



Malawi's Day of Reckoning

By Paul Tiyambe Zeleza



The much anticipated ruling of Malawi's Constitutional Court was somberly delivered to an anxious, tense, and polarised nation on February 3, 2020. In a unanimous decision, the court nullified the hotly contested and rigged presidential election of May 21, 2019. It was a brilliant legal victory for the opposition parties, and a profound political watershed for the country.

The level of public anticipation and apprehension was so high that in many parts of the country businesses, schools, offices, and public transport were closed or suspended. It felt like a national holiday. Like millions of spellbound Malawians at home and in the diaspora, I was glued to the radio. It made watching the impeachment trial of President Trump in the US Senate - where the Republicans, save for two, refused to allow additional witnesses and documents - seem farcical in comparison. So much for mature and emerging democracies!

In a lengthy judgement comprising more than 500 pages, but summarised in a proceeding that was broadcast live to an anxious nation, the court noted that it was alive to the enormous importance of the case given that this is the first time in the country's history that a presidential election has been subjected to a court dispute and ruling. The court stressed that the Constitution calls for an open, transparent and accountable government through the democratic choice exercised by its citizens. The right to vote is guaranteed and entrenched in the Constitution under the Bill of Rights.

It affirmed that elections must be managed with all due diligence and integrity, and conducted in a

fair and transparent manner. Clearly, this was not the case with the May 21 presidential election. In more than ten hours of reading the summary judgement, the court systematically demolished the arguments of the respondents. There was substantial compromise of citizens' voting rights and the principles and processes of free and fair elections. The magnitude of the irregularities and anomalies were so widespread, systematic and grave that the results were compromised, and could not be trusted as a true reflection of the will of the voters.

In a meticulous and masterly exhibition of jurisprudence and judgement, the judges painstakingly outlined and analysed all the issues in contention and the applicable laws, and interrogated relevant legal precedents from other countries. The defence of the respondents against the charges of the petitioners was left in tatters. They lost on the important issues of proof in an election case and the processes of election management. The court found the Malawi Electoral Commission (MEC) committed multiple breaches against several pertinent sections of the Constitution, and even created illegal processes, thereby raising serious doubts about the validity of the election results. In its ruling, the court called for the appointment of new officers for the commission.

On May 27, 2019, the deeply compromised Electoral Commission had declared the incumbent, Professor Peter Arthur Mutharika of the ruling Democratic People's Party (DPP), the winner, with 38.57% of the popular vote, against 35.41% garnered by Dr. Lazarus Chakwera of the Malawi Congress Party (MCP), the age-old independence party, and 20.24% for Dr. Saulos Chilima of the insurgent United Transformation Party (UTM) formed in 2018 by the country's former Vice President. The rest was shared by four other minor candidates.

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The results provoked angry nationwide protests led by the followers of the two main opposition parties and civil society organisations, most notably the Human Rights Defenders Coalition, which paralysed the major cities in the months that followed. The protesters accused the DPP and MEC led by Dr. Jane Ansah of gross electoral fraud. They called for the ouster of President Mutharika and Dr. Ansah, the latter under the #AnsahMustFall campaign, and demanded fresh elections. DPP supporters responded with counter-demonstrations, state-sanctioned intimidation, and support rallies for the beleaguered Chair of MEC led by women functionaries of the regime. Sporadic violence broke out in several areas.

The country was on fire, staring at the abyss of ungovernability. Public order virtually collapsed in some parts of the country as the discredited police lost their credibility and authority. Even the president could no longer travel freely to many parts of the country outside his ethnic laager, including the capital, Lilongwe, without a convoy of heavily armed military vehicles. The popularity of the Malawi Defence Force rose, and a few misguided elements even seemed to yearn for the dangerous respite of a military coup. Predictably, businesses and the economy were shuttered.

The other institution in which the disaffected and inflamed masses placed their political desires and demands for electoral justice was the judiciary. Within a week after the general elections were held, the two opposition parties filed separate petitions with the High Court for the nullification of the presidential elections over alleged irregularities and mismanagement of the electoral system.

