

THE NULLIFICATION OF THE 2019 PRESIDENTIAL ELECTION IN MALAWI *A Judicial Coup d'État?*

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ABSTRACT

In February 2020, the High Court of Malawi nullified the May 2019 presidential election and ordered a fresh election. This judgment was later confirmed by the Malawi Supreme Court of Appeal. These two judgments are monumental and unprecedented because this was only the second time a presidential election had been judicially nullified in Africa. The fresh presidential election also scored a first in Africa when it was won by an opposition candidate. These judgments carved new terrain for electoral law in Malawi and divided legal and political opinion. This paper offers a critical analysis of the two judgments. It focuses on the court's treatment of the burden and standard of proof in electoral disputes; the interpretation of 'majority' to mean 50% + 1; and the effect of the nullification of the 2019 presidential election and consequential transitional issues. Overall, the paper concludes that while the outcome of the litigation garnered plaudits, the reasoning in the two judgments is not wholly persuasive.

Keywords: elections, electoral systems, burden and standard of proof, meaning of 'majority'

INTRODUCTION

Constitutions are sacrosanct as they embody the collective ideals and will of a people (Hatchard et al. 2004, p. 12). Beyond laying down national values, they

define the basal relationship between the governors and the governed (Loughlin 2010, p. 278). The power of a people to elect leaders through a free and credible electoral process is a critical tenet of this relationship. A fair and objective electoral system serves as the vehicle through which the will of the people finds expression. There is, therefore, primacy in the obligation of courts to ensure that the resolution of electoral disputes sustains and conforms to constitutional values and ideals, especially when they affect franchise and electoral systems.

On 3 February 2020 the High Court of Malawi, sitting as a constitutional court, delivered judgment in *Saulos Chilima and Lazarus Chakwera v Peter Mutharika and Electoral Commission (Chilima Case-HC)* (Constitutional Reference No. 1 of 2019, HC (LL)) nullifying the May 2019 presidential election. On 8 May 2020 the Malawi Supreme Court of Appeal (the Supreme Court) upheld this judgment in *Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera (Chilima Case-MSCA)* (Constitutional Appeal No. 1 of 2020 (MSCA)). Globally, judicial nullification of presidential elections is rare. To date in Africa, this has only been achieved in Kenya (de Freytas-Tamura 2017). With these judgments, Malawi became the second African country to nullify a presidential election and also, exceptionally, the first where an opposition candidate won a court-sanctioned fresh election (Matonga 2020).

Although the judicial processes have garnered many plaudits, Malawi's former president, Peter Mutharika, lamented that the courts had orchestrated a judicial coup d'état (AFP 2020). Additionally, the High Court judgment included consequential orders that have not only called into question the accuracy of the constitutional interpretation that led to the change of the presidential electoral system, but also raised constitutional reform issues. Notwithstanding the monumentality of the two judgments, sustained scholarly analysis of these two decisions has yet to be undertaken. This article critically analyses the two judgments by probing the legal propriety of the approaches employed in interpreting the disputed constitutional provisions and the legal ramifications of the findings.

The article has four substantive parts excluding this introduction. The first frames the theoretical context by highlighting the justification for judicial resolution of electoral disputes. The article then provides a conspectus of the two judgments, which is followed by a critical analysis of the key procedural and substantive issues, including the burden and standard of proof; the interpretation of majority to mean 50% + 1; and the effect of nullifying the 2019 elections and consequential transitional issues. The penultimate part evaluates the aftermath of the litigation while the conclusion wraps up the discussion.

COURTS AND ELECTIONS IN MALAWI

The Constitution of the Republic of Malawi (the Constitution) establishes the judiciary as the supreme arbiter on its interpretation, protection and enforcement (section 9). This confirms the judiciary's role in the mediation of electoral processes (Kanyongolo 2006, p. 195). The judiciary is an integral part of the institutional framework for elections with the twin mandate of defining the scope and limit of electoral law, and refereeing electoral disputes (Kanyongolo 2015, p. 40).

