The rule of law under the threat of the pandemic. Echoes from the African constitutional justice

(comment to High Court of Lesotho, Acb & ors v Prime minister & ors)

di Enrico Andreoli

Title: Stato di diritto e pandemia. Spunti dalla giustizia costituzionale africana (nota a High Court of Lesotho, Acb & ors v pPrime minister & ors)

Keywords: Lesotho; Prorogation; Covid-19

1. – «As a Court, all we can hope is that as the laws are being implemented, we continue to maintain the legality because numerous reports from around the world are showing how easy it is to turn to illegality in the name of safeguarding lives. Courts remain vigilant to promote and protect the rule of law … » (High Court of Malawi, *State v The President of Malawi et al ex parte Mponda, Soko et al* (Judicial Review Number 13 of 2020) [2020] MWHC 6, 07 April 2020).

Although this commentary regards the decision rendered by the High Court of Lesotho in *ACB & Ors v Prime Minister & Ors* (Constitutional Case No. 0006/2020 [2020] LSHCONST 1, 17 April 2020), I deem it interesting to start it by quoting a contextual judicial decision of the Malawian High Court returned, which represents a case of limitation of constitutional rights in a time of pandemic.

Such a connection does not seem surprising, since it embeds a good example of how the circulation of legal devices among Southern African courts often help them to resolve similar political and legal problems (M. Nicolini, *L'altra Law of the Land. La famiglia giuridica "mista" dell'Africa australe*, Bononia University Press, Bologna, 2016, 73 ff.).

The Malawian Court is as concerned about the current pandemic situation as its counterpart in Lesotho. These concerns, which revolve around a hypothesis of limitation of fundamental rights, are justified on the basis of the actual global health crisis. Furthermore, these concerns are also fully reflected in the facts underlying the judgement I will consider in this paper, that was decided by the High Court of Lesotho as an adjudicator in constitutional issues.

The *ACB & Ors v Prime Minister & Ors* case deals with a case of prorogation of Parliament of Lesotho made by the Prime Minister, which was an obvious attempt to avoid a vote of no-confidence. And such attempt was cautiously hidden behind a claim to be protecting human lives from the threat posed by the spread of Covid-19.

2. – Within the High Court decision, several constitutional, and legal, principles stem from the following factual circumstances.

Early in the evening of March 20, 2020, the four leaders of Lesotho's political parties in government attended a meeting at the Royal Palace. There, the PM advised the King of his intention to prorogue Parliament. Later that evening, the same PM

wrote to the King, putting him on notice to act as advised and to sign his asset to prorogation that very night.

The King did not give his assent, though, primarily because the PM signed the documentation by himself. The latter had indeed issued a legal notice proclaiming that he had prorogued Parliament in accordance with the provisions of Section 91(3) of the Constitution (*Legal Notice No. 21 of 2020, Prorogation of Parliament Notice*).

The official reason given to the prorogation was that, «due to prevalence of Coronavirus (Covid-19) which has been declared a pandemic by the World Health Organisation, it is advisable not to have large gathering of people in order to avoid the spread of the virus».

The PM developed this reasoning by asserting that one of these large gatherings to be countered was, say, the very summoning of MPs during sessions.

Following the adoption of the Legal Notice, on March 23 police officers therefore prevented parliamentarians from entering Parliament premises.

As they deemed to be damaged by this situation, a group of MPs and some parties brought proceedings before the High Court. In so doing, they sought a declaration of unconstitutionality for the actions taken by the PM.

With a very cultivated reasoning, the High Court came to accept the applicants' petitions; it also declared the prorogation to be «null and void»; consequently, Parliament could continue with the business and processes that prorogation had interrupted.

In order to understand this reasoning, this comment will proceed as follow. Firstly, it will supply a brief historical and contextual analysis of the institute of prorogation. Secondly, it will evaluate how prorogation works within the constitutional landscape of Lesotho. Thirdly, it will explore prorogation within the relationship between powers. Lastly, it will address the position of constitutional justice as a guarantor of the relations among Constitution, the rule of law, and political bodies.

3. – Although it is not possible to systematically explore the institution of prorogation in this paper (where it will instead be analyzed functionally to the decision under comment and within the constitutional system of Lesotho), it seems therefore appropriate to start the reasoning with its brief overview.

