global, regional and national levels. These expert technical analyses have assisted the Court in understanding the pandemic, the known and unknown parameters and expert opinions on the type of measures that are feasible in curbing the spread of the virus. Equally instructive were the submissions of the Malawi Law Society and Women's Lawyers Association who have provided insights on the legal and gendered implications of the pandemic in the Malawian context.

2. Issues for Certification

2.1. The application for judicial review from which these proceedings emanate sought the review of the following decisions:

1) The decision to declare a lockdown without the attendant declaration of a state of emergency when the lockdown amounts to a substantial derogation from the fundamental rights under Chapter IV of the Constitution;

2) The decision to declare a lockdown without providing for social security interventions to marginalised groups in our society, which groups are in the majority, the decision being made with an effective view of punishing innocent Malawians;

3) The decision to promulgate Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (hereinafter referred to as "COVID-19 Rules) and to implement them without parliamentary oversight as required by Section 58 of the Constitution given that the effect of the rules is to substantially derogate from the fundamental rights under Chapter IV of the Constitution. Can the Minister lawfully suspend fundamental constitutional rights through the making of subsidiary rules and lawfully implement the rules before Parliament has a chance to review the rules; and

4) The decision to promulgate and implement the COVID-19 Rules purportedly under Section 31 of the Public Health Act where the rules expressly state that they authorize the taking of measures which are outside the scope of the parent statutory provisions and which are otherwise ultra vires.

Having gone through the application and having heard the Claimants, Justice Kenyatta Nyirenda was unable to decide on the questions raised in the action for judicial review because he was of the opinion that a matter on the interpretation or application of the Constitution had arisen. In consequence, the honourable Judge refered the questions below to the Chief Justice for certification pursuant to section 9(3) of the Courts Act and Order 19 rule 2 of the Courts (High Court) (Civil Procedure) Rules 2017. The questions are:

> 1) Whether or not the Minister of Health can declare the lockdown with the attributes [sic] as the lockdown impugned herein as provided for under the COVID-19 Rules without the attendant declaration of a state of emergency under Section 45 of the Constitution;
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> 2) Whether or not the right to social security is provided for, implicitly or explicitly under the Constitution and whether the Minister of Health can declare a lockdown without establishing and implementing social security interventions to protect the livelihoods of most Malawians who are impoverished;
>
> 3) Whether or not the Minister of Health has power to make subsidiary legislation outside the specification of the parent Act, namely, the Public Health Act;
>
> 4) Whether or not the Minister of Health has power to implement subsidiary legislation made under the Public Health Act after it has been gazetted, without the subsidiary legislation first being laid before Parliament for its scrutiny in accordance with the relevant Standing Orders;
>
> 5) Whether or not the COVID-19 Rules substantially and significantly affect the rights and freedoms recognized by the Constitution;
>
> 6) Whether or not the COVID-19 Rules are ultra vires, and whether or not the populace should be subjected to the implementation of such rules given the threat posed by the deadly COVID-19 pandemic.

2.2. Although it was the Judge that referred the matter for certification, this Court has noted that the Claimants in the matter also intended to have the matter referred for certification, as the record reveals a joint submission by the Claimants (filed on 23rd April 2020) in which they argued that there are a number of issues arising in the present case which are amenable to certification as constitutional matters. The matters highlighted by the Claimants' submission for certification were as follows:

1. Whether the Minister of Health can declare the lockdown with the attributes as the lockdown impugned herein as provided for under the COVID-19 Rules without the attendant declaration of a state of emergency. The Applicant's position is that they cannot. This issue will require the determination of the question whether the determination of a lockdown is in reality a declaration of a state of emergency which must comply with the tenets of section 45 of the Constitution and if so, whether it did indeed so comply.

2. Whether the right to social security is provided for, implicitly or explicitly under our Constitution and whether a Minister of Health can declare a lockdown without establishing and implementing social security interventions to protect the livelihoods of most Malawians who are impoverished. Sections 26, 27, 28, 29 and 30 appear to be implicated herein. Further it will be an issue for the Court's determination whether on the facts of the present case such interventions, if any, meet the social security requirements of the Constitution.

3. Whether section 58 of the Constitution which prescribes constitutional standards for the making or coming into force of subsidiary legislation. The main issues are whether the Minister has power to make subsidiary legislation outside the specification and purposes of the parent Act; whether the Minister has power to implement subsidiary legislation after it has been gazetted, without first being laid before parliament for its scrutiny in accordance with the relevant Standing Order and further whether the Minister has power to make subsidiary legislation that would substantially and significantly affect the rights and freedoms recognized by the Constitution.

4. In relation to the right to administrative justice under section 43 of the Constitution, whether the COVID-19 rules are ultra vires, and whether the populace should be subjected to the implementation of such ultra-vires rules given the threat posed by the deadly COVID-19 pandemic. This raises the issue whether the rule of law must be complied with in times of crisis.

It was therefore the Claimants' submission that the issues they raised related substantially to the determination of the constitutionality of an act or omission of an organ of State or other persons, in this case the 1st Respondent, President of Malawi and the 2nd Respondent, the

Minister of Health. They further argued that their application also concerned the status, powers or functions of State or a public authority under the Constitution; and last but not least, that the application dealt with the enforcement and protection of the Constitution. The questions that the Claimants intended for referral are similar in nature to those raised by the Judge and their concerns have been sufficiently dealt with by his referral.

2.3. All the issues that fell before Justice Kenyatta Nyirenda in the action for judicial review have now been referred to this Court. Initially, this Court formed the view that it would restrict its jurisdiction only to the certified questions that hinge on constitutional issues and refer any matters that are purely administrative back to Justice Nyirenda to determine in the judicial review. Having carefully reflected on the questions that have been certified for this Court's decision, we have come to the considered view that the final decision on all the questions certified in effect fully subsumes any issues that came before Justice Nyirenda in the judicial review. Any decision as to whether the Rules complained of are unconstitutional or ultra vires can only be made by a panel of not less than three judges empaneled under section 9(2) of the Court's Act. In arriving at this decision, this Court has also considered the decision of the Supreme Court of Appeal in the case of ***Amon Mussa v The Republic***, MSCA Criminal Appeal No. 2 of 2011 (unreported) where the learned Justices of Appeal held as follows:

> *"We are of the view that declaring a provision of a statute to be unconstitutional is a constitutional matter. Therefore, only a constitutional court has the jurisdiction to do so".*

3. Intervening Events

3.1. It has come to our attention that the Minister of Health has, since this matter has been pending before this Court, promulgated the Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules 2020 under s. 31 as read with s. 29 of the said Public Health Act. These rules were published under Government Notice No. 48 in *The Malawi Gazette Supplement on August 7, 2020* and were to have immediate effect. Rule 22 of these rules state that the Public Health (Corona Virus Prevention, Containment and Management) Rules 2020 are revoked.

3.2. By section 3 of the General Interpretation Act, the Courts are mandated to take judicial notice of any Act enacted by Parliament as a public Act, and by s. 22 of the said Act, this

includes any subsidiary legislation promulgated under such an Act. In the present case, this Court takes judicial notice of the Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules, (hereinafter referred to as "the new Rules") which, by rule 22, have expressly revoked the previously promulgated Public Health (Corona Virus Prevention, Containment and Management) Rules 2020. Recalling that this action was commenced to challenge the now revoked rules, it would appear on a preliminary view, that any constitutional issues that arose in respect of the questions certified for our interpretation and application of the Constitution by Justice Kenyatta Nyirenda have ceased to exist and are no longer amenable for the Court's determination.

3.3. Ordinarily, the extinction of the subject matter to litigation has the consequence of extinguishing the entire action rendering any decision-making by the Court moot thereby becoming a mere academic exercise and of no legal consequence. However, subject matter extinction must arise out of an uncontrollable or inevitable event that occurs during the course of the proceedings. Subject matter extinction cannot be conduced by any of the parties to the matter. The event before us was neither uncontrollable nor inevitable. It arose out of the deliberate action of the 2nd Respondent, the Minister of Health. Acceding to the view that the subject matter in this action has been withdrawn would be tantamount to acceding to the withdrawal or discontinuance of the action by a respondent contrary to rule 42 of the Courts (High Court) (Civil Procedure) Rules, 2017. Rule 42 only envisages withdrawal or discontinuance at the instance of the claimant and further only with the leave of the Court having first filed an application to that effect and serving all affected parties as required under rule 46. To cease making a determination under the circumstances would therefore mean the Court has allowed a respondent to discontinue a matter without following procedure.