Elections in a multiparty democracy inevitably involve a contest among several political players. Conflict is, therefore, not uncommon (Kanyongolo 2006, p. 195). Malawi's electoral law creates two sites for dispute resolution, namely the Electoral Commission and the courts. Under section 76(2)(c) of the Constitution, the Electoral Commission is empowered to determine electoral complaints, and the High Court has an appellate function (section 76(3)). Additionally, the High Court has jurisdiction to assess the legality of any exercise of power by the Electoral Commission through judicial review (section 108, Constitution).

In Malawi, the judiciary's competence to resolve electoral disputes is founded in section 103(2) of the Constitution, which vests it with jurisdiction over all issues of a judicial nature. This arguably justifies why an institution with no original democratic mandate inquires into the validity of democratic processes. The continued public trust and legitimacy that it commands further solidifies its stature (Nkhata 2010, p. 240). Unsurprisingly, the judiciary has established itself as the primary custodian of democratic processes (Ng'ong'ola 2002, p. 69).

A CONSPECTUS OF THE JUDGMENTS

The genesis of the litigation was the determination by the Electoral Commission that Peter Mutharika had won the May 2019 presidential election. Two of the unsuccessful candidates, Saulos Chilima and Lazarus Chakwera, separately filed petitions before the High Court alleging irregularities. Subsequently, five High Court judges were empanelled to hear the petitions after their consolidation and certification as a constitutional dispute (Section 9, Courts Act). Broadly, the High Court had to determine two constitutional issues. First, whether the Electoral Commission breached its duties under sections 76 and 77 of the Constitution, which provide for its powers and functions in relation to elections and guarantees franchise. Second, whether the Electoral Commission's conduct infringed the petitioners' rights under section 40 of the Constitution, which, *inter alia*, guarantees the right to vote and to stand for election.

The High Court also interrogated other substantive and procedural matters. The procedural issues included the burden and standard of proof applicable in

electoral petitions. Substantively, the High Court had to determine whether the May 2019 presidential elections were marred by irregularities, including the use of white-out fluid (tippex) on tally sheets, fake tally sheets, and duplicate result sheets. It also had to determine whether the Electoral Commission committed infractions in the conduct of the elections, which amounted to a gross and unjustifiable dereliction of its duties under section 76 of the Constitution.

Upon considering the evidence, the High Court nullified the May 2019 presidential election and ordered a fresh election, having found irregularities that greatly undermined the integrity of the election. The High Court also revisited the meaning of the word ‘majority’ under section 80(2) of the Constitution and determined that this requires a candidate to amass 50% + 1 of the valid votes cast in order to be duly elected president. It concluded that no candidate had achieved that threshold in the May 2019 elections. This finding effectively discarded the first-past-the-post system that Malawi had used to elect presidents since 1994.

The High Court also made several consequential orders and directives. First, that the presidency reverted to what it was prior to the declaration of the presidential results on 27 May 2019. Second, that parliament should take appropriate legislative measures to ensure that whoever is elected president during the fresh elections is allowed to serve the constitutionally prescribed five-year term. Third, that the Electoral Commission should conduct fresh presidential elections within 150 days. Fourth, that parliament should make necessary amendments to section 75(1) of the Constitution to clarify the appointing authority of the chairperson of the Electoral Commission. Fifth, that parliament should make appropriate provision for the holding of presidential run-off elections in case no candidate secured 50% + 1 of the votes.

On appeal, the Supreme Court affirmed the High Court’s findings but on some issues it reasoned differently. For instance, the Supreme Court opined that the High Court improperly nullified the election because under section 100 of the Parliamentary and Presidential Election Act (PPEA) it can only declare an undue return and election. It also held that the declaration of an undue return and election created a vacancy in the presidency, which required a fresh election be held within 60 days. Although the Supreme Court’s judgment was said to be unanimous, Justice of Appeal Twea SC (Twea JA) read a separate opinion, which expressed divergent views on some of the findings and can be considered a thinly veiled dissent.

A CRITICAL ANALYSIS OF THE TWO JUDGMENTS

The judgments of the High Court and Supreme Court raise critical procedural and substantive constitutional issues. The procedural issues relate to the burden and standard of proof in electoral petitions. Substantively, the findings bring to the

fore constitutional questions regarding the interpretation of the term ‘majority’, and the ramifications of the consequential orders. Also implicated are questions of transitional arrangements subsequent to the nullification of a presidential election and the necessity for electoral reform. These issues are analysed in this section.

