Judicial Nullification of Presidential Elections in Africa: Peter Mutharika v Lazarus Chakera and Saulos Chilima in Context

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Introduction

In contemporary Africa, the judicialization of presidential elections between incumbents and challengers in courts is becoming increasingly visible.[1] In at least two instances within the last three years, courts have overturned presidential elections. In addition, an increasing number of non-gubernatorial electoral disputes are being judicialized in national and international courts. There are examples from Malawi, Zambia, Nigeria and Kenya.

These cases show the increasing role of formal rules as a constraint on power in

some African countries. These examples together with the fact that there have been at least twenty peaceful alternations of Presidencies since 1990, with several of these succeeded by candidates who run on opposition parties.[2]

These cases can also be characterized as mega-political disputes, although our primary claim as alluded to above is that these cases illustrate that the rule of law as a limit to political power is gaining traction.

Peter Mutharika v Lazarus Chakera and Saulos Chilima is the latest example of the judicialization of a high-profile election dispute. This case successfully triggered a repeat election in which an opposition politician defeated an incumbent. Apart from being the first election to be judicialized since Malawi's independence in 1964, this case followed a handful of cases – Cote d'Ivoire in 2010 and Kenya in 2017 – in which a court has overturned a presidential election in Africa. The fact that this case successfully resulted in a turnover of the government may potentially serve as a deterrent to African leaders who may assault the judiciary to entrench and re-entrench themselves in power. The Malawi case also shows that litigating such high profile electoral disputes can sometimes tip the balance against incumbents. It also shows that such high profile cases have utility beyond galvanizing the power to shame or mount pressure against such incumbents.

We contend that the judicialization of mega-political election and high-profile disputes will continue to have growing influence on and in shaping the future of elections and democratic institutions in Africa.[3] We are cautious to note that the role of these high profile electoral disputes should not always be assessed in narrow terms of judicial victory as Malawian example discussed this essay shows. Thus, unlike Dan Banik and Happy Kayuni, who contend that "relying on the courts alone to resolve political disputes is not a viable alternative to democratic consolidation …", we are less pessimistic.

From what we see in Malawi and Kenya in 2017, we can surmise that judicializing presidential election disputes may under certain circumstances constitute a safeguard protecting the integrity of elections that incumbents rig in their favour. From this perspective, we see the role of the independent courts backed up by support from the bar and the public in alliances with civil society

groups inside and outside the country as being (i) to adjudicate disputes between an overbearing incumbent and politically weak opposition candidates; (ii) and to check the propensity of corruption especially in rigging elections. Indeed, under conditions where the opposition has a close to or more than 50% support from the electorate, it is very likely that courts could be emboldened to assert their independence in the face of assault by a lawless executive. That is clearly the case in Malawi and was also the case in Kenya following the 2017 election.[4]

Second, if the dispute is judicialized at any of Africa's international courts, unique questions also arise. One question is whether the relevant court has the jurisdiction to entertain the dispute. As James Gathii, Olabisi Akinkugbe and Karen Alter have argued separately in their forthcoming articles, Africa's international courts are an alternative forum for the resolution of mega-political disputes.[5] Opposition political parties and politicians who fear they will not be able to access victory before national courts opt to file their cases in international courts to continue pressurizing incumbents to follow the law in a forum they do not control.[6] Opposition political parties therefore find innovative ways, such as claims for the breach of fundamental human rights, freedom of association so that international courts can find that they have jurisdiction in what are really national electoral disputes.

This blog post analyzes the mega-political dispute in the Supreme Court of Malawi's decision in *Peter Mutharuka v. Lazarus Chakera and Saulos Chilima*. As such, it teases out the context of the Malawi Presidential dispute; the backlash it triggered from the executive in the face of a bold judiciary, as well as the implications that we should draw from the episode for constitutional democracy and governance as well as for the role of courts in mega-political disputes. The blog foregrounds the role of solidarity from academia, the bar – both within and outside Malawi, as well as pressure by non-governmental organizations.

Bold and Defining Judicial Outcomes: Peter Mutharika v Lazarus Chakera and Saulos Chilima

This year-long dispute which ended on May 8 2020 with a successful nullification of a presidential election and the declaration of a new election was

triggered by the May 21, 2019 annulled election that returned the then sitting President Professor Peter Mutharika to power. The incumbent Vice-President Mr. Saulos Chilima and Mr. Lazarus Chawera, who unsuccessfully ran against Prof. Mutharika, alleged that that election had been rigged against them. Vice-President Chilima had broken away from the ruling party and formed the United Transformation Movement. President Mutharika's return by the Malawi Electoral Commission as winner of the May 21, 2019 presidential election by a slim margin over main opposition leader, Lazarus Chakwera and Saulos Chilima sparked widespread protects on the basis of claims that the polls were marred by irregularities, rigged and unfair, while earning trending names such on the " Tippex election" on social media platforms.