3.4. Further, the 5th Respondent, the Attorney General, was instrumental in the promulgation of the new rules. The 5th Respondent was the only Respondent who made submissions to this Court and did not contest the unconstitutionality of the former COVID-19 Rules in their submission in response. In essence, all the 5th Respondent sought was that certain parts of the former Rules that were unconstitutional be struck off so that the Executive could continue with its task of enforcing COVID-19 measures. Considering that this is the case, by removing the subject matter of the current proceedings from this Court, the 5th Respondent has in effect taken on the role of final arbiter in deciding that specific parts of

the former Rules were unconstitutional. Had the 5th Respondent wished to have taken this course, knowing that they did not have much to contest, an agreement by consent for the execution of the Court should have been entered into with the Claimants. It is only competently open to this Court to decide whether the issues raised by the Claimants and the amici curiae in their detailed submissions, were unconstitutional. It was therefore not open to the 5th Respondent to decide which parts of the Rules were unconstitutional without considering all the issues that were before the Court.

3.5. There is also another reason, rooted in established constitutional law doctrine, why this Court must proceed to a firm determination of the present matter. The reason this Court would be invited, if occasion arose, not to proceed to a determination of the present matter, in view of the repeal or revocation of the previously promulgated Public Health (Corona Virus Prevention, Containment and Management) Rules 2020, would be that such repeal or revocation has rendered the present matter moot. But this cannot be so. This matter is not moot. In arriving at this conclusion, we draw inspiration from the decision of the US Supreme Court in the case of *Nebraska Press Association vs Stuart* 427 U.S. 539 (1976). In that case, Burger CJ, at pages 546-547, stated as follows:

> *"The order at issue in this case expired by its own terms when the jury was empaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the* ***Simants*** *case. Intervenor* ***Simants*** *argues that for this reason the case is moot. Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies.* ***Indianapolis School Comm'rs v. Jacobs****, 420 U.* ***S.*** *128 (1975);* ***Sosna v. Iowa****, 419 U.S. 393, 397-403 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review."* ***Southern Pacific Terminal Co. v. ICC,*** *219 U.* ***S.*** *498, 515 (1911)...The controversy between the parties to this case is "capable of repetition"...the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the Claimants who cover events throughout the State is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered*

*plenary review in this Court, since these orders are by nature short-lived. See, e. g., **Weinstein v. Bradford**, 423 U. **S.** 147 (1975); **Sosna v. Iowa, supra; Roe v. Wade**, 410 U. S. 113, 125 (1973); **Moore v. Ogilvie**, 394 U. **S.** 814, 816 (1969); **Carroll v. Princess Anne**, 393 U. S. 175, 178-179 (1968). We therefore conclude that this case is not moot, and proceed to the merits."*

3.6. Just like the US Supreme Court found in *Nebraska Press Association vs Stuart*, we likewise find in the present case that the issues that we have been called upon to decide are capable of repetition and, in this regard, we take judicial notice that the new regulations have indeed repeated a number of salient issues for review as raised by the Claimants in respect of the previous rules and with which this Court is seized. Again, as the Court found in ***Nebraska Press Association vs Stuart,*** we also find that a finding that the matter herein is moot would only enable the Respondents to evade review of a matter capable of repetition. The facts of the present case are therefore not caught by the constitutional doctrine of mootness.

3.7. In another US Supreme Court decision, ***Super Tire Engineering Co. v. Mccorkle*** 416 U. S.115 (1974) the Court proceeded to determine a matter on a labour issue even though the strike that was the subject matter of the litigation was no longer live. Blackmun J, delivering the decision of the Court, stated, at page 122, that:

the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.

3.8. He proceeded to state, at pages 125-126, that:

If we were to condition our review on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review"...To require the presence of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action (or the immediate threat thereof). It is sufficient, therefore, that the litigant shows the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest. Otherwise, a state policy affecting a collective-bargaining -arrangement, except one involving a fine or other penalty, could be adjudicated

> *only rarely, and the purposes of the Declaratory Judgment Act would be frustrated. Certainly, the pregnant appellants in* ***Roe v. Wade, supra****, and in* ***Doe v. Bolton****, 410 U. S. 179 (1973), had long since outlasted their pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. 410 U. S., at 125 and 187. Similar and consistent results were reached in* ***Storer v. Brown****, 415 U. S. 724, 737 n. 8 (1974);* ***Rosario v. Rockefeller****, 410 U. S. 752, 756 n. 5 (1973);* ***Dunn v. Blumstein****, 405 U.* ***S.*** *330, 333 n. 2 (1972); and* ***Moore v. Ogilvie****, 394 U.* ***S,*** *814, 816 (1969), cases concerning various challenges to state election laws. The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.*

3.9. In our own jurisprudence, we refer to the recently decided case of ***The State (on the application of the Human Rights Defenders Coalition and 2 others) v The President of The Republic of Malawi and Another***, Judicial Review Case No. 33 of 2020, High Court, Lilongwe District Registry (unreported) (***the HRDC case***). In the ***HRDC*** case, the respondent took the liberty of reversing an act that had led to the institution of judicial review proceedings. Justice Mkandawire refused to accede to the view that the subject matter had been withdrawn and reasoned as follows:

> *After having listened to both sides, I ordered that the matter should proceed for adjudication. I was satisfied that the Respondents had not withdrawn the matter. All that had happened was the reversal of the letters to the concerned justices. Even if such reversal of decision was taken to be withdrawal, the Respondents had not complied with Order 12 Rule 42 of the Civil Procedure Rules as to how matters can be discontinued. I considered the fact that there was a lot at stake in this matter. The doctrine of separation of powers and the foundation of judicial independence were on trial. I took judicial notice of the public interest in the matter. It would have been a betrayal of judicial accountability. If I followed the road map of the Attorney General to have the matter closed.*

3.10. All these decisions tend to show that the Court will look at the continuing or potential continuing effect of the governmental action in issue when addressing its mind to the question as to whether particular proceedings are moot or not. For the reasons already given, we find that the present case presents an issue "*capable of repetition, yet evading review*", and that even if there had been no replacement rules to the previously promulgated

Public Health (Corona Virus Prevention, Containment and Management) Rules 2020, there would still have been a strong potential of repetition or continuing effect of those regulations. As earlier observed however, the newly adopted Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules, 2020 in some respects, make the continuing effect or potential thereof even more likely.

3.11. This Court shall therefore proceed to consider the action as originally referred to it on its merits.

4. Issues for Determination

4.1. The issues for this Court's consideration have therefore been summarised as follows:

1. Does the Minister of Health have the power to make subsidiary legislation outside the specification and purposes of the parent Act?
2. Does the Minister of Health have power to implement subsidiary legislation made under the Public Health Act after it has been *Gazetted*, without the subsidiary legislation first being laid before Parliament for its scrutiny in accordance with the relevant Standing Orders?
3. Can a lock down be imposed under a state of emergency as opposed to a state of disaster?
4. Is the right to social security provided for, implicitly or explicitly, under the Constitution and can the Minister of Health can declare a lockdown without establishing and implementing social security interventions to protect the livelihoods of most Malawians who are impoverished?

5. Does the Minister of Health have the power to make subsidiary legislation outside the specification and purposes of the parent Act?