The Burden of Proof in Electoral Disputes

In adversarial legal systems like Malawi, the burden of proof has a significant role in determining judicial outcomes. It determines the party responsible for leading evidence and the attendant level of evidence required to prevail on their claim(s) (*Commercial Bank of Malawi v Mhango*, MSCA Civil Appeal No. 8 of 2001). The standard position in Malawi is that the person who avers must prove the allegation(s).

In civil cases, the legal burden to prove a case always rests with the plaintiff (*Commercial Bank of Malawi v Mhango*). The evidential burden, however, shifts and this plays out in two phases. First, the plaintiff assumes the evidential burden, which is to lead evidence to prove a fact. Afterwards the burden shifts to the defendant who must rebut the plaintiff’s evidence.

Before the High Court, the burden of proof was a heavily contested issue. There were clear constraints in clarity between the parties on the issue, partly due to a conflation of the two constitutive but distinct concepts of burden of proof, namely the legal burden and evidential burden (Cf. Schweizer 2016, pp. 217–234). The petitioners argued that they were only required to raise a prima facie case and the evidential burden then shifted to the respondents. The respondents asserted that the burden did not shift and that they were under no obligation to discharge an evidential burden in rebuttal.

Under common law norms of civil procedure applicable in Malawi, the respondents’ arguments were strange both in theory and practice. In theory, the argument proposed a departure from established rules that require the opposing party to respond to the evidence adduced once the petitioner meets the requisite threshold of proof. Again, assuming that a respondent does not lose the right to challenge the testimony, the witnesses paraded by the respondents were, in the circumstances, of no use as they did not adduce evidence to discharge the evidential burden in rebuttal. Practically, this argument suggests that in an electoral dispute, the Electoral Commission does not need to lead any evidence since the evidential burden does not shift to it. By further extrapolation, the argument suggests that an election petition is akin to a criminal trial that should end after the petitioners close their case, whereupon the court should pronounce on whether the petitioners have discharged both the burden and standard of proof. It further means that the petitioners would have to seek court orders

to compel the Electoral Commission to adduce testimony to explain electoral processes on matters on which only it has information. This glosses over the duty-bearer obligations of the Electoral Commission as an independent and impartial body entrusted with the conduct and management of elections.

Unsurprisingly, both the High Court and Supreme Court were undeviating on who bears the burden of proof. Regardless of the *sui generis* nature of election petitions, the legal burden of proof remains with the person who avers and does not shift throughout the case. The evidential burden, however, shifts once the party that avers has adduced evidence to the requisite standard and the party opposing has to rebut it. The two judgments, therefore, correctly articulated the position regarding the burden of proof.

The Standard of Proof in Electoral Matters

A balance of probabilities versus an intermediate standard

The prefatory of the High Court judgment on the issue of standard of proof begins by conceding that the Courts (High Court) (Civil Procedure Rules) 2017 (the Civil Procedure Rules) and electoral law in Malawi do not address the standard of proof in electoral disputes. This legislative lacuna may have contributed to the controversy on the requisite standard of proof, and this arguably explains the surfeit of foreign cases cited by the parties. In the High Court, the petitioners argued that the standard of proof is on a balance of probabilities. The respondents argued for a raise of the standard of proof to an intermediate level that falls below the criminal standard of proof beyond all reasonable doubt. The respondents also argued that where voters' rights are concerned and allegations of fraud are made, a court should demand an intermediate standard of proof higher than a balance of probabilities. It is clear, from the judgment of the High Court, that the crux of contention emanated from the assumed lack of clarity on the appropriate standard of proof to subject the allegations of criminality, such as bribery and fraud, when they arise in a civil action. The election petition being a civil matter, the interrogation into the requisite standard of proof for allegations of criminality was germane. Nevertheless, the High Court's reasoning fails to address the critical questions on the appropriate standard where an election petition is founded on civil and criminal allegations. The High Court concluded that 'to demand a higher standard of proof ... would have a chilling effect on the capacity of citizens, especially the vulnerable groups in society ... to ably vindicate their democratic rights' (*Chilima Case – HC*, para. 1052).