Developed within the Westminster governmental model as an executive power, prorogation is defined as «the action of temporarily stopping the activities of a legislature» (*Prorogation*, in *The Cambridge Dictionary*, Cambridge University Press, Cambridge, 2020).

Within parliamentary democracy, prorogation is a prerogative power legally vested in the Crown. Specifically, it regards the use of the royal prerogative to produce a temporary suspension of Parliament, a mechanism whereby the Monarch as Head of State «ends a session …, creating a recess until the next session … commences or Parliament is dissolved» (A. Twomey, *The Veiled Scepter: Reserve Powers of Heads of State in Westminster Systems*, Cambridge University Press, Cambridge, 2018, 584; for its development in recent times, A. Torre, *"Serial Miller". Revival della prerogativa, sovranità parlamentare, Corte Suprema (ed esigenze di codificazione costituzionale?) nel Regno Unito della Brexit: riflessioni sparse*, in *DPCE Online*, 4, 2019, 3083 ff.; C. Martinelli, *Downing Street vs Westminster. Autonomia di un conflitto costituzionale: dalla Premiership Johnson alla sentenza Cherry/Miller (No. 2) della UKSC*, in *Osservatorio Costituzionale*, 6, 2019, 6-7).

Prorogation must be distinguished from dissolution. In fact, the latter terminates a Parliament, implying new elections. Prorogation, instead, puts Parliament in a sort of stasis (*Prorogation*, in N. Wilding, P. Laundy, *An Enciclopædia of Parliament*, Casell, London, 1968, 606 ff.).

It is quite hard to reconstruct its exact origins in England; what may be said is that, from the sixteenth century, a distinction has been drawn between a routine discretionary adjournment and a longer prorogation on the command of the Crown.

In the early seventeenth century the Crown's powers to force an end to parliamentary proceedings, whether by adjournment or prorogation, became a source of controversy. Under King Charles I, for example, a series of Parliaments were prematurely brought to an end in the later 1620s. Few things were more instrumental than prorogation in producing the political distrust and polarization that led to the civil war (Earl of Clarendon E. Hyde, *The History of the Rebellion and the Civil War in England*, I, W. Dunn Macray (ed.), Oxford University Press, Oxford, 1992; F.W. Maitland, *The Constitutional History of England: A Course of Lectures Delivered*, Lawbook Exchange, Clark, 2013, 238 ff.; A. Lyon, *Constitutional History of the UK*, Routledge, London, 2016, 214-239).

Over time, royal involvement in prorogation became fairly ceremonial (*Halsbury's Law of England*, 5th ed., 78, 2010, 1018). Despite this, the British practice was followed by other European monarchies (see e.g. the German Constitution of 1870, at Section 12; or the French Constitution of 1814, at Section 50); it then found fertile ground in those legal systems influenced directly or indirectly by the British Commonwealth, such as for example Canada, Australia, New Zealand, India, the post-independence Anglophone Caribbean Constitutions, and several African Constitutions (for a complete survey, see *amplius* J. Fowkes, *Prorogation of the Legislative Body*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, 2017, 1 ff.; see also J. Hatchard, M. Ndulo, P. Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective*, Cambridge University Press, Cambridge, 2009, 123-149; D. Amirante (ed.), *South Asian Constitutional Systems*, Eleven International Publishing, The Hague, 2020, 3-27).

It seems interesting to note how prorogation often turned out to be a highly political instrument (P. Schleiter, T.G. Fleming, *Parliamentary Prorogation in Comparative Context*, in *The Political Quarterly*, 2020, 2).

Since it quashes nearly all parliamentary business (most bills, all motions, and all parliamentary questions), it is patent the delicacy of this institution within the separation of powers. If the power of prorogation is exercised on the advice of the Prime Minister, the executive is put in a position to decide when, for what purpose, and for how long to suspend Parliament (P. Schleiter, T.G. Fleming, *Parliamentary Prorogation in Comparative Context*, cit., 4).