5.1. The 1st, 2nd, 3rd and 4th Claimants have argued that some of the rules in the COVID-19 Rules are *ultra vires* section 31 of the Public Health Act and therefore contravene section 58 of the Constitution. Section 31 specifically provides that:

> *"Whenever any part of Malawi appears to be threatened by any disease described in the last preceding section, the Minister may declare such part an infected area and may make Rules for all or any of the following purposes, namely—*
>
> *(a) for the speedy interment of the dead;*

(b) for house to house visitation;

(c) for the provision of medical aid and accommodation, for the promotion of cleansing, ventilation and disinfection and for guarding against the spread of disease;

(d) for preventing any person from entering or leaving any infected area without undergoing all or any of the following— medical examination, disinfection, inoculation, vaccination or passing a specified period in an observation camp or station;

(e) for the formation and regulation of hospitals and observation camps or stations, and for the placing therein and reception of persons who are suffering from or have been in contact with persons suffering from infectious disease;

(f) for the destruction or disinfection of buildings, furniture, goods or other articles, which have been used by persons suffering from infectious disease, or which are likely to spread the infection;

(g) for the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;

(h) for the removal of corpses;

(i) for the destruction of rats, the means and precautions to be taken on shore or on board vessels for preventing them passing between vessels and from vessels to the shore or from the shore to vessels and the better prevention of the danger of spreading infection by rats;

(j) for the destruction of mosquitoes, the means and precautions to be taken in respect of aircraft arriving at or departing from Malawi and for preventing mosquitoes from passing from aircraft to land or from land to aircraft, and the better prevention of the danger of spreading infection by mosquitoes;

(k) for the removal and disinfection of articles which have been exposed to infection;

(l) for prohibiting any person from living in any building or using any building for any purpose whatsoever if in the opinion of a medical officer of health any such use is liable to cause the spread of any infectious disease; any Rules made under this

section may give a medical officer of health power to prescribe the conditions on which such a building may be used;

(m) for the compulsory medical examination of persons suffering or suspected to be suffering from infectious disease;

(n) for the registration of residents in an infected area;

(o) for the registration of vehicles in an infected area;

(p) for the compulsory confiscation and disposal of canoes and fishing gear used by any person in breach of any rule relating to the disease known as sleeping sickness;

(q) for the control of wood cutting in an infected area;

(r) for the restriction of residence in, immigration to or emigration from, an infected area;

(s) for the control of fishing and hunting in an infected area;

(t) for any other purpose whether of the same kind or nature as the foregoing or not having for its object the prevention, control or suppression of infectious disease, and may by order declare all or any of the Rules so made to be in force within the whole or any part or parts of the infected area".

According to the section above, it is not disputed that the Minister can make subsidiary legislation for purposes of managing threats of infections or widespread infections. The critical issue however, is whether such subsidiary legislation can lawfully impose a lockdown.

5.2. The 5th Respondent, on behalf of the 1st, 2nd, 3rd, and 4th Respondents has submitted that the 2nd Respondent has powers under section 31 of the Public Health Act to make subsidiary legislation, and that any legislation made in such a manner is legal. However, the Respondents acknowledge that the 2nd Respondent does not have power to make subsidiary legislations outside the specifications and purposes of the Public Health Act. The Respondents have implored the Court to hold that the Covid-19 Rules were legal, save for Rules 11, 18 and 19 which were outside the specifications and purpose of the Public Health Act, and which were ultra vires the powers of the 2nd Respondent. Rule 11 concerns the declaration of a lockdown, rule 18 concerns the Judiciary and Rule 19 concerns the

National Assembly. The Respondent prays that only rules 18 and 19 be struck down as being ultra vires.

5.3. The Respondents brought to the attention of this Court a recent Kenyan case, seeking this Court to adopt the reasoning in that case in particular the precautionary principle. In the ***Law Society of Kenya v. Hillary Mutyambai, Inspector General of Police and Others***, Petition Number 120 of 2020 (Covid 025), the issue concerned the imposition of a night curfew as one of the various measures that the Kenyan Government had put in place to halt or prevent the spread of the virus. The Claimants in that case challenged the night curfew as unconstitutional and of no legal effect on the basis that it was made under a statute that deals with public order and not health issues. While the court held that failure to specify the time frame for the night curfew was unconstitutional, it ordered that the Kenyan Government specify the time and it upheld the order as being constitutional and of legal effect based on the fact that the order for a night curfew was a precautionary measure to prevent the spread of the disease. The court held on pages 78 to 81 as follows:

> *"In a crisis like the one facing the country, it can be presumed that the 2nd Respondent issued the Curfew Order in line with the 'Precautionary Principle' as was elucidated in the case of the* ***Republic v. Ministry & 3 Others Ex Parte Kennedy Amdany Langat & 27 Others, [2018] Eklr*** *as follows; "Therefore, applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and seriousness of those risks are apparent"*

The premise of this precautionary principle as advanced by the Respondents, is that the lockdown, though declared through an Act that deals with public health was constitutional and of legal effect because it was aimed at containing the rate of the spread of the infection of COVID-19. It must be noted that the employment of such a precautionary principle must be grounded in law and in legality which they have failed to demonstrate in the matter before us.

5.4. It is the considered view of this Court that the provisions complained about in the COVID-19 Rules do indeed exceed what is specifically provided for in the parent Act. The ambit of what the Minister can lawfully provide for under section 31 of the Public Health Act is very clear from what has been reproduced above. It would be a stretch of section 31 to state that power of the minister to provide for the speedy interment of the dead extends to authorising the Minister under rule 12(3) of the COVID 19 Rules to regulate public gathering by restricting the conduct of funerals, compel the provision of sanitary or hygienic facilities at public events and to compel the provision of adequate ventilation at a gathering as set out in paragraphs (j), (k) and (l) of that rule.

5.5. Further, this Court holds that rule 16(2) of the COVID-19 rules that specifically restricts movement to a restricted area has no basis in the parent Act. Rule 16(2) provides as follows:

> *"Where a person has to travel to a restricted area or depart from a restricted area, for*
>
> *(a) purposes of receiving essential medical management;*
>
> *(b) purposes of attending a funeral of a close family member, an acquaintance or a dependant;*
>
> *(c) purposes of assisting a close family member, acquaintance or dependant who is ill or otherwise suffers from a distressing situation; and*
>
> *(d) any other reason which an enforcement officer considers sufficient to warrant the travelling, that person may obtain a permit from an enforcement officer nearest to that person or at the point of entry into or exit from a restricted area, authorising travel".*

The closest provision providing for the restriction of any form of movement is section 31(d) above which simply provides for preventing any person from entering or leaving any infected area without undergoing medical examination, disinfection, inoculation, vaccination or passing a specified period in an observation camp or station. The restriction envisaged in the parent Act is very narrow and relates specifically to ingress and egress from infected areas. There is no plausible way in which such a provision can be used to justify the restrictions that have been set out in rule 16(2) of the COVID-19 Rules.

5.6. The rule that has provided the most consternation in the COVID-19 Rules is perhaps rule 11 which provides that:

> *"(1) In furtherance of the measures imposed under section 31 of the Act, the Minister may declare a lockdown:*
>
> *Provided that where the declaration has been made prior to its publication in the Gazette, the Minister shall, as soon as possible after making it, cause it to published in the Gazette.*
>
> *(2) The Minister shall, in the declaration,*
>
> *(a) specify the date on which the lockdown commences and prescribe the duration of the lockdown;*
>
> *(b) specify the area to which the lockdown applies;*
>
> *(c) specify the persons to whom the declaration does not apply;*
>
> *(d) seek the deployment of the Malawi Defence Force and Malawi Police Services to enforce the lockdown;*
>
> *(e) allow the operation and provision of essential services;*
>
> *(f) prescribe the manner in which any person may access essential services and acquire basic necessities of life; and*
>
> *(g) specify any other matter he considers relevant.*
>
> *(3) During a lockdown-*
>
> *(a) a person, except a person exempt under sub-rule (2)(c), shall-*
>
> *(i) be confined to his place of residence, except for any of the following reasons-*
>
> *(aa) performing an essential service;*
>
> *(bb) obtaining essential goods or services;*
>
> *(cc) seeking medical attention; or*
>
> *(dd) visits to pharmacies, food supply stores, courts or banks;*
>
> *(ii) not enter into or depart from a restricted area;*
>
> *(iii) not travel from one restricted area to another restricted area; or*

(iv) not sell or purchase alcoholic beverages;

(b) all shops and businesses shall be closed, except those classified as essential services;

(c) all open markets and informal trading activities shall be closed;

(d) all entertainment places, including bottle stores, shebeens, bars, pubs and nightclubs, including those within hospitality facilities, cinemas, casinos and video shows, shall remain closed; and

(e) restaurants, fast food outlets, cafes and coffee shops shall be closed to the public except to provide take away services.

(4) The Minister may, extend or further extend the duration of the lockdown for a period not exceeding one month at a time, and the Minister shall, as soon as possible after making the extension, cause it to be published in the Gazette".

There is no provision under section 31 of the Public Health Act that envisages a situation of lockdown and therefore this rule also lacks a basis in the parent Act.