The Supreme Court reaffirmed this position and stated that 'setting the standard too high ... might well impinge on the average Malawian's right to access justice ...' (*Chilima Case-MSCA*, p. 38). While both courts adopted an access to

justice approach, the point is not squarely about access to justice. The petitioners sought to vindicate the right to participate in public affairs protected under section 40(3) of the Constitution, which includes the rights to vote and be voted into office. These fall in the realm of civil law and are subject to the balance of probabilities standard. Although presidential petitions are not ordinary proceedings requiring special treatment, they are nevertheless civil cases and as such do not require a higher standard of proof (Hatchard 2015, pp. 291–302). Effectively, the High Court ought to have applied itself to justify its decision to subject civil and criminal allegations to one standard of proof.

The Supreme Court avoided undertaking this exercise, opting to reason that ‘it would not have been the scheme of the law to saddle a petitioner with an onerous burden of proof’ to vindicate rights under the Constitution (*Chilima Case-MSCA*, p. 39). The Supreme Court also rejected the suggestion that if allegations ‘relate to the commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply’ (*Chilima Case-MSCA*, p. 39). Commendably, the Supreme Court and High Court judgments avert the scenario of prosecuting a criminal case within a civil case.

Nevertheless, the failure by both courts to motivate their findings is patent. One would have expected both courts to at least analyse the case law that supports the position of subjecting allegations of criminality to a balance of probabilities standard. English law, for example, has settled the debate by rejecting a third standard that falls between the two applicable to civil and criminal cases, such that civil cases that include allegations of criminality are still subject to the balance of probabilities standard. In *Hornal v. Neuberger Products Ltd (Hornal case)* ([1957] 1 Q.B. 247) the English Court of Appeal held that in a civil action, where fraud or other matter which is or may be a crime is alleged, the standard of proof to be applied is proof on the balance of probabilities, and not the higher standard of proof beyond all reasonable doubt. Furthermore, common law provides for certain acts classified as crimes, such as fraud, to be subjected to a civil standard in a civil suit, which averts litigating a criminal case within a civil case (*In re H (Minors)* [1996] AC 563 at pp. 586–7). Considering that Malawian law borrows heavily from English law, both courts ought to have found these developments strongly persuasive.

On the strength of the evidence, the case of *Foodco UK LLP v Henry Boot Developments Ltd* ([2010] EWHC 358 (Ch)) is instructive. In this case, Lewison J explained that ‘although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly’.

Ironically, the respondents in the High Court cited the *Hornal Case* in support of their argument for an intermediate standard. This case, albeit holding that stronger evidence ought to be adduced to prove a criminal allegation like fraud in a civil case, still supports the balance of probabilities standard. English common law has adhered to the binary of civil and criminal standards of proof and has resisted attempts to introduce a third intermediate standard (Wallace-Bruce 1993, pp. 157-166).

While the first petitioner failed to adduce credible evidence to prove the criminal allegations of intimidation, bribery and unlawful arrests of persons, both courts missed the opportunity to expound on the finding why such allegations should be subjected to a balance of probabilities standard. A critical analysis of the varying degrees of probability, within the balance of probabilities standard, could have shed more light on this legal question (Hatchard 2015, pp. 291–302).

Qualitative versus quantitative approaches

A central question to the standard of proof dispute was the appropriate approach to employ in evaluating the evidence to establish claims filed under section 100 of the PPEA, which confers powers on the High Court to declare an undue return and election. Two theories emerged in this litigation. The petitioners advanced the qualitative approach, which entails evaluating the non-compliance with electoral law that vitiates the conduct of a credible election. The respondents argued for the primacy of the quantitative approach, which seeks to interrogate whether non-compliance with electoral law numerically affected the outcome of the election.

Both courts analysed a litany of local and foreign case law that advance the two separate approaches, and a hybrid approach. In the end, the High Court was persuaded by the hybrid approach. It relied partly on the Ugandan case of *Besigye v Museveni et al.* (Election Petition No. I of 2001, Supreme Court of Uganda) which held that numbers are not the only determining factor and courts should look at the whole process of the election because not every violation of electoral law is evaluable quantitatively.