Following initial individual actions by the opponents and subsequent consolidation of the disputes into one action, a five-member bench of the High Court judges was constituted as the Constitutional Court to adjudicate over the election petition. On February 3 2020, the Constitutional Court upheld the petition in favour of the opposition petitioners and ordered a fresh election to be conducted within 150 days. President Mutharika and the Malawi Electoral Commission appealed to the Supreme Court of Malawi. On May 8 2020, Malawi's Supreme Court affirmed the decision of the Constitutional Court and ordered a rerun of the election with the original candidates.

The re-run of the election was conducted in late June The opposition candidate Lazarus Chakwera won the election re-run. While the opposition parties celebrated their victory on the heels of a peaceful and transparent election, the outgoing President declared the election as the worst in the country's history.

Unsuccessful Backlash from the Executive on the Independence of the Malawian Judiciary

The decision of the Supreme Court of Malawi that annulled the initial election sparked an immediate backlash from the President. In an unprecedented move by a public notice dated June 12 2020, the Chief Justice of Malawi, the Right Hon. Andrew K. C. Nyirenda, S.C., was asked to proceed on leave pending retirement with immediate effect and the most senior Justice of Appeal was appointed to act as Chief Justice until the appointment of a new successor. Justice Nyirenda was the judge that led the court that annulled Mutharika's

election victory and ordered a re-run. So, this was a direct backlash from the executive.

The President's assault on the judiciary came under significant critical scrutiny from inside and outside Malawi. In particular, the Malawian High Court judges granted injunctions preventing the move following a petition filed by the Malawi Human Rights Defenders Coalition (HRDC), the Association of Magistrates, and the Malawi Law Society. In an interview, Gift Trapence, the Chairperson of the HRDC stated that:

> "We don't want a lawless country where the executive thinks that they are the law themselves. We want to safeguard the rule of law in this country. We want to safeguard the independence of the judiciary. No one should attack the judiciary which had been the case by the DPP [Democratic Progressive Party] government including the president."

This backlash prompted a tsunami of critical responses from academia, the bar in Malawi, the judges from neighbouring States as well as non-governmental organizations.

From a comparative perspective, it is important to note that when the 2017 Presidential election was annulled by the Supreme Court of Kenya, President Uhuru Kenyatta called the Supreme Court judges thugs. Speaking to his supporters, President Kenyatta said that "[Chief Justice] Maraga and these thugs have decided to cancel the election. Now I am no longer the president-elect. I am the serving president… Maraga should know that he is now dealing with the serving president." For his part, Kenyan that "[Chief Justice Maraga] has had his day, ours is coming. By the way, that is not a threat. He has had his day, he has done his game, our day is coming." Speaking at a news conference, Maraga said that after the nullification of the presidential election and the statements by the President and the Deputy President, that the judges of the Supreme Court of Kenya had received aggressive threats.

Solidarity from and the Role of the Academia, the Bench and the Bar in Quelling Executive Backlash on Judicial Independence in Malawi

In addition to the role of HRDC and judges in Malawi, the coordinated effort of the academics, non-government organizations, the Commonwealth Lawyers Association and the Malawi Law Society mounted political pressure to counter the executive. A press release dated June 14 2020 by the Malawian judiciary pushing back against the actions of the President and asserting the independence of the appointment and removal of judges together with the organized efforts critiquing the Mutharika regime are instructive elements for responding to incumbent regimes elsewhere.

In a letter titled "Statement Condemning Executive Assault on the Judiciary in Malawi", concerned law professors and academics from around the world expressed deep concern "about coordinated attempts by the government to undermine the judiciary, including statements by President Mutharika falsely accusing the judiciary of having staged a coup against his government and claiming that Parliament is supreme in Malawi."[7] They called on the government of Malawi to uphold the rule of law.