5.7. No provision under section 31 of the Public Health Act touches on the duties or conduct of employers in relation to infectious diseases. The attempt in rule 13 to regulate employment sector undermines the Public Health Act. The said rule 13 provides as follows:

(1) The Minister may prescribe the following measures on employers and employees —

(a) operation of shifts for employees;

(b) the spacing between shifts for employees at a workplace;

(c) restrictions on the number of persons at any workplace at any time;

(d) the spacing between employees at a workplace;

(e) prevention of persons showing general symptoms of COVID-19 from accessing a workplace;

(f) where applicable, provision of isolation facilities at a workplace for employees showing symptoms of COVID-19;

(g) provision of personal protective equipment for all persons at a workplace;

(h) observance of sanitary and hygienic practices, including disinfection of the workplace and in between shift.

5.8. Rule 17 of the COVID-19 Rules places restrictions on public entertainment and works. Yet clearly, the mandate to regulate these areas falls within the ambit of Local Councils under section 103 of the Local Government Act, and not with the Minister of Health. This is clearly an overreaching of functions which cannot be sustained by the power given to the Minister of Health under section 31 of the Public Health Act.

5.9. Rule 18 of the COVID-19 Rules regulates judicial proceedings. By no stretch of section 31 can such a measure be justified. The said rule 18 provides as follows:

"(1) A judicial officer may use electronic means of hearing and conducting a matter as a primary means, including the service of documents, actual hearing of the parties, receiving evidence and making determinations.

(2) Where it is absolutely necessary that a matter be heard in chambers or in open court, a judicial officer presiding over a matter shall

(a) cause the chamber or open court where the hearing takes place to be disinfected prior to commencement of the hearing of the matter;

(b) ensure that persons in a closed space are sitting or standing at least two metres apart from each other in all directions;

(c) all persons in the chamber or open court have personal protective equipment during the proceedings;

(d) the chamber or open court is well ventilated;

(e) the hearing does not exceed two hours without a break of at least thirty minutes;

(f) ensure that, prior to entry into the chamber or open court, every person has practiced sanitary and hygienic measures, including washing of hands.

(3) The Chief Justice may issue directions to___

(a) prescribe the use of electronic means as a primary means of hearing, conducting and disposing of matters;

(b) suspend the hearing of matters in chambers or open court;

(c) prescribe the number of persons present in a chamber or open court;

(d) suspend, extend or relax the procedure and time periods prescribed under the Supreme Court of Appeal Act, Courts Act and Local Courts Act;

(e) allow officers with underlying medical conditions to stay at home; and

(f) address, prevent and combat the spread of COVID-19 in all courts in Malawi; and

(g) request the Minister to impose special measures in the manner of administering the courts in order to combat the spread of COVID-19.

(4) Directions issued under sub-rule (2)(a) shall be regarded, and have the same effect as directives issued under rule 20".

The affront to the rule making powers in subsidiary legislation posed by this particular rules is substantial. The exercise of rule-making powers by the courts is placed under the authority of the Chief Justice under the Courts Act. Subsidiary legislation such as the COVID-19 Rules cannot divest the Chief Justice of this power and neither can it place the powers in the Minister responsible for health. The concept of a Chief Justice being vested rule making power under the health legislation would be an anomaly to start with which is then further compounded by the fact that the legislation in question is subsidiary legislation. The least subsidiary legislation would do would be to offer guidelines for other institutions to follow. The Courts Act already delegates subsidiary legislative authority to the Chief Justice under sections 7E, 39 and 67 to make rules of procedure. With regard to COVID-19, the Chief Justice has already issued directives in view of the presidential declaration of a State of Disaster. The affrontery of the COVID-19 Rules in this respect is therefore significant. Whilst this may appear to be a small encroachment in the doctrine of the separation of powers, no breach of such separation should ever be diminished. Justice Mkandawire's reiteration of the importance of the doctrine in the recent ***HRDC case*** cited above, cannot be overstated. Any breach of this doctrine is both illegal and unconstitutional.

5.10. Further, there is equally no basis for rule 19 of the COVID-19 Rules which regulates procedure in the National assembly as follows:

(1) Where it is absolutely necessary that a sitting of the National Assembly shall take place, the Speaker shall___

(a) cause the chamber to be disinfected prior to commencement of the hearing of the matter;

(b) ensure that any person in the chamber is sitting or standing at least two metres apart from each other in all directions;

(c) all persons in the chamber have personal protective equipment during the proceedings;

(d) the chamber is well ventilated;

(e) the proceedings do not exceed two hours without a break of at least thirty minutes;

(f) ensure that, prior to entry into the chamber, every person has practiced sanitary and hygienic measures, including washing of hands.

(2) The Speaker may issue directions to___

(a) use of electronic means at the National Assembly in conducting the business of the National Assembly;

(b) suspend a sitting of the National Assembly;

(c) limit the number of persons who are not Members of Parliament to be present in the chamber, at any time;

(d) suspend, extend or relax the procedure and time periods prescribed under the Standing Orders of the National Assembly;

(e) allow officers with underlying medical conditions to stay at home; and

(f) address, prevent and combat the spread of COVID-19 in the National Assembly.

(3) The Speaker shall, from time to time, request the Minister to prescribe special measures in the manner of administering proceedings in the National Assembly in order to combat the spread of COVID-19.

Once again, the powers being exercised by the Minister of health in relation to the National Assembly cannot be justified in the context of the Provisions in the Public Health Act and are further not amenable to the limited of powers in subsidiary legislation lawmaking. Section 7 of the Constitution makes it very clear that the Executive initiates policies and legislation and section 8 of the Constitution expressly provides that only the Legislature

enacts laws. Rule 19 dictates upon the legislature procedures that are competently within its mandate in section 56 of the Constitution where it is expressly stated that the National Assembly regulates its own procedure. As alluded to earlier with reference to rule 18 vis a vis the judiciary, this is an affront to the doctrine of the separation of powers.

5.11. For all we have argued above we find that the rules are void ab initio. Having considered the submissions before us, and while we are in agreement with the arguments of the 1st, 2nd, 3rd and 4th Claimants and accordingly find that the Public Health (Corona Virus Prevention, Entertainment and Management) Rules 2020 promulgated by the 2nd Respondent under section 31 of the Public Health Act are *ultra vires* the said section 31 and are therefore *void ab initio*. In this respect, we are fortified by the decision of Mzikamanda J (as he then was), in the case of ***Lenson Mwalwanda v Stanbic Bank Ltd*** [2007] MLR 198 (HC). At pages 203-204, the learned Judge stated that:

> *"According to section 58(1) of the Constitution, Parliament has authority to delegate to the Executive power to make subsidiary legislation only within the specification and for the purposes laid out in the parent Act. Ultra vires subsidiary legislation is void of legal effect and not binding. It is void ab initio. The respondents referred to section 21(b) of the General Interpretation Act which provides that no subsidiary legislation shall be inconsistent with the provision of any Act and any such legislation shall be of no effect to the extent of such inconsistency. They argue that whatever was done under the miscarried amendment cannot be claimed to have been lawful, and cannot stand in the way of the plaintiff to block him from claiming his well-deserved severance allowance. The purported amendment was still borne and that we did not need Khawela's case to invalidate the ill-conceived amendment. The law is settled that subsidiary legislation must conform strictly to the enabling provisions of the main Act. Any subsidiary legislation made in excess of what is permissible under the enabling provisions of the main Act is ultra vires and invalid to the extent of the inconsistency with the main Act (see the case of Press (Produce) Limited v A.H. B. Enterprises 12 MLR 1)."*

5.12. We agree that the 2nd Respondent has powers to make subsidiary legislation but can only do so without departing from the specification and purposes of the parent Act. The COVID-19 Rules as they stand cannot even be saved under the employment of

the precautionary principle (even if we had found such principle to be applicable) as prayed by the Respondents.