The odour of electoral malfeasance began days after the election as stories of rigging started circulating, buttressed by delays in announcing the results. Soon a new word entered Malawi's

political vocabulary: Tip-ex, a correction fluid used to alter vote results sheets. The elections were Tip-exed, Mutharika was Tip-Ex president. The overwrought social media went into overdrive. On May 25, UTM called for nullification of the election, while the DPP requested the immediate release of the election results, and MCP applied for a judicial review of the presidential election results from several districts and constituencies.

MEC proceeded first to release the results of the parliamentary election, and briefly withheld results of the presidential vote for a few more days, which raised much suspicion. The influential and quasi-religious body, Public Affairs Committee (PAC), issued a press statement on May 30, 2019, stating categorically that the elections lacked credibility. The next day, on May 31, the two main opposition parties filed separate election cases, which were consolidated by the High Court four days later because they were similar.

Efforts by lawyers for the Electoral Commission and the ruling party first to dismiss the case and later to extend the time for disclosures of documents and information by the 2nd respondent (Malawi Electoral Commission) to the 2nd petitioner (Lazarus Chakwera of MCP) were curtailed. The case was referred to select High Court judges sitting as a Constitutional Court (such a court doesn't exist as a separate entity). The court also dismissed several applications by the Attorney General in August and September for sanctions and an injunction against political demonstrations.

The drama continues

Thus began the months-long election case that was broadcast live and transfixed the troubled nation. The hearing of the case commenced on August 8 and ended on December 20, 2019. The hearings lasted 61 days and, according to the Constitution, judgement had to be rendered within 45 days. February 3, 2020 marks the 45th day. The court hearings, with all their gravity and levity, enraptured the population as no other event since the transition from one-party dictatorship to multiparty democracy in the early 1990s. It raised national awareness about election laws and processes, and democratic rights and responsibilities. The country's crass and corrupt ruling cabal was exposed for all its impunity, iniquity, and ineptitude.

Some lawyers and pundits were applauded; others damaged their reputations for their mediocrity and mendacity. Similarly, some witnesses were celebrated and others were ridiculed into ignominy. The latter included an insufferably arrogant cabinet minister who flaunted a fake doctorate degree (an unearned accolade so beloved by African elites), but couldn't mention his alma mater, a term he didn't seem to know! In the meantime, large demonstrations and counter-demonstrations continued.

The country seemed to be spiralling out of control and the acrimony between the ruling and opposition parties intensified. PAC called for dialogue on the electoral stalemate to no avail. Appeals for an open and inclusive dialogue by the foreign diplomatic missions of Germany, Ireland, Japan, Norway, the United Kingdom, and the United States also proved ineffectual.

The court hearings systematically revealed blatant manipulation and mismanagement of the electoral process and system. The submissions by the lawyers of the opposition parties vigorously argued that the Electoral Commission had breached its duty and infringed on the petitioners' and citizens' political rights under various sections of the Constitution. They concluded; "The irregularity and fraud in the elections were substantial and significant that they affected the integrity of the elections."

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The petitioners sought nullification of the presidential election of May 21, 2019 and the declaration of Peter Mutharika as president-elect as invalid, null and void. In their lengthy submissions, the respondents accused the petitioners of relying on hearsay evidence, and claimed “there were no irregularities or other factors that beset the election and that even if any were there, they did not affect the result of the election.” They requested dismissal of the petitions with costs.

In January 2020, the drama continued as the nation eagerly awaited the ruling of the Constitutional Court. Two particular events caught public attention and wrath. One was a visit by the European Union’s election observation mission. They announced plans to release their report on the May 21 election, which was met with outrage by the opposition parties, civil society, and the general public; the EU team was forced into a hasty retreat.