Among the issues involving the maintenance of a parliamentary democracy, there is precisely the hypothesis that occurred in the decision in comment, where the use of the prorogation by a Prime Minister can deploy the power to avoid facing a motion of no confidence. Over the years evidences of this abuse have been found in Sri Lanka (2001), Canada (2008), Turks and Caicos Islands (2009), Grenada (2012), or Guyana (2014).

The main problems related to this distorted use of prorogation arise from its being inconsistent with the basic principles of the rule of law in a constitutional democracy: «a government is not entitled to remain in office and continue governing simply because it can exercise procedural powers to avoid proof of the loss of confidence in it» (A. Twomey, *The Veiled Scepter*, cit., 593-594).

In order to protect this possible opposition between what is legally, constitutionally, permitted and what is politically preferred, the defense of the legal system is mainly delegated to resolution by courts.

Where the institution of prorogation exists, indeed, the judiciary has been confronted with hypotheses such as the unconstitutional usage of the advice to use the prerogative power, or which ones may be the conditions for a refuse to act on the advice (for a case of deep impact on constitutional law, see the leading case of the UK Supreme Court, *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, 24 January 2017).

Whereas the examples I mentioned allow us to discuss the proper use of the prorogation power allocated on the executive, the case in comment brings to the

attention a question that might radically be more damaging for the constitutional principles.

The *ACB & Ors v Prime Minister & Ors* case, indeed, brings back to the fore the hypothesis in which the Prime Minister poses itself as the sole decision-maker, contravening in this sense that balance of powers provided for by the Constitution.

4. – Prorogation takes different forms in different constitutional contexts. This is also the case of Lesotho, whose 1993 Constitution highlights that prorogation is a royal prerogative governed directly in the constitutional text.

Section 83 of the Constitution provides as follows: «(1) The King may at any time prorogue or dissolve Parliament. … (4) In the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister».

Section 91(3) is directly linked to the previous one as it embeds a possible evolution of the constitutional procedure envisaged for the prorogation. The King exercises his prerogatives following an advice received by the PM (see *infra*); and the King's possible inactivity is sanctioned by Section 91(3). It is provided that «the Prime Minister may inform the King that is the intention of the Prime Minister to do that act himself after the expiration of a period to be specified», then reporting the Parliament «at the earliest opportunity thereafter».

When it comes to the reasoning of the High Court, it is fundamental to begin with the supremacy of the constitutional text (see the "Supremacy Clause" of Section 2: «This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void»).

This latter provision clearly plays a role in the attribution of powers to the different constitutional bodies. As a consenquence, the analysis of the correct (constitutional) procedure provided for the prorogation of Parliament becomes itself a parameter of substantial constitutionality.

First of all, a certain preeminent role of the King in Lesotho constitutional system is guaranteed by Section 92 of the Constitution. This Section states that «The King shall have the right to be consulted by the Prime Minister and the other Ministers on all matters relating to the government of Lesotho».

It is not the scope of this commentary to enter into the merits of the constitutional procedure provided for the prorogation of Parliament. In the case in comment, however, it must be highlighted the reasonableness (*rectius*, the unconstitutionality) of the timing given to the King by the PM, which was not acting within a space of a few hours, and the consequent overreach of royal prerogatives.

The analysis of the constitutional procedure makes it possible to see in full light the 'procedural-as-substantial' unconstitutionality of the actions taken by the PM.

The above-mentioned Section 83 of the Constitution sets a clear process placed above all as a guarantee of the rights of MPs.

The planned time scan between the advice of the PM and the action taken by the King is mainly used for this: to ensure the accountability of the executive. If Parliament were to be prorogued with immediate effect, there would be no possibility for this accountability until after a new session of Parliament had started.

At the same time, the constitutional balance of power is guaranteed by the aforementioned provision of Section 91(3). If the King does not act as advised at the expiration of a certain period of time, the PM can act by himself, reporting as soon as possible the circumstance to Parliament.

Nonetheless, this cannot push the PM to be «lackadaisical» (see Para 35), forcing the King to act in a time that, for the particular matter, can be considered derisory – a few hours, at night. In so doing, the 'procedural-as-substantial' unconstitutionality is due to the fact that «the Prime Minister's approach to the King might have the intended or unintended consequence of setting up the King for failure» (see Para 36).