6. **Does the Minister of Health have power to implement subsidiary legislation made under the Public Health Act after it has been *Gazetted*, without the subsidiary legislation first being laid before Parliament for its scrutiny in accordance with the relevant Standing Orders?**

6.1. The 1st, 2nd, 3rd 4th and 5th Claimants have sufficiently argued that before subsidiary legislation can be made into law, certain procedures must be followed. Section 58 of the Constitution regulates the manner in which subsidiary legislation may be made as follows:

> *"(1) Parliament may, with respect to any particular Act of Parliament, delegate to the executive or to the judiciary the power to make subsidiary legislation within the specification and for the purposes laid out in that Act and any subsidiary legislation so made shall be laid before Parliament in accordance with its Standing Orders.*
>
> *(2) Notwithstanding subsection (1), Parliament shall not have the power to delegate any legislative powers which would substantially and significantly affect the fundamental rights and freedoms recognized by this Constitution"*

The Respondents have argued that following on the decision of the Constitutional Court in ***The State and the Minister of Finance, The Governor of the Reserve Bank of Malawi ex parte Golden Forex Bureau Ltd and Others (Golden Forex II)*** which stated that under Standing Order 161(b) the Legal Affairs Committee of Parliament must scrutinize, review and report such subsidiary legislation. If the subsidiary legislation is *gazetted*, it must be promptly submitted after *gazetting* for the Committee to uphold or reject. The Respondents therefore argue that since the subsidiary legislation was *gazetted*, the 2nd Respondent would have taken it to Parliament any time after *gazetting*. The Respondents submitted that the disputed COVID-19 Rules attained the force of law when they were *gazetted* on the 9th of April, 2020 and there is no prescribed time as to when they are supposed to be laid down before Parliament. Many best practices, which we approve, have been cited from the law obtaining in England and Wales and South Africa on the promulgation of subsidiary legislation. What emerges consistently is adherence to constitutional and statutory law. Unless the procedural requirements set out in the relevant laws are followed, any lawmaking in the name of subsidiary legislation is rendered null and void. Section 58(1) of

the Constitution is very clear that when subsidiary legislation is made, the same shall be laid before Parliament in accordance with the relevant standing orders. Standing Order 159(e) places the function of considering and reporting on subsidiary legislation in the Legal Affairs Committee. This is a necessary function which enables the Committee to examine in standing order 159(g) (i), (ii) and (iii) whether any statutory instrument being promulgated is in accordance with the Constitution or the statute under which it was made, does not trespass unduly on personal rights and liberties and is restricted to administrative detail and not the substantive content of the law. At the time this matter was commenced, the Rules had not been laid before Parliament.

6.2. The issue that arises with respect to the law (section 58 (1) of the Constitution and section 17(1) of the General Interpretation Act and the jurisprudence (see ***Fred Nseula v The Attorney General and Another***,) M.S.C.A Civil Appeal No. 32 of 1997, (Malawi Supreme Court of Appeal), is that subsidiary legislation comes into force once *gazetted*. The consequences of such an interpretation of the law and jurisprudence is that any Minister can implement subsidiary legislation, once *gazetted*, even before laying the subsidiary legislation before Parliament for its oversight role. ***The State and Minister of Finance and Governor of the Reserve Bank of Malawi ex parte Golden Forex Bureau and Others,*** Consolidated Misc. Causes No. 153, 164, 165, 166 and 167 of 2007, High Court, Principal Registry, which adopted ***Dzanjalimodzi v The Attorney General*** Misc. Civil Cause No. 29 of 2006, takes a different approach, one that is more consistent with the approach taken in the Zimbabwean Constitutional Court case of ***Justice Alfred Mavedzenge v Minister of Justice, Legal and Parliamentary Affairs and Others***, (CCZ 5/18) Constitutional Application No. 32 of 2017. The approach taken is primarily that subsidiary legislation is still subject to mandatory scrutiny by Parliament and secondly that subsidiary legislation cannot be promulgated until the parliamentary committee tasked with their scrutiny and confirmation has done so and has confirmed that the subsidiary legislation is constitutional and does not unduly trespass against personal rights and freedoms. The reasoning of Justice Kamanga in the ***Dzanjalimodzi*** case was adopted by Justice Manyungwa in the ***Ex Parte Golden Forex Bureau*** case that the General Interpretation Act preceded the current Constitution hence the inconsistency between section 17 of that Act that simply requires *gazetting*, and section 58(1) of the Constitution that makes it mandatory that subsidiary legislation be laid before Parliament. Justice Manyungwa went to lengths to explore the

meaning of the words "shall be laid before parliament" in section 58(1) of the Constitution and held that the legislation acquires validity only when it is so laid as opposed to when it is *gazetted*.

The submission by the Respondent that the law does not give a specific timeframe within which to present the Rules before Parliament once *gazetted* would be correct under section 17 of the General Interpretation Act. However, this Court concludes that section 17 of the General Interpretation Act is rendered obsolete by section 58(1) of the Constitution. The argument that the law does not give any specific time within which subsidiary legislation is to be laid before Parliament is not only contrary to best constitutional practice, it was also held to be wrong by Justice Twea S.C. as he was then who held as follows in the ***Golden Forex Bureau*** case above when he stated as follows:

> *The first thing that one has to note is that all matters relating to such legislation are 'severally deemed permanently referred to the Committee', in my view, this 'deemed permanent reference' effectively bars exclusion of the committee from legislative processes by delegated authority. This is, in my view, fortified by my requirement to submit the documents promptly after publication in the Gazette. There is no requirement as to time when it must be submitted. However, the 'deemed permanent reference' ensures that whatever time may elapse, Parliament still has power to review the legislation and therefore annul or sustain it. It is important to note that the requirement to submit the document is after publication in the Gazette.... In the present case, there is no dispute that the legislation was gazetted. The respondents therefore complied with Standing Order 161 of Parliamentary Standing Orders. What remains is for Legal Affairs Committee to scrutinize or review the 2007 Regulation and report to Parliament. Parliament may annul or suspend the Regulations.*

6.3. This Court fully endorses the views in the ***Golden Forex Bureau*** case and finds that the 2nd Respondent was incompetent to lawfully implement the COVID-19 Rules by enforcing the nationwide lockdown without having the Rules laid down before Parliament for scrutiny.

6.4. The Respondent has also acknowledged in their submissions that the impugned lockdown was contrary to the provisions of section 58 (2) of the Constitution. We therefore find that the 2nd Respondent has no power to make subsidiary legislation outside the specific terms stipulated by the Public Health Act. The recent case of ***The State (on application of Lin Xiaoxiao and Others) v Attorney General and Another***, Judicial Review No. 19 of 2020 (High Court, Lilongwe District Registry) buttresses the point that,

> *"... a person vested with the power to make subsidiary legislation under one Act cannot start making regulations or rules in respect to matters covered in another Act: the regulations or rules must be "within the specification and for the purposes laid out in that Act".*

6.5. Whatever law, if any, predicated the COVID-19 Rules, it is not the Public Health Act. We therefore find that the 1st Respondent had no powers to implement the Rules without first laying them before Parliament in accordance with section 58(1) of the Constitution. We also find fault with the rules in so far as they had the effect of substantially affecting fundamental rights under the Constitution such as education (section 25); culture and language (section 26); freedom of religion (section 33); freedom of movement (section 39); freedom of association (section 32); the right to assemble and demonstrate (section 38); the right economic activity, to work and to pursue a livelihood (section 29); among others. Under section 58(2) of the Constitution, subsidiary legislation may not have the effect of substantially affecting fundamental human rights under the Constitution because Parliament has no power to delegate the making of such law. Therefore, wherever under the Covid-19 Rules the rules had the effect of substantially affecting the enjoyment of the fundamental human rights guaranteed under the Constitution, the same were invalid to the extent of the inconsistency. This is a position therefore that should be avoided in any present or future conduct and/or actions of the State. The significance of section 58(2) of the Constitution was clearly highlighted by Twea J (as he then was) in the case of ***The State, The President of Malawi and others and ex parte Malawi Law Society and others*** [2002–2003] MLR 409 (HC) where he stated, at page 415, that:

> *"section 48 of the Constitution vests all legislative powers in Parliament and under section 58(2) Parliament is prohibited from delegating legislative powers that substantially and significantly affect the fundamental rights and freedoms recognised by the Constitution. The President under the Constitution therefore, does not have power to make laws."*

6.6. Therefore, to the extent of their inconsistency with sections 58(1) and 58(2) of the Constitution, we accordingly declare the Covid-19 Rules unconstitutional and invalid under section 5 of the Constitution. Our reasoning in this respect is further consistent with that of the Court in the ***The State (on application of Lin Xiaoxiao and Others) v Attorney General and Another,*** (cited above) where it was made very clear that it is unconstitutional if bodies

vested with the powers to make subsidiary legislation purport to make subsidiary legislation that "substantially and significantly affect the fundamental rights and freedoms recognized by this Constitution." Whilst we agree that the court when making this constitutional observation in that case was sitting as a single judge, we are mindful that the observations were only made in passing and did not form part of the *ratio decidendi* (the real reason for the decision) in that case. What is most significant for our purposes is that the reasoning of the Court in this regard was sound and it is affirmed by this Court.