While it held that it would employ a hybrid approach, the High Court effectively used only the qualitative approach as it never attempted to quantify the total number of votes from tally sheets where data were discrepant. However, since it found that non-compliance with electoral law was widespread, quantifying any discrepant data would be an exercise in futility because in such a case it is no longer possible to ascertain the winner or loser. Unlike the High Court, the Supreme Court clarified when to use the approaches, whether severally or jointly. According to the Supreme Court, the use of the qualitative or quantitative test depends on how the petition is framed, such that where a

petition challenges quality or figures, then the qualitative and quantitative tests will be used respectively. If the petition challenges both quality and quantity, both approaches will be employed.

This position conforms to section 100 of the PPEA. It is clear from this section that the discord between the parties on the applicable test emanated largely from their uncritical recourse to foreign case law when the PPEA and local case law are insightful. Section 100(1) of the PPEA provides that a 'complaint alleging an undue return or an undue election of a person ... to the office of President by reason of *irregularity or any other cause* whatsoever shall be presented ... to the High Court'. The Supreme Court properly observed that while section 100 of the PPEA is specifically about quality, the law refuses to circumscribe the categories of grounds under which a claim of undue return or election can be brought, which would in effect include cases that would be subject to the quantitative test. The Supreme Court unequivocally stated that section 100 'leaves it open to the court to employ either the qualitative or quantitative approach ...' (*Chilima Case-MSCA*, p. 94). Undoubtedly, the words 'any other cause' leave the door open for more grounds and how they can be established in court.

Nevertheless, the Supreme Court omitted to address scenarios where the qualitative test alone is not clearly dispositive of a matter. In such a case, arguably, there would be a successive employment of both approaches. This is the approach advanced by Chimasula J in *Phoso v. Malawi Electoral Commission*, ([1997] 1 *Malawi Law Report* 201) where he observed that he would have nullified the by-election and ordered a re-run if the number of votes affected by irregularities could also have affected the results.

The finding by Chimasula J lends credence to the argument that although in certain instances the irregularities could raise a *prima facie* case of quality, a court would still be compelled to employ the quantitative test as well to comfortably determine if quality affected quantity. In this case, the court would be pursuing a hybrid approach. However, under the scheme in section 100 of the PPEA, it appears that once irregularities are proved to have affected quality, it is futile to advance the quantitative approach since there can never be a fair and credible election that fails to adhere to electoral law. Ultimately, however, this depends on the weight to be attached to the irregularities and how they affect quantity.

The Meaning of 'Majority of the Electorate'

Section 80(2) of the Constitution provides that the president shall be elected by 'a majority of the electorate'. Since 1994, all presidents had been elected on the

basis of the first-past-the-post system, which requires a candidate simply to obtain more votes than any other candidate. This position was cemented by the Supreme Court in *Gwanda Chakuamba and others v Electoral Commission (Chakuamba Case)* (MSCA Civil Appeal No. 20 of 2000). In the *Chilima Case-HC*, the High Court departed from the *Chakuamba Case* and held that section 80(2) requires a candidate to secure at least 50% + 1 of the votes cast. These findings were upheld in the *Chilima Case-MSCA*.

As both courts conceded, section 80(2) touches the very heart of Malawi's political and electoral systems. Given Malawi's political dynamics, especially the ethnic and regional voting patterns since 1994, the change in the electoral system, arguably, contributed to the ousting of Peter Mutharika (cf. CMI 2015).

The reasoning of both courts on the meaning of section 80(2) of the Constitution is fundamentally identical. Two factors seem to have influenced their departure from the *Chakuamba Case*. First, in the *Chakuamba Case* the Supreme Court omitted to consider its earlier decision in *Attorney General v MCP (MCP Case)*, ([1997] 2 MLR 181). Both courts pointed out that this was the only other decision that dealt with the meaning of 'majority'. It was also noted that the decisions in these cases contradicted each other on the meaning of 'majority'. Second, both courts drew definitive inspiration from parliamentary practice in Malawi, which requires all 'majority' decisions to be made using a 50% + 1 formula unless a special majority is expressly stipulated. According to both courts, this was a clear indication that the term 'majority' in section 80(2) carried the same meaning as used in parliamentary practice. Both courts also alluded to the absurdity of electing a president with a numerically insignificant share of the votes, for example, 10% of the total votes. This, it was argued, would undermine the notion of majority rule in a democracy.