It is worth remembering that PM's primary reason to prorogue Parliament was due to prevalence of the spread of Covid-19 within the country. But in this respect, the court found that his haste turned out to be nothing more than a pretext, provided that the threat of Covid-19 has been known already for several weeks, thanks to the announces made globally by the World Health Organisation.

The actions taken by the PM as evading his responsibilities were then found in open violation of that principle of accountability mentioned above.

The principle of accountability is therefore linked to that of legality, as well as to that of legitimacy. Within a system of constitutional democracy, powers must be exercised in accordance with the preferences expressed by voters.

Hence, the (ab)use of powers of prorogation that the PM unilaterally "granted" to himself violates the Constitution with reference to all these fundamental principles (W.J. Newman, *Of Dissolution, Prorogation and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinction during a Parliamentary Crisis*, in 27 *National Journal of Constitutional Law*, 2009-2010, 221).

This is the hermeneutic line followed by the High Court. By placing the participatory and accountability principles such as «basic features of the Constitution» (see Para 38), any action taken by a constitutional power against them is, for this very reason, contrary to the Constitution.

In the sense so last outlined and in the perspective pursued by the High Court, prorogation of Parliament comes into contact with the more general concept of the rule of law, which the principles of accountability, legality, and legitimacy refer to.

This reasoning concerns the correct (constitutional) relationship between powers, enforced by the control rendered by the (constitutional) judges.

As its main corollary, the "Supremacy Clause" set forth in Section 2 of the Constitution entails that constitutional powers must always be exercised in the proper way the Constitution has intended.

Most of all, that failure to comply a constitutional obligation directly violates the same Constitution.

5. – It seems now appropriate to explore the relationship between the PM and the King within the prorogation procedure. It is necessary to start from Section 83 of the Constitution and by the meaning given to those royal powers that can be exercised with «advice».

It should be remembered that the 1966 Lesotho Independence Constitution provided for the exercise of King's powers in accordance with any constitutional conventions applicable to the exercise of a similar function by the Crown in the United Kingdom.

The shift of executive powers from the King to the Prime Minister and its cabinet, consequently, implies that the first was to act «in accordance with the advice of the cabinet or a minister acting in the general authority of cabinet» (see Section 76).

Notwithstanding this, it should be noted that there were also residuary royal powers reserved for the King's absolute discretion. This dealt with: 1) prorogation and dissolution of Parliament; 2) appointment of senators; 3) appointment and removal of PM; 4) performance of Prime Ministerial functions during absence or illness; 5) designation of members of the Privy Council and National Planning Board; and 6) allocation of land and disciplinary control over chiefs.

This dichotomy (powers performed on advice and discretionary powers) is part of a tripartite classification of powers traditionally attributed to the monarch. The classification adds to the two cases cited above the hypothesis of those performed under royal prerogatives, but not necessarily performed by the crown yet also, for example, by ministers or public officials acting under the aegis of royal prerogatives (B.S. Markesinis, *The royal prerogatives re-visited*, in *The Cambridg Law Journal*, 1973, 287-288).

With the adoption of the 1993 Constitution, all discretionary powers were removed, and royal powers are now generally to be exercised in accordance with the advice of others constitutional actors (for an interesting statement contrasting discretionary exercise of royal powers as regards dissolution of Parliament, see Constitutional Court of Lesotho, *Mofomobe v Minister of Finance*; *Phoofolo v The Prime Minister* (out-going), (CC 07/2017 CC 08/2017) [2017] LSHC 2, 03 April 2017), and Court of Appeal of Lesotho, *Mofomobe and Another v Minister of Finance and Another*; *Phoofolo KC and Another v The RT Hon. Prime Minister and Others*, (C OF A (CIV) 15/2017 CONST./7/2017 C OF A (CIV) NO. 17/2017) [2017] LSCA 8, 12 May 2017).

The Constitution, therefore, now attribute to the King only those powers to act on the advice of the Cabinet, or a Minister acting under the general authority of the Cabinet. In some limited cases, the King acts on advice of the Council of State, or any person other than these ones, if specifically provided for in the constitutional text.