The second was a shocking leak in mid-January 2020. It was reported that on November 28, 2019, the Chief Justice had lodged a formal complaint with the Anti-Corruption Bureau (ACB) about a bribery attempt targeting the judges hearing the case for the nullification of the presidential election. On January 22, the ACB ordered the arrest of Mr. Thom Mpinganjira, a leading business tycoon. But later that same night, Mr. Mpinganjira’s lawyers managed to get an order from a magistrate in another city quashing the arrest warrant. Several days later, on January 28, a High Court judge ordered the re-arrest of Mr. Mpinganjira, and called for disciplinary action to be taken against the errant magistrate and lawyer. The case underscored both the rot and rectitude of the country’s besieged judicial system.

Pivotal moments in Malawi’s history

As February 3, 2020 approached, everyone wondered which face of the courts would show up. There are few dates in any nation’s history that mark pivotal moments. In Malawi’s history they include February 3, 1915, when the leader of the first major uprising against colonial rule, John Chilembwe, an American-educated Baptist pastor, was killed. Chilembwe Day is commemorated every January 15. Another key date is March 3, 1957, the day the British colonial government declared a state of emergency to quell nationalist agitation by arresting leading nationalists, which provoked more protests. The day is marked as a national holiday called Martyrs’ Day in honour of nationalist heroes who sacrificed their lives in the protracted struggle for decolonization.

Then there is of course July 6, Malawi’s Independence Day. In the postcolonial era, June 14, 1993, marks a significant day when a referendum was held to abolish President Banda’s ruthless MCP dictatorship and introduce multiparty democracy. The referendum was approved by nearly 65% of the voters. My parents’ generation had fought for the “first independence”; mine was at the forefront of the “second independence”. In recognition of my own role in the democratic struggle, the opposition party, the United Democratic Front appointed me Shadow Minister, but I turned down a Cabinet appointment when the party won the elections in May 1994. Unfortunately, my initial misgivings about the leadership and integrity of President Bakili Muluzi’s ten-year corrupt and lacklustre administration were borne out.

A day of infamy in Malawi’s political trajectory under the “Second Republic” is July 20, 2011, when nationwide protests broke out against economic mismanagement and creeping political authoritarianism by the DPP government led by President Bingu wa Mutharika, the elder brother of the current president. The draconian crackdown against the demonstrations over the next several days resulted in nearly 20 people killed and another 58 injured and up to 275 arrested. The country was shaken to its knees. The hapless president never regained his political footing, and less than a

year later, on April 5, 2012, he died of a heart attack at the age of 78.

The landmark verdict nullifying the presidential election will mark February 3, 2020 as another milestone in the history of this incredibly beautiful, but badly governed, and desperately poor country. One of Malawi's most renowned intellectuals, Thandika Mkandawire, noted for his caustic wit, told a Malawian friend that visiting Nairobi in December 2019 served as a grim reminder of Malawi's lost fifty years of independence; much as one might find visiting the Asian economic tigers a sobering testimony to Africa's lost years of independence.

The Kenya case

Malawi follows Kenya, where on September 1, 2017, the Supreme Court annulled the country's presidential election held on August 8, 2017. In fact, in its judgement, the Malawi Constitutional Court frequently referred to the Kenya case. Cancelling presidential elections is extremely rare given the high levels of substantiality of evidence required in such cases. Thus Malawi has joined an exclusive club of world democracies. Annulment of an election represents a grave indictment of the electoral body. The Constitutional Court was unsparing in castigating the Malawi Electoral Commission for its incompetent and improper management of the entire presidential election process.

The court called for fresh elections within 150 days. The offices of the President and Vice President were returned to the status quo before the May 21 election, thereby reinstating Vice President Chilima and retaining President Mutharika till new elections. Parliament was urged to meet within 21 days to pass legislation on new presidential, parliamentary, and local elections and maintain the principle of concurrent tripartite elections every 5 years.