A great deal of importance was attached to the usage of the term 'majority' in parliamentary practice. Indeed, parliament in Malawi uses the term 'majority' to mean 50% + 1 unless the Constitution requires it to use an enhanced majority i.e., two-thirds (Malawi Parliament 2013). It is open to question whether parliamentary practice ought to have had the binding effect that it did on the determination of the formula for electing a president. The term 'majority', as used in the Constitution in relation to parliament, largely speaks to the conduct of parliamentary business, predominantly voting on bills and other issues. As used in section 80(2), the term speaks to the election of a president. These two processes have distinct levels of solemnity. Both courts may have forcibly assumed the same meaning for the term 'majority' even though the contexts in which it is used, including within the Constitution, are varied. At the very least both courts are guilty of failing to demonstrate an awareness of the contextual nuances in the use of the term 'majority' across the Constitution

which appears at least 15 times in the Constitution. Only an analysis of all these contexts could properly support the finding that the same meaning is intended across the Constitution. This oversight risks subjecting the term 'majority' to a straight-jacket definition erroneously ascribed by the courts that is oblivious of its contextual usage across the Constitution.

There is diversity to the contexts in which the Constitution employs the term 'majority' and it is very doubtful if the same purport was intended in all these contexts. The subject matter at issue, in relation to which the term 'majority' is used, ought to indicate what the Constitution may have intended. For example, the confirmation of the appointment of an Auditor General or Inspector General of Police does not have the same solemnity as the election of the president, yet these also require a majority decision in parliament. An acknowledgment of the nuances to the usage of the term 'majority' in the Constitution is absent in the judgments of both courts. This suggests a rather uncritical embrace of the decision in the *MCP Case*, which tangentially dealt with the meaning of 'majority', and only in the context of determining parliament's quorum.

In the *Chakuamba Case*, the Supreme Court stuck to the literal meaning of the term 'majority'. While all approaches to constitutional interpretation must be brought to bear in construing the Constitution (as correctly conceded in the *Chilima Case-HC*), there is importance to be attached to the presumption in favour of the plain meaning of words and the need to respect the language of the framers (Webb 1998, p. 218). This is because constitutional interpretation, in all contexts, is basically about attaching meaning(s) to words. Instead of over-focusing on the usage of the term 'majority' in parliamentary practice, a more useful enterprise might have been to engage in comparative constitutional analysis. Ironically, the Supreme Court attempted this in the *Chakuamba Case* and found that the requirement for a majority of 50% + 1 is, generally, explicitly provided for in other constitutions and is not one to be implied. In the *Chilima Case*, both courts eschewed this approach.

The controversy about reliance on dictionaries also deserves mention. In the *Chakuamba Case*, the Supreme Court relied on the Concise Oxford English Dictionary (COED) to determine the ordinary meaning of 'majority'. In the *Chilima Case-HC*, this reliance on a general dictionary was faulted. According to the High Court, the Supreme Court in the *Chakuamba Case* should have relied on a specialised law dictionary and it hence opted to use Black's Law Dictionary to deduce that the term 'majority' means 50% + 1. The problem with this approach is that a constitution is never simply a legal document but is also a political and historical text. The term 'majority', therefore, is more than a legal term and to assume that only a specialised law dictionary could fix its meaning was erroneous. The challenge with such a dictionary is that it gave the meaning of

the term 'majority' as generically used in the law without having any regard to the socio-political and historical context of the Constitution. Overall, the courts' approach demonstrates the dangers of employing unfettered judicial discretion in adjudication where the outcome of a case is not clearly dictated by statute or precedent. This results in interpretations actuated by policy inclinations instead of those that have regard to arguments of principle in consonance with democratic ideals (Dworkin 1975, pp. 1057–1109).

There is an additional challenge from the Black's Law Dictionary meaning of 'majority', which neither court confronted. Indeed, Black's Law Dictionary defines 'majority' as 'a number that is more than half of a total; a group of more than 50 per cent' (Garner 2009, p. 1040). This by itself would support interpreting section 80(2) as requiring a presidential candidate to obtain 50% + 1 of the votes to be elected. Strikingly, however, Black's Law Dictionary goes on to state that 'a "majority" without further qualification usually means a simple majority' (Garner 2009, p. 1040). A 'simple majority' is then defined as 'a numerical majority of those actually voting' (Garner 2009, p. 1041). Notably, Black's Law Dictionary offers definitions of different shades of 'majority' – which neither court seemed to fully countenance. Not insignificantly, the expression that the High Court defined, using Black's Law Dictionary, is 'majority vote' (*Chilima Case-HC*, para 1423) whereas section 80(2) uses the phrase 'a majority of the electorate'. In section 80(2), the Constitution uses the term 'majority' without a qualifier, suggesting that the meaning intended is as later clarified in Black's Law Dictionary, i.e., a numerical majority of those actually voting. The meanings drawn by both courts, strangely, do not find support even within Black's Law Dictionary.