A letter from Mr. Burton Chigo Mhango, President of the Malawi Law Society, dated June 28 2020 in the wake of the swearing in of the new President demonstrates this coordination in responses to the Mutharika regimes lawlessness.[8] Mr. Mhango thanked "the Lawyers, the Judiciary, the Police, the Armed Forces and the people of Malawi on the historic election."[9] A few questions arise from the foregoing. First, while it is beyond the scope of this essay, we wonder why the Legislature was left out completely? Second, the fact that the Armed Forces were mentioned by the Malawi Law Society indicates a recognition of the precarity and uncertainty of the situation Malawi found itself. The Law Society seemed to be acknowledging that the military did not take advantage of the opportunity to engineer a coup. The decision of the military to support other institutions of the government to work through the crisis suggests some gains in the consolidation of democratic governance and the rule of law in Malawi. This is not a far-fetched argument as is indicated by the courageous decision of the High Court presided over by Judge Charles Mkandawire that granted an injunction that stopped the decision by the executive to send Justice Nyirenda on leave pending retirement.

Similarly, in Kenya following the 2017 elections, the bar and civil society groups

rallied to defend the judiciary from assault from the President. In a strongly worded statement, the Law Society of Kenya condemned President Kenyatta's remarks that the judges who invalidated his election were thugs. According to the Law Society of Kenya, "the head of state who under the constitution is a symbol of national unity" should refrain from derogatory comments about the judiciary. The lawyers' association noted that the judges had acted professionally, with honour and dignity, and that they did not deserve the disrespectful treatment. Further defense of the judiciary came from the Kenya Magistrates and Judges Association who issued a statement to "condemn this assault of decisional independence" and to take "great exception" to President Kenyatta's remarks. A Nairobi-based analyst at the International Crisis Group classified the President's statement as "veiled threats" and stated that "politicians should be careful not to incite the public against the judiciary."

Situating the Malawian Executive Interference in the Removal of Chief Justices in Wider Contexts: Successful Backlash in Nigeria?

The initiation of the eventual successful removal of the Chief Justice of Nigeria, Justice Walter Onnoghen, in 2016 on the basis of non-disclosure of assets, when Nigeria's presidential election was only weeks away provides an important recent case to deepen our analysis here.[10] We recognize that the Nigeria case is raises wider socio-political and legal contexts which we have not explored here.

Yet, the Nigeria case illustrates the intricate and contested relationship between many of Africa's executive and judiciary. In this regard, the instrumentalization of discipline by asking judges to proceed to terminal leave should not be viewed in isolation. Like the Malawian case, it was also the first time that the executive arm of government attempted the removal of a sitting Chief Justice of Nigeria (CJN).

Nigeria's presidential election was weeks away when the CJN was suspended. Opposition parties accused the ruling party of assaulting, intimidating and interfering with the judiciary and undermining separation of powers. The important background context here is that the CJN participates in constituting memberships of the tribunals that adjudicate election disputes arising at various levels. The CJN could also preside over a presidential election dispute if

an aggrieved party appeals to the Supreme Court.[11] Another important dimension to the removal of the Nigerian CJN is that the executive had consistently accused the judiciary of corruption and frustrating the federal government's anti-corruption agenda, particularly by reversing lower court convictions of opposition politicians.

In the charged atmosphere preceding Nigeria's 2015 Presidential election, the motivation for Justice Onnoghen's suspension[12] elicited a range of explanations from legal practitioners, the Nigerian Bar Association and academics. They all questioned the CJN's speedy trial, alleging failure of due process in doing so. Many believed the executive simply set out to assault the judiciary's integrity and thereby weaken their independence. Despite the campaign by some sections of the Nigerian Bar Association and civil society against the perceived assault by the executive and questions surrounding the wisdom of the action taken weeks before a consequential presidential election, the CJN resigned voluntarily following the recommendation of the Nigerian Judicial Council. The point of the foregoing brief comparison is to underscore the importance of the victory in Malawi by situating it alongside the Nigeria example.

Conclusion

Our analysis reaches the following three broad conclusions.

(i) Growing Coordination and Cross-fertilization in the Jurisprudence of National Mega-Politics Cases

The Malawi decision nullifying the Presidential election made frequent references to the analogous Kenyan decision of 2017. These two cases are a modest but significant contribution towards the fraught consolidation of democratic governance and the independence of African judiciaries. We cannot of course say that these cases definitively represent a new direction in dealing with the immensely complicated terrain of mega-political disputes that arise from elections. Yet, as we note below, they illustrate the increasing role of formal rules as a constraint on power in some African countries

(ii) Modest Strategies to Counter Executive Overreach

The coordination of efforts by the bar, the bench in Malawi, academics as well as non-governmental organizations indicates the strategies that other African states may deploy to shame an erring incumbent to comply with the law. As such, it is an important implication for lessons in civil society coordination for building constitutional democracy.[13]

(iii) Rare but Important Victories for Judicializing Presidential Elections

The Malawi and Kenyan decisions invalidating presidential elections are an important, albeit new precedent that marks the importance of rules of law in controlling power. These cases will nudge other African judiciaries to more seriously consider invalidating rigged elections, a theme we are currently working on in our larger project. Our research so far indicates that even where apex courts have not invalidated elections, there is an increasing number of dissenting judges when rigged elections are challenged. In our more substantive ongoing research, we elaborate on the each of the foregoing themes at greater length in addition to examining the growing cross-pollination in Africa's presidential election jurisprudence.