The mandatory nature of the advice has been clarified by the judiciary since the *Makenete v Lekanhya* case: «the words 'on the advice' … can only mean … that the King is obliged to act in accordance with the advice» (see High Court of Lesotho, *Makenete v Lekhanya and Others* (CIV/APN/74/90) (CIV/APN/74/90) [1990] LSHC 1, 06 November 1990. For a similar setting in another Westminster country, see for example Supreme Court of Singapore, *Yong Vui Kong v Attorney-General*, [2011] SGCA 9, annotated by S. Dam, *Presidential Pardon in Singapore: A Comment on Yong Vui Kong v AG*, in 42 *Common Law World Review*, 1, 48-60).

The constitutional system of Lesotho is thus aligned with the general Westminster principle that the crown is generally required to exercises its powers in the manner received through a particular governmental advice.

However, it is necessary to consider with particular caution the impact of this general principle in the case of prorogation.

In this case, the advice might conceal a request substantially contrary to the rule of law, and therefore unconstitutional. Any advice to prorogue Parliament that has the intended purpose of thwarting the performance of its constitutional functions would render itself unlawful.

As a royal prerogative created to enable the monarch to control Parliament (B. Hicks, *British and Canadian Experience with Royal Prerogative*, in *Canadian Parliamentary Review*, 2018, 18), the power to prorogue Parliament is generally exercisable by the crown on the advice of the PM.

There is a general consensus that the King cannot deviate from the advice received by the Prime Minister regarding prorogation of Parliament (A. Twomey, *Prorogation: Can It Ever Be Regarded as a Reserve Power?*, in 27 *Public Law Review*, 2016, 144; H. 'Nyane, *Re-Visiting the Power of King under the Constitution of Lesotho: Does He Still Have Any Discretion?*, in 53 *De Jure Law Journal*, 2020, 166). But it is also true that «… it is not unimaginable in modern constitutional law that devices such as legality, separation of powers and rule of law may still provide exceptional avenues which the King may use to decline the advice of the Prime Minister to prorogue a parliament» (H. 'Nyane, *Re-Visiting the Power of King under the Constitution of Lesotho*, cit., 170; see also P.J. Monahan, *Constitutional Law*, 4th ed., 2013, Irwin Law, Toronto, 75-76).

The case in comment, conversely, provides an example of one of these avenues.

If prorogation of Parliament is a royal prerogative that must be used in consequence of an advice given by the PM, it follows that the King must not agree with an unlawful advice.

This is indeed the case, when prorogation is invoked just to avoid scrutiny. The unconstitutionality of this situation is primarily due to the protection of the principles of the rule of law.

This circumstance was also outlined by the UK Supreme Court in the *R (on the application of Miller) v The Prime Minister* case ([2019], UKSC 41). In the Supreme

Court's reasoning «… the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions … [T]he longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model».

If then the constitutional obligation for the King to act only for lawful purposes seems to be a widespread principle, the *Acb & Ors v Prime Minister & Ors* case also returns a slightly different evaluation.

It is a procedural matter, which deals with the justiciability of the case in which the King decides to not follow the advice received from the PM.

The Constitution of Lesotho, at a first reading, seems to make it impossible for a court to take such a decision. Section 91(5) states as follow: «… where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into by any court».

Nevertheless, the High Court comes to refuse its absolute deprivation of jurisdiction (see the references to Judicial Committee of the Privy Council, *Anisminic Ltd v. Foreign Compensation Commission*, [1969]2 AC 147; *Attorney-General of Trinidad and Tobago v. Phillips*, [1995]1 AC 396; *Attorney-General v. Dumas*, 2017 UKPC 12; Supreme Court of India, *State of Rajasthan v. Union of India*, AIR [1977] SC 1361).

On the one hand, it should be considered the justiciability of the King's action exercised by virtue of a correct procedure for the exercise of that power. On the other hand, it should be considered the justiciability of the incorrect procedure for the direct or indirect exercise of that power, where the monarch's action scrutiny becomes secondary.

If the former is not permitted under the ouster clause in Section 91(5) of the Constitution, the latter is allowed because it is a jurisdiction that arises *ex lege* because of the imperatives of the rule of law and the principle of legality (see Para 47).