7. Does the lockdown limit or derogate human rights and personal freedoms?

7.1. The term "lockdown" refers to a number of measures which are put in place to curb the spread of the COVID-19, through controlled movement, stay at home orders, and other measures; all aimed at quarantining the population. By its very nature, the declaration of such measures will have an impact on the exercise of constitutional rights of the populace. And this has been acknowledged in the amici curiae submissions of the Malawi Law Society and the Women Lawyers Association. The characteristics of the lockdown declared by the 2nd Respondent under Rule 11 of the COVID-19 Rules substantially affected human rights and personal freedoms leading the 1st to 4th Claimants to question whether or not the 2nd Respondent can make such a declaration without the attendant declaration of a state of emergency. It is the argument of the Claimants that the rights of the populace have been restricted in such a substantive manner that constitute a derogation, and the only way in which such a derogation is permissible is if a state of emergency were declared. In logical consequence therefore, it is the position of the Claimants that a state of disaster cannot be the anchor for rules with such far reaching consequences on fundamental constitutional rights.

7.2. Further, the 1st to 4th Claimants contend that at the joint press briefing conducted on 16th April 2020 in readiness to enforce the lockdown, the 3rd and 4th Respondents sounded intimidatory, which gave the impression that there would be human rights violations visited on the citizenry in the enforcement of the lockdown. The conclusion drawn by the Claimants invites this Court to countenance that the lockdown impugned herein would have a serious bearing on the enjoyment of the right to economic activity, the right to freedom of movement, the right to human dignity, the right to freedom of association, the right to freedom of conscience, the right to freedom of assembly, and several other rights and freedoms guaranteed by the Constitution.

7.3. In their submissions, the 1st to 5th Respondents acknowledged that the impugned lockdown as contained under Rule 11 of the COVID-19 Rules had serious bearing on people's enjoyment of their constitutional rights and freedoms. However, it is the Respondents argument that the restrictions only limited constitutional rights under section 44 of the Constitution and did not amount to a derogation of rights under section 45 of the Constitution. The Respondents consequently implored the Court to consider the question whether or not, the lockdown herein met the "limitation test" under section 44 of the Constitution, which provides that:

> *(1), Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards, and necessary in an open and democratic society.*
>
> *(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question and shall be of general application."*

The Respondents further submit that the limitation of rights is inevitable in so far as such limitation is justifiable in an open and democratic society based on human dignity, equality and freedom and are of general application.

7.4. Limitations on rights are restrictions that are necessary to balance competing or conflicting rights, or to harmonise rights with other public objectives. However, it is clear from the Women Lawyers Association amicus curiae submission which also extensively discussed the issue of limitation of rights, that any limitation of constitutional rights must be of general application and that the COVID-19 Rules fall short in this respect. Derogation from rights, on the other hand, are supposed to be temporary additional limits, or suspensions of rights, imposed during a state of emergency.

7.5. The question whether the lockdown in effect derogates from or limits the rights in the Bill of Rights in the Constitution is significant in the determination of this matter. This is because if the lock down limits the rights in question, then the only test for their constitutionality is if the limitation satisfies section 44 of the Constitution. If, however, the restrictions imposed on the rights are such that they negate the essential content of the rights

then what transpires is a derogation of those rights, which can only be permissible if the requirements of section 45 of the Constitution are satisfied.

7.6. The characteristics of the declaration of the lockdown herein were clearly articulated in the submissions of the 1st to 4th Claimants with reference of rule 2 of the COVID-19 Rules which define a lockdown as "the restriction of movement of persons declared under rule 11." Rule 11 has been cited fully and discussed above. However, for the purposes of this section, it suffices to state that Rule 11 (2) stated, among other things, that it would only allow operation of essential service and would seek the deployment of the Malawi Defence Force and the Malawi Police Service to enforce the lockdown; Rule 11(3) specified what activities could be carried out during the lockdown, limiting going to court, pharmacies, and markets among other things.

7.7. As can be seen from the above, the restrictions imposed on movements restricted movements even to food supply stores, pharmacies, banks and courts and travel from one area to another. They also restricted the sale or purchase of alcohol, proscribed the opening of all shops and businesses and all open markets and informal trading, entertainment places and restaurants except those providing take away services. Religious gatherings and a huge selection of marketing and commercial activities, social gatherings were also restricted. These restrictions all curtailed or would curtail essential commercial activity and the lifeline of the citizens whose constitutional rights to life and dignity were therefore threatened in view of the impact of the restrictions to the rights to property, economic activity, freedom of conscience, freedom of religion, right to equality development, freedom of association, freedom of movement and residence, access to justice and remedies and many other rights.

7.8. It is the considered view of this Court that whilst the Executive was well within its powers to prescribe mitigation and control measures in response to the COVID-19 pandemic which continues to claim lives and also in the process causing unprecedented strain to the economy, the measures imposed by the Rules went beyond limiting the rights in the Bill of Rights in Chapter IV of the Constitution as the impact of the restrictions was to actually negate the essential content of these rights. The impugned lockdown fundamentally restricts the right to life, the right to equality and recognition before the law and the right to freedom of conscience, belief, thought and religion which cannot be derogated. Thus, contrary to the arguments of the Respondent, this Court finds that the COVID-19 Rules violated section 45(1) of the Constitution which provides that:

"(1) No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.

(2) There shall be no derogation with regard to –

(a) the right to life;

(b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment;

(c) the prohibition of genocide;

(d) the prohibition of slavery, the slave trade and slave like practices;

(e) the prohibition of imprisonment for failure to meet contractual obligations;

(f) the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;

(g) the right to equality and recognition before the law;

(h) the right to freedom of conscience, belief, thought and religion and to academic freedom; or

(i) the right to habeas corpus.

(3) The President may declare a state of emergency-

(a) Only to the extent that is provided for in this section

(b) Only with the approval of the Defence and Security Committee of the National Assembly;

(c)Only in times of war, threat of war, civil war or widespread natural disaster"

7.9. Considering that the rights were limited in the absence of a declaration of a state of emergency, we further find that 2nd Respondent acted unconstitutionally by using subsidiary legislation to declare measures which could only be imposed by the President by invoking his constitutional powers under section 45 of the Constitution to declare a state of

emergency. What was in effect obtaining at the time was only a state of disaster declared by the 1st Respondent, the President on 20th March, 2020 but the consequences of that declaration have all the characteristics of measures that exert extreme pressures on the rights and freedoms of the citizenry. The incursion on personal rights and freedoms is made even more severe as the COVID-19 Rules even exclude the possibility of challenge, by curtailing access to courts and thereby infringing on the rights of access to justice to challenge acts of illegality or illegal conduct generally. It is to be recalled that even the extreme situation of a state of emergency, section 45 of the Constitution allows for judicial challenge of the declaration itself or some of the measures imposed. It was therefore an overly bold arrogation of the powers of the State under a state of emergency for the 2nd Respondent, who is only a Minister to, acting in the context of a declared state of disaster, to substantially restrict significant range of constitutional rights and to also impede access to justice. The powers that the 2nd Respondent exercised in declaring the lockdown under the COVID-19 Rules were so unlimited and expansive that he reserved the right to allow himself to extend the lockdown for further time should he so wish. The executive went over-broad. It was also over-concentration of power in one authority. The Minister, under the COVID- 19 Rules, was therefore purporting to arrogate to himself more sweeping powers than those the President has under a state of emergency. This act visited violence upon this country's constitutional scheme.

7.10. To contextualise the nature of this arrogation, one must be reminded that even in a state of emergency in which limitation and derogation of rights is permissible, it requires a majority vote of 2/3 in Parliament to extend the declaration of a state of emergency. There is no possibility for such exercise of powers under the rule of law when the exercise of any power, even in a state of emergency is subject to checks and balances. Imbued in the checks and balances under section 45 is the right of the populace to challenge the imposition of measures that derogate rights. The COVID-19 Rules do not provide any access for challenge and this in itself renders them unconstitutional. It is for purpose of checks and balances in the exercise of power that even in a state of emergency, the Constitution provides for processes aimed at safeguarding the rights of citizens. The absence of recourse to such processes in the COVID-19 Rules in the imposition of the lockdown thus conflicts with the prevailing constitutional order. Consequently, it is our

finding that a state of emergency was imposed through the back door and without following sections 45(2), (3) (4) and (5) of the Constitution.