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[1] Some scholars refer to such cases as megapolitical disputes. Mega-political disputes have been argued to refer to "[h]igh profile cases that arise from national electoral processes and judicial monitoring of electoral procedures. They also include cases relating to good governance and the rule of law, constitutional and electoral law amendments, and regime changes. The common thread between these cases is the level of socio-political attention that they generate at the national level, either through media publications, preliminary contestations before national courts, the national profile of wealthy political elites involved in the dispute or the potential impact of the outcome for the ... State involved." *See* Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice, in* The Performance Of Africa's International Courts: Using International Litigation For Political, Legal, And Social Change (ISBN 9780198868477) (James Gathii ed., Oxford University Press, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186627; Ran Hirschl, *The Judicialization of Politics*, *in* The Oxford Handbook of Political Science 254, 257 (Robert E. Goodin ed., 2011).

[2] According to the Supreme Court of Kenya in invalidating the 2017 Presidential election, “"The greatness of a nation lies in its fidelity to the Constitution and the strict adherence to the rule of law." Raila Amolo Odinga & Another v Independent Electoral And Boundaries Commission & 2 Others [2017] EKLR, para. 394. *See also* James Gathii, Implementing a New Constitution in a Competitive Authoritarian Context: The Case of Kenya; Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, 18 Journal of Democracy 126–40 (July 2007).

[3] For a thorough discussion of the role of the East African Court of Justice in democratization, see James T. Gathii, *Chapter One: International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice*, *in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press 2020),.

[4] James Thuo Gathii, “Judicial Nullification of Presidential Elections: Explaining How it Happened in Kenya,” Draft of September 2017.

[5] Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice, in*The Performance Of Africa's International Courts: Using International Litigation For Political, Legal, And Social Change (ISBN 9780198868477) (James Gathii ed., Oxford University Press 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186627;James T. Gathii, *Chapter One: International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice*, *in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630724; Karen Alter, James Gathii & Laurence Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, *in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press 2020).

[6] James T. Gathii, *Introduction*, *in* The Performance Of Africa's International Courts: Using International Litigation For Political, Legal, And Social Change (ISBN 9780198868477) (James Gathii ed., Oxford University Press 2020).

[7] The authors have a copy of this letter on file.

[8] The letter dated 28th June 2020 and titled "Election of President Dr. Lazarus Carthy Chakwera and Vice President Dr. Saulos Kluas Chillima: Independence of the Judiciary, Rule of Law and Constitutionalism in Malawi" is on file with the authors.

[9] *Id.* at 1. Mr. Mhango also noted the roles of some past and present Chief Justices from other countries in petitioning the Mutharika regime to comply with the rule law as well as a joint statement signed by 47 democracy and justice institutions including East Africa Law Society.

[10] The summary in this section is based on Olabisi D. Akinkugbe's forthcoming chapter. For an analysis of the issue in the context of disciplining judges in Nigeria, see Olabisi D. Akinkugbe, *The Politics of Regulating and Disciplining Judges in Nigeria*, *in* Disciplining Judges: Contemporary Challenges and Controversies (Richard Devlin & Sheila Wildeman, eds., Edward Elgar, forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561969.

[11] Nigeria's main opposition party argued that suspension of the CJN was part of an overall plan to influence the constitution of the election tribunals to favour the ruling party. *See* Success Nwogu, *Swearing-in of election tribunal members, a nullity – PDP*, Punch(Jan. 26, 2019), https://punchng.com/swearing-in-of-election-tribunal-members-a-nullity-pdp/.

[12] The ruling All Progressive Congress (APC) saw the suspension as fighting corruption, arguing that the opposition People's Democratic Party too quickly defended corruption. The PDP countered that the APC presidential candidate (the sitting President) had taken the law into his own hands.

[13] This co-ordination effort is similar to the regional strategies that the ECOWAS Community Court judges deployed in mounting pressure on the leaders of the member states to expand the substantive and personal jurisdiction of the court to human rights violations and individuals respectively.

See Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice,* 107 American Journal of International Law 737–79 (2013).

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