The High Court reaches this conclusion analyzing the steps that the Constitution requires the PM to take for his act to overreach the King in compliance with Section 91(3).

Those steps could be summarized as follows: 1) the existence of an advice to the King to prorogue Parliament; 2) failure to prorogue by the King; 3) satisfaction on the part of the PM about the King's failure to prorogue; 4) notice to the King to act within a certain period accompanied by the PM's declaration of his intent to act after the expiry of the stated period; 5) issuing of the proclamation of prorogation by the PM after the expiry of the notice to the King; and 6) reporting of the prorogation to Parliament at the earliest opportunity thereafter.

The advice of the PM to prorogue Parliament was handed to the King at the Royal Palace meeting started at 6 pm. The deadline for the King to act was 9 pm.

As the factual circumstances uphold, three aspects are considered relevant by the High Court in order to sanction the non-rituality of the procedure followed by the PM. Firstly, there was no notice to the King to act for proroguing the Parliament after he had failed to do that after 9 pm. Secondly, there was no expression of the PM of his intention to act following the inactivity of the King. Finally, there was no reporting activity by the PM to Parliament thereafter at the earliest opportunity.

As a result, the court concludes that the Legal Notice proclaiming that Parliament shall stand prorogated is invalid.

The examination of the circumstances last summarized may be reconciled with the constitutional precepts enucleated above.

Proroguing Parliament was (allowed in) nothing more than a desperate move by the PM to avoid his accountability, in contrast to the principles set for a

constitutional democracy.

With reference to relations between the government and the crown, the High Court states that, in advising the King to prorogue Parliament, the constitutional rights of the latter were not respected.

The court concludes its reasoning by placing primary emphasis on the following circumstance: the King has the right to be properly informed by the Prime Minister about a supposed and «self-created» (see Para 116.2) urgency for King's action and must not be set-up for failure so that the PM can overreach him.

Otherwise, the King would be required to act on an unlawful advice, in open breach to the basic values of a democracy like the one put in place by the Constitution of Lesotho.

6. – We come now to the impact of this decision on the separation of powers. To this end, it is necessary to reflect on the relations between executive – the Prime Minister – and legislative – the Parliament.

It should be remembered that the motivation put forward by the PM as a basis for the prorogation concerned the containment of the diffusion of Covid-19.

The High Court challenged this on the ground of the lack of rationality between means and pursued objectives (for a brief overview about the shaping of judicial decisions, M. Al Hasani, *Rationality and Bounded Rationality in Decision Making*, in 6 *European Journal of Economics, Law, and Politics*, 2019, 20 ff.).

According to the court, the impact of this shortcoming on the relationship between powers is evident. The PM did not take into account the role of Parliament to allocate resources to deal with the health emergency posed by Covid-19.

The principle of rationality is placed in a close correlation with the competence of the judiciary to syndicate an unlawful exercise of public power (for limitations placed on courts when reviewing executive decisions on the basis of the principle of rationality, it seems useful to read Constitutional Court of South Africa, *Albutt v Centre for the Study of Violence and Reconciliation and Others*, [2010] ZACC, 2010(3), SA 293, CC).

Inserting the latter within the general principle of legality as forming part of the rule of law (as also stated in Constitutional Court of South Africa, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, CCT 7/98 [1998] ZACC17; 1999(1) SA 374, CC, and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, 2000(1) SA 1, CC), it was therefore derived the fundamental principle that the exercise of public authority can never be totally arbitrary.

Given this principle, the precise responsibility of the Prime Minister resided in an exercise of public power contrary to the Constitution, having ignored the fact that, by proroguing Parliament, «its constitutional financial-resources-allocative capacity which is crucial to fighting the scourge of Covid-19, would be virtually crippled, and, therefore, render his decision irrational» (see Para 79).

In court's opinion, his failure to deal with the allegation that he failed to take into account the importance of Parliament in fighting the pandemic amounted to an admission (for applications of this principle, see South Africa Labour Appeal Court, *South African Football Association v Mangope*, (JA 13/11) [2012] ZALAC 27; (2013) 34 ILJ 311, LAC; South Africa Supreme Court of Appeal, *National Director of Public Prosecutions v Zuma*, 2009 (2) SA 227, SCA).