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As happened in Kenya after the presidential election was annulled on September 1, 2017, the annulment in Malawi will be greeted with jubilation by the leaders and followers of the opposition parties, and with trepidation by those affiliated to the ruling party, including some professionals and former activists who sold their souls for tarnished pieces of silver. In the days leading to the Constitutional Court ruling, political and religious leaders, the security services, foreign diplomatic missions, as well as the United Nations and the African Union, appealed for calm and urged citizens to accept the court's decision.

One hopes President Mutharika will try to salvage his tattered reputation by gracefully accepting the court decision, as his predecessors, President Banda did when he lost the 1993 referendum, and President Muluzi lost an ill-guided attempt at a third term.

As became evident in Kenya, annulling a presidential election does not guarantee a smooth re-election process. In fact, the opposition in Kenya proceeded to boycott the repeat election in October, which led the incumbent, President Uhuru Kenyatta, to cruise to victory unopposed. This is unlikely to happen in Malawi. In fact, what might be in question is not whether the main contending parties will contest the fresh presidential election, but how. Will the opposition parties proceed separately as before or form an electoral alliance to fight the fresh election?

In its ruling, the Constitutional Court found that no candidate in the May 21, 2019 presidential election had secured a majority and proclaimed that from the next election only a candidate who

secured 50+1 would be deemed elected as President. Parliament was asked to make the necessary amendments to the electoral law. In 2017 the DPP, supported by a minority party, had blocked the Presidential, Parliamentary and Local Government Amendments Bill that would have allowed a 50+1 electoral system.

The court ruling might facilitate much-needed political realignment. The two leading parties, UTM and MCP, must seriously pursue forming a possible coalition to beat the DPP and any coalition it might cobble together. Malawi cannot afford to mortgage its future to the DPP, a party that has degenerated into an incompetent, sleazy, tribalistic, nepotistic, and kleptocratic cabal. Creating meaningful and durable political coalitions require statesmanship and compromise that is quite rare among politicians.

Historic opportunity

Malawi has been offered a historic opportunity to reclaim its future, to change direction and to fulfill the dreams of millions of its people who fought for the “second independence”. The opposition parties and politicians who succeeded in nullifying the presidential election must not seek to become a reincarnation of the discredited DPP regime, greedily awaiting their chance to “eat” from the paltry state coffers. They owe it to history, and to the past, current and future generations of citizens of this aggrieved country to pursue and realise persistent yearnings for an inclusive, integrated, innovative and sustainable democratic developmental state and society.

As we’ve learned from development studies and histories and economies of some Asian countries, creating such a state and society is not a mystery: it is not a matter of ethnicity or race or nationality, neither is it dictated by the peculiarities of culture or the imagined genius of a particular civilization, let alone the endowments of natural resources. Rather, it is determined by the quality of institutions and leadership, the development of human capital, and the prevalence of the social capital of trust. The future will centre on confronting many challenges and seizing new opportunities. Two stand out.

First, there is need to undertake profound political reforms, including of the electoral system. There are, of course, many other electoral systems, including single member or multi-member constituencies under which there are several variants; they can also be complemented by majoritarian or proportional or mixed majoritarian and proportional features. Malawi must introduce an electoral system that best promotes proportionality of seats to votes, accountability to constituents, inter-ethnic and inter-religious conciliation, and minority office holding. The decentralisation and devolution of power from a highly centralised presidency should also be on the table.

The newly empowered masses must maintain pressure on the politicians to embrace the politics of policy differences rather than that of ethnic chauvinism and personal self-aggrandizement. They must resist the self-serving machinations and shenanigans of the political class. As we have learned in African studies and from the rise of contemporary political populisms around the world, ethnicity (or race), overlaid by all manner of regionalisms, is often a more powerful predictor of political loyalties and voting behavior than class and social interests.