7.11. The Respondent has invited the Court to consider the question whether or not the promulgation of the COVID-19 Rules are rational and adopt the rationality test as outlined in the South African case of ***De Beer & Others v. Minister of Cooperative Governance and Traditional Affairs (the De Beer Case)***, where the court stated that the rationality test is concerned with the evaluation of the relationship between means and ends, in particular whether the means employed are rationally related to the purpose for which the power was conferred. The court in that case further stated that if a measure is not rationally connected to a permissible objective, then that lack of rationality would result in such a measure not meeting the limitation test.

7.12. As to the argument by the Respondent on the rationality of the COVID-19 Rules with regard to the lockdown, there are serious issues to be considered by this Court in adopting the South African test of rationality as a test for constitutionality. In developing the test of rationality as a standard for scrutiny as to whether legislation is constitutional, South African jurisprudence has undergone an evolution. Three tests have historical been used by the South African Constitutional Court and these are rationality, reasonableness and proportionality. Debates are currently raging as to what the justification of using these three different tests is and the practical effect of applying different standards of scrutiny[1]. It has therefore been concluded by an academic that he examination of the case law of the Constitutional Court shows that *"rather than strict formulas that determine the outcome of the constitutional challenges examined, the standard of scrutiny chosen and the intensity of the scrutiny are just flexible departing points to address the issues at stake, but rarely determine the outcome of the case"*[2]. Indeed, under section 11 of the Constitution, this Court is called upon to apply appropriate principles of interpretation which reflect the unique character and supreme status of this Constitution; and only where applicable, to have regard to current norms of public international law and comparable foreign case law. Considering that the Malawian Constitution provides for standards of scrutiny in terms of whether the limitations imposed on rights are justifiable in section 44 and whether

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[1] See Christian Courtis; "Rationality, Reasonableness, Proportionality: Testing the Use of Standards of Scrutiny in the Constitutional Review of Legislation" 2011, Constitutional Court Review (volume 3) CCR 2 available at www.saflii.org/za/journals/CCR/2011/2.pdf p.31

[2] As above at p.50

derogation is permissible in terms of section 45, we are slow to adapt a test of scrutiny outside these constitutional prescriptions.

8. **Is the right to social security provided for implicitly or explicitly under the Constitution and can the 2nd Respondent declare a lockdown without establishing and implementing social security interventions or measures to protect the livelihoods of most Malawians who are impoverished?**

8.1. The Malawi scenario shows that poverty is deep and about 51 per cent of Malawians live below the national poverty line and 73 per cent below the international poverty line of US$1.25 per day. While the Government has identified social protection as a key instrument to address the endemic poverty and vulnerability like public works; 2) social cash transfers; 3) school meals; 4) microcredit; and 5) village savings and loans schemes. Despite the interventions, which do not normally come timely and are not widespread to the whole country, Malawi's social protection system falls significantly short of the social protection floor (SPF) guarantees on health care and income security throughout the life cycle. Existing social assistance programmes provide insufficient protection to a small number of poor and vulnerable households. Total spending on social protection for the elderly and children is low compared to spending on programmes for the working age population. Moreover, there are no specific interventions that directly address the needs of Malawi's children besides school feeding programmes[3].

8.2. The submissions of the Association of Medical Doctors have clearly indicated that poverty is one of the issues that must be seriously considered in whatever measure is to be adopted. We believe that community members are non-compliant to several COVID-19 measures because of financial constraints as many "live on hand to mouth basis". This makes it impossible for them to follow the "stay home policy" and social distancing in places such as congested markets where they buy their daily needs or are traders. In any case, the "stay at home" policy is advocated in such that essential travel is still recognized as non-avoidable. We believe that many Malawians (the majority of whom are unemployed or employed in the informal sector) need to travel out of their homes as a matter of survival. Avoidance of such travel presents a real threat to their life and livelihoods, largely in terms of access to food necessary for survival.

[3]ILO Building social protection floors and comprehensive social security systems, Florian Juergens, 2018

8.3. All the Claimants have argued to the satisfaction of the Court that social security or the right to social security is not expressly provided for in the Constitution but submissions of the 1st to 4th Respondents have correctly argued that it is implicitly provided for under the principles of national policy in the Constitution (see section 13) and under the right to development (see sections 29,30). We find that social security is implicitly provided for in section 13 which provides as follows:

> *"The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—*
>
> *(a) Gender Equality*
>
> *To obtain gender equality through—*
>
> *(i) full participation of women in all spheres of Malawian society on the basis of equal opportunities with men;*
>
> *(ii) the implementation of the principles of nondiscrimination and such other measures as may be required; and*
>
> *(iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.*
>
> *(b) Nutrition*
>
> *To achieve adequate nutrition for all in order to promote good health and self-sufficiency.*
>
> *(c) Health*
>
> *To provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.*
>
> *(d) The Environment*
>
> *To manage the environment responsibly in order to—*
>
> *(i) prevent the degradation of the environment;*
>
> *(ii) provide a healthy living and working environment for the people of Malawi;*

(iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and

(iv) conserve and enhance the biological diversity of Malaŵi.

(e) Rural Life

To enhance the quality of life in rural communities and to recognize rural standards of living as a key indicator of the success of Government policies.

(f) Education

To provide adequate resources to the education sector and devise programmes in order to—

(i) eliminate illiteracy in Malaŵi;

(ii) make primary education compulsory and free to all citizens of Malaŵi;

(iii) offer greater access to higher learning and continuing education; and

(iv) promote national goals such as unity and the elimination of political, religious, racial and ethnic intolerance.

(g) Persons with Disabilities

To enhance the dignity and quality of life of persons with disabilities by providing—

(i) adequate and suitable access to public places;

(ii) fair opportunities in employment; and

(iii) the fullest possible participation in all spheres of Malaŵian society.

(h) Children

To encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society.

(i) The Family

To recognize and protect the family as a fundamental and vital social unit.

(j) The Elderly

To respect and support the elderly through the provision of community services and to encourage participation in the life of the community.

(k) International Relations

To govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs.

(l) Peaceful Settlement of Disputes

To strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.

(m) Administration of Justice

To promote law and order and respect for society through civic education, by honest practices in Government, adequate resourcing, and the humane application and enforcement of laws and policing standards.

(n) Economic Management

To achieve a sensible balance between the creation and distribution of wealth through the nurturing of a market economy and long-term investment in health, education, economic and social development programmes.

(o) Public Trust and Good Governance

To introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions".

8.4. Section 13 of the Constitution is strengthened by section 14 of the Constitution which calls upon the courts to have regard to the principles of national policy contained in Chapter III in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution, and the principles shall be directory in nature. The case of ***Gable Masangano and Others v Attorney General and Another*** [2009] MLR 171 also makes it clear that the principles of national policy are essential in interpreting the Constitution. We therefore proceed on the premise that section 13 is paramount in elucidating the rights and freedoms under of the Constitution.

8.5. Of paramount importance to this Court in determining whether the Constitution provides for the right to social security is its interpretation of section 16 which guarantees the right to life and section 29 which provides for the right to a livelihood. Essentially, the right to life

cannot be exercised in the absence of enabling factors. This position was well articulated by the Indian Supreme Court in the case of ***Olga Tellis v Bombay Municipal Corporation,*** 1986 AIR 180, 1985 SCR Supl. (2) 51 which held as follows:

> *The right to life conferred by section 21 is vast and far-reaching. It does not simply mean that life can be extinguished or removed only in accordance with the procedure established by law. This is just one aspect of the right to life. The right to livelihood is an equally important aspect of this right because no one can live without means of subsistence.*
>
> *If the right to subsistence is not treated as part of the constitutional right to life, the easiest way to deprive a person of their right to life would be to deprive them of their means of subsistence to the point of repealing. Such deprivation would not only negate the life of its content and meaning but render life impossible.*
>
> *... such deprivation should not necessarily be in accordance with the procedure established by law if the right to livelihood is not considered to be part of the right to life. Deprive a person of his right to a means of subsistence and you will have deprived him of his life. In light of Article 39(a) and 41, it would be pedantry to exclude the right to livelihood from the content of the right to life.*

It would therefore be unconstitutional if the lockdown in the context of the matter before us was implemented without paying particular regard to the right to life, and the right to a livelihood, which are seriously affected.