Failure to take into account that relevant consideration had an impact on the rationality of the decision of issuing the Legal Notice No. 21 of 2020. In particular, such failure would have constituted the means to achieve the purpose for which the power of prorogation was bestowed on him.

In shutting down the Parliament, deleterious effects would have resulted on the ability of government to have access to financial resources to deal with the threat of Covid-19.

The failure to consider this role of the legislative body was not rationally related to the purpose for which the power to prorogue Parliament is conferred according to the Constitution.

Another factor concerning the contradictory nature of the actions carried out by the executive resides in the connotation of irrationality of the exercise of public power by the PM.

The Minister of Health issued the *Public Health (COVID-19) Regulations, 2020* (*Legal Notice No. 27 of 2020*) on March 27, 2020. In it was expressly stated that Parliament is an essential service, not affected by the lockdown put in place in the country.

Specifically, the executive act provided for «a restriction of movement of persons during the period for which these Regulations apply, being the period from mid-night the 29th March 2020 to midnight of 21st April 2020».

It then stated: «every person shall be confined to his place of residence, unless the person has to the residence to provide or acquire an essential service or goods as set out in Schedule I … All places and premises not involved in the provision of essential services or goods as set out in Schedule I shall remain closed to all persons».

Essential services, as set out in Schedule I of the Regulations, yet included «services rendered by the Executive and Parliament».

Parliament was suspended by PM on March 20, 2020. The government (with the clear acknowledgement of the PM) subsequently listed it among institutions not affected by the lockdown, because it provides essential services. To this contradiction «[t]he Court does not find any answer» (see Para 99).

Reconciling all these hermeneutical principles to the parameter of constitutionality mainly set in Section 91(3), the infringement of the principle of separation of powers was then seen by the court in the violation of the necessary steps that the Constitution provides for the prorogation procedure.

In particular, this is because the Prime Minister failed to report to Parliament that he had prorogued it, in open contrast with the procedure set in Section 91(3) of the Constitution, where the report to Parliament is a necessary formal passage.

Therefore, the decision shades the fore the necessary protection of the above-mentioned principles of accountability, legitimacy, and legality. Not only in the relationship between the King and the PM, but also in the relationship between the executive and the legislature.

A failure for the PM to discharge his constitutional obligations vulnerated the basic tenet of the rule of law. And for this only reason, such infringement placed PM's actions in the control of (constitutional) judges, who act as the guarantors of the relations among Constitution, rule of law, and political bodies.

7. – It is important to note that the *ACB & Ors v Prime Minister & Ors* decision arose perhaps as one of the strongest final political shocks in a lengthy political crisis that has gripped Lesotho, and it had immediate practical (and political) effects.

Having obtained no comfort from the judiciary, the PM ordered the army to mobilize on the streets, claiming that not better-defined law enforcement agencies were undermining democracy. But nothing followed from this forcing situation. A few days later, on May 11, the PM Thabane has fallen apart in Parliament, after his coalition partners withdrew their support. He then formally resigned on May 19.

When issuing the Legal Notice No. 21 of 2020, the prorogation of Parliament made by the PM clearly disregarded fundamental values in a constitutional democracy. This violation derived from two aspects: 1) the violation of the procedure that Lesotho Constitution provides for the prorogation of Parliament; and 2) the violation of principles set as fundamental values for the constitutional system (separation of power, accountability of political actors, legitimacy of political exercise of power).

Covid-19 was nothing more than a pretext used exclusively for political

DPCE online
ISSN: 2037-6677

purposes only, and this illegitimacy materialized the fears pointed to in the decision of the High Court of Malawi with which it began this analysis (High Court of Malawi, *State v The President of Malawi et al ex parte Mponda, Soko et al*).

Countering such fears, in the *ACB & Ors v Prime Minister & Ors* case the High Court of Lesotho defended the Constitution. The court «remained vigilant to promote and protect the rule of law».

The decision at stake hence returns once again an important feature of constitutional democracies. When acting as constitutional judges, courts are able to pose themselves as effective guarantors of the core values of democracy.

Enrico Andreoli
Department of Law
University of Verona
enrico.andreoli@univr.it