But ethnicity itself is a complex phenomenon. “Moral ethnicity” differs from “political ethnicity”. The former represents a complex web of social obligations and belonging, while the latter reflects the competitive confrontation of “ethnic contenders and constituencies” for state power and national resources. As I wrote elsewhere, “Both are socially constructed, but one as an identity, the other as an ideology. Ethnicity may serve as a cultural public for the masses estranged from the civic public of the elites, a sanctuary that extends its comforts and protective tentacles to the victims of political

disenfranchisement, economic impoverishment, state terror and group rivalry. In other words, it is not the existence of ethnic groups (or racial groups) that is a problem in itself, a predictor of social conviviality or conflict, but their political mobilisation." This is the struggle Malawians committed to a more inclusive future must fight.

Malawi's current first-past-the-post or winner-take-all system is one of the root causes of political instability. It facilitates minority presidencies. Since the dawn of multiparty democracy in 1994, there have been six elections. Only in two of these did the elected president garner more than half the votes of the electorate (1994-Bakili Muluzi 46.15%; 1999-Bakili Muluzi 52.34%; 2004 Bingu wa Mutharika 35.97%; 2009 Bingu wa Mutharika 66.17%; 2014 Peter Arthur Mutharika 36.4%; 2019 Peter Arthur Mutharika 38.57%).

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Incidentally, it is the first-past-the-post system that allowed the election of President Donald Trump, who lost the popular vote to Senator Hilary Clinton by a margin of 2,868,686. Similarly, commenting on Brexit a day after Britain left the European Union, a British journalist wrote in *The Guardian*: "How did a matter of such momentous constitutional, economic and cultural consequence come to be settled by a first-past-the-post vote and not by a super-majority?...There is much that is historically unjust about the British state, but very little of that injustice derives from the EU...It was the task of the Brexit campaign to persuade the electorate otherwise. In the referendum they succeeded with 37%, enough to transform our collective fate for a generation at least."

Second, the awakened citizenry must force the political class to attend to the country's tenacious crises of mass poverty, low economic growth, and rising inequalities. There is a pressing need for strategic and sustainable interventions in the traditional primary, secondary, and tertiary sectors, and what some call the quaternary sector or the knowledge sector comprising high quality education and training, research and development, and the advancement of science, technology and innovation.

In short, a future democratic government will need to focus steadfastly on economic growth and transformation by overcoming the country's enduring legacies of underdevelopment as it simultaneously embraces, even if belatedly, the unrealised potentialities of the old industrial revolutions and the possibilities of the fourth industrial revolution. At stake is the need to raise the country's human development index by ensuring the provision of what the United Nations Development Programme calls basic capabilities while moving towards enhanced capabilities. Especially critical is reducing power imbalances and gender inequalities, as well as promoting youth employability and decent work.

Malawi's development deficits are glaring indeed, ranging from persistent poverty among the rural and urban masses, to poor physical and social infrastructure, abysmally low levels of education at all levels, and extensive unemployment and underemployment. Each time I visit the country, I am struck by how little the cities where I grew up in the 1960s and 1970s have changed. I joke to my relatives and friends that I cannot get lost in Lilongwe, Blantyre, or Zomba, although I left the country 43 years ago! When I visited last December, together with my family, including my son and his fiancée, it was disconcerting to see that the primary and secondary schools I attended look so dilapidated; they are depressing and pale replicas of the fine institutions I attended.

Thus, getting the politics right is only a prelude to getting the economics right for the well-being and dignity of Malawian citizens. The good news from the ruling of the Constitutional Court annulling the presidential election is that an indispensable first step has been taken. This day will be remembered as a turning point in the country's tortured political history. Perhaps it will be known as Constitutional Democracy Day.

One of my relatives, a young, bright and highly educated professional, said the whole saga had left her proud to be a Malawian. This is a moment of reckoning for the country, she said, when Malawians became active citizens, abandoning the docility of bystanders in the political game created, controlled and manipulated by self-serving, cynical, corrupt and crafty politicians. Her fervent hope is that the citizenry, now informed and inspired by their active involvement in a signal political event, will not retreat to the political sidelines as passive observers. That, too, is my hope and the hope of many in this land of the lake, the Warm Heart of Africa, to use the country's much beloved national moniker.

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