8.6. We have noted that the Respondents do not dispute the importance of social security measures in the imposition of a lockdown. It is their argument that Government did provide for social security measures to accompany the lockdown. However, according to the 1st, 2nd, 3rd and 4th Claimants, the issue is that Government only announced that it would affect social cash transfers to urban households at minimum wage of MK35,000 to less than 200,000 households in Malawi as a social security cushion to those affected. What is of concern is that 89% of Malawians constitute the informal workforce and it is inconceivable that 200,000 cash transfers would cover this figure. The figure falls way below what the Centre of Social Concern Malawi has calculated to be the cost of basic foods in most districts of Malawi which exceeds MK100,000.00 per month. Considering that no process was put in place to identify those in need or the eligibility requirements for the cash

transfers, this in itself is a constitutional issue as the constitutional rights of many affected people are ignored and the manner of allocating relief to a select few is open to abuse and discrimination.

8.7. Whilst the emphasis on social protection measures has been on cash transfers or poverty alleviation, the Women Lawyers Association's submissions are unique in that they highlight to this Court the duty of the State in promoting and providing adequate health care for all its citizens, in particular women and children. Thus, the State is reminded not to abrogate its duty of ensuring that all health services which are provided especially to women and children remain open, accessible and well-resourced at all times. The impact of the lockdown in terms of the implications of the sexual reproductive health rights of women must be considered. To wit, the Women Lawyers Association submitted that the COVID-Rules should enhance access to ante-natal, post-natal and sexual and reproductive health services as an additional social protection measure.

8.8. Additionally, the Women Lawyers Association, have noted that female health care workers shall be at an increased risk of infection and face the pressure of balancing work and home responsibilities more than their male counterparts. In terms of cadres, most medical doctors are males (73.2%), most professional nurses are female (91.5%) and most associate nurses are female (84.7%)12. With COVID 19, women are likely to be on the front lines of the fight against COVID 19 and as a result of the pandemic facing an increase in the double-burden: longer shifts at work and additional care work at home. Therefore, social protection measures that mitigate the negative effects of the pandemic for women in relation to their care burden should be considered.

8.9. Finally, the declaration of a state of disaster has impacted negatively on adolescent girls in Malawi who mirror motherhood roles. In addition, the closure of schools has increased the vulnerabilities of teenage girls with increased rates of teenage pregnancies, school drop-out rates and child 'marriages'. These are social and reproductive health implications impacting a vulnerable group within the population who must be given appropriate mitigation measures if they are to enjoy other fundamental rights accorded by the Constitution during the lockdown.

10. Conclusion: Summary of Findings and Recommendations

10.1. After carefully reading all the detailed submissions made by parties; and having discussed and analysed the relevant constitutional provisions, section 31 of the Public Health Act and other laws, we now make the following declarations, findings and recommendations:

10.1.1. That the 2nd Respondent has powers to make subsidiary legislation but can only do so without departing from the specification and purposes of the parent Act. The COVID-19 Rules under which the lockdown obtains are unconstitutional (being contrary to sections 44, 45, 46 and 58 of the Constitution) and are hereby set aside forthwith.

10.1.2. That the Public Health (Corona Virus Prevention, Entertainment and Management) Rules 2020 promulgated by the 2nd Respondent under section 31 of the Public Health Act *gazetted* by the Government on 9th April 2020 (COVID -19 Rules) are *ultra vires* the said section 31. Section 21(b) of the General Interpretation Act provides that "no subsidiary legislation shall be inconsistent with the provisions of any Act and any such legislation shall be of no effect to the extent of such inconsistency." We therefore declare the COVID -19 Rules unconstitutional under section 5 of the Constitution and thereby *void ab initio*.

10.1.3. That section 17 of the General Interpretation Act is rendered obsolete by section 58(1) of the Constitution. As such, the 2nd Respondent was incompetent to lawfully implement the COVID-19 Rules by enforcing the nationwide lockdown without having the Rules laid down before Parliament for scrutiny.

10.1.4. That the 2nd Respondent had no powers to make subsidiary legislation that substantially and significantly affected or would affect the fundamental rights and freedoms recognized by the Constitution. This breached section 58(2) of the Constitution.

10.1.5. That the restriction on rights by the lockdown provisions under the COVID-19 Rules exceeded permissible limits under section 44 of the Constitution. Consequently, a state of emergency was imposed through the back door and without following sections 45(2), (3) (4) and (5) of the Constitution. This was a clear violation of the Constitution.

10.1.6. That the right to social security is implicitly guaranteed under sections 19 (human dignity) and 16 (right to life) of the Constitution, as read with section 13 of the Constitution on principles of national policy; and that section 13 is paramount in elucidating the rights and fundamental freedoms guaranteed under the Constitution.

10.2. The Court makes the following recommendations;

10.2.1. There is urgent need for Parliament to pass a new law on public health to be enacted that will comprehensively deal with issues of pandemics. The current Public Health Act is very old and ill-equipped to deal with a pandemic of the COVID-19 magnitude. The submissions of the Association of Medial Doctors, as well as the submissions by the Malawi Law Society on the legal gaps clearly show that that the novelty and impact of this pandemic cannot fit within the framework of a law that is both technically and substantially outdated. Legislative quick-fixes through subsidiary legislation in the form of Rules and/or Regulations cannot be an effective substitute for effective legislative measures adopted by Parliament. They are likely, as seen in the present case, to easily fall foul of constitutional dictates. Even public health emergencies must always be handled within the framework of the rule of law. The alternative is social chaos. We therefore recommend that the law be reviewed as soon as it is practicable so that robust legislation that takes into account fast spreading viruses or other disease causing organisms or agents, and provides an appropriate legislative framework to respond to them is the basis of any measures taken, whether such measures necessitate the declaration of a state of emergency or not.

10.2.2. If there is need, now or in future to impose a lockdown as a measure to quarantine the population or a part thereof, it is recommended that such a measure be preceded by cogent research on the numbers to be affected by the lockdown and adopt practical and realistic social security measures respond to the ensuing socioeconomic needs of the indigent (impoverished) ones in the locked down population. If a lockdown as a measure is to be imposed, the executive must follow constitutional and lawful precepts. Within the domain of Government's obligations for ensuring the realisation of economic, social and cultural rights under the Constitution and under international law, the issues the Executive is to consider when implementing lockdown measures should include but should not be limited to;

10.2.2.1. The impact of a lockdown on school children coming from insecure households who depend on school feeding programs who would be at risk from hunger, starvation and nutrition related diseases as a result of the lockdown;

10.2.2.2. The impact of the lock down on early marriages and pregnancies;

10.2.2.3. The impact of the lockdown on domestic violence and abuse; especially violence and other forms of abuse against women, children and persons with disabilities;

10.2.2.4. The impact of the lockdown on the sexual and reproductive health rights of women.

10.2.2.5. The impact of the lockdown on general access to healthcare by the locked down population;

10.2.2.6. Where the period of the lockdown exceeds one month, the substantial effect of the lockdown on the right to education, especially for children, and a comprehensive remedial plan for all affected educational institutions;

10.2.2.7. The additional burden on women's care work imposed by the pandemic;

10.2.2.8. The situation of child-headed households;

10.2.3. The amended or new law should also set open and transparent mechanisms for ensuring equality and equity in the disbursement of social security measures. The law must also include the definition of social security and the parameters under which social security will be provided.

10.2.4. Whilst this is not a statutory requirement in Malawi, the impact of the lockdown to the rights of citizens requires Government to go beyond what is ordinary in imposing any conditions of this nature and wider consultations with the Malawi Law Society; The Association of Medical Doctors; the Ministry responsible for vulnerable persons such as women, children, the elderly and the disabled; distinguished experts in affected areas of life and relevant, reputable non-governmental organisations dealing with the rights of the vulnerable and social justice.

10.2.5. In the final analysis, whatever measures the executive chooses to take in responding to the COVID-19 pandemic, these measures cannot be lawfully and effectively made using the Public Health Act as the parent Act in its present form.

10.2.6. Because public resistance to follow the guidelines on prevention of COVID-19 Regulations is high, deliberative measures must be put in place to shield vulnerable people such as the elderly and those with chronic health conditions. These must be provided with basic needs to protect them from SARS-COV-2 as they are at high risk of severe illnesses. Social protection measures, must therefore not only be considered in the case that a lockdown is imposed, but in order to ensure the rights to life and dignity of vulnerable groups, in accordance with sections 14, 29 and 30 of the Constitution, those most vulnerable should be provided with social security.

10.2.7. Government must prioritize civic and health education, at all levels of society including at the grassroots.

10. Costs

10.1. Costs are in the cause.

Pronounced in OPEN COURT this ____ day of September 2020

Justice K. Manda

Justice F. A. Mwale

Justice D. A. DeGabriele