There is another subtle dimension to the contest of dictionaries. In the *Chakuamba Case*, the Supreme Court used the COED to define several other terms: 'elect', 'ballot', 'express' and 'suffrage'. In arriving at the meaning of 'electorate', the Supreme Court built on the meanings of the earlier mentioned words as crafted by the COED. The irony is that in the *Chilima Case*, both courts readily accepted the meaning of 'electorate', as defined in the *Chakuamba Case*, but outright rejected its definition of 'majority'. Yet the definition of 'electorate', in the *Chakuamba Case*, was in part built on meanings ascribed to other terms derived from the COED. The rejection of the meaning of 'majority' from the *Chakuamba Case*, on the basis that it was derived from a non-authoritative dictionary, was, therefore, disingenuous.

Furthermore, the suggestion that a president elected with 10% of the national vote would undermine the democratic foundations of the country is suspect. As applied by both courts, there is a bland assumption that in a democracy, a president must always secure a 50%+1 majority of the electorate to be legitimate. Comparatively, however, a candidate with a majority of electorate votes does not

always become president and neither is the required threshold always 50%+1 (AP 2020).¹ The manner in which votes are translated into a governing mandate varies from one system to another, and this simply represents national choices. Both courts failed to appreciate that a plurality system is, inherently, no less democratic than a majoritarian system. Fundamentally, it is important to bear in mind that there is no perfect electoral system (Kadima 2003, pp. 33–47). Ironically, both courts presented the 50%+1 as the perfect electoral system for Malawi.

Additionally, even assuming that both courts were correct in endorsing majoritarianism, the judgments seem oblivious to the various shades of majoritarianism. Majoritarianism can be manifested through at least two systems, two-round voting and alternative/preferential voting. If the Constitution had intended to create a majoritarian system, this would have been clearly spelt out by including provisions governing a run-off should no candidate attain the stated 50% +1 majority of votes cast, and not left for conjecture – the *Chakuamba Case* was clear on this point. Both courts may also be guilty of usurping parliament’s legislative function in changing the electoral system because the lapses earlier pointed out suggest an incorrect interpretation of the term ‘majority’. The change of the electoral system adds another layer of complexity if parliament failed to pass the run-off provisions and no candidates in future elections attained a 50% +1 majority of votes during the first round of polls. This would create an electoral impasse since the Electoral Commission cannot hold a run-off without any legislative mandate and guidance.

The Effect of the Nullification and Transitional Matters

Subsequent to nullifying the May 2019 presidential election, the High Court issued several directives and consequential orders. These take a particularly interesting legal turn in light of the separate opinion in the Supreme Court by Twea JA.

The Supreme Court found that the High Court erroneously ‘nullified’ the presidential election because, under section 100(3) and (4) of the PPEA, a court can only declare an undue return or election. This is understandable; but given the prescriptions of section 100 of the PPEA, it is also clear that a declaration of undue return or election nullifies an election. While being alive to these legal nuances, this paper loosely uses the term ‘nullification’ to capture the effect of such a declaration.

1 In the United States of America, for example, the winner of the presidential election is not necessarily the winner of the popular vote (AP 2020).

Period Within Which to Hold a Fresh Presidential Election

After nullifying the presidential election, the High Court had to decide the timeframe within which the Electoral Commission was to hold fresh presidential elections. The High Court did not attempt to find a solution from the existing legislative framework. Instead, it exercised its discretion to order a fresh presidential election within 150 days. While acknowledging the High Court's exercise of its discretion, the Supreme Court held the view that the period should have been shorter. It held that a prolonged delay in holding fresh elections is unjustifiable and undesirable in the interest of democracy. It opined that 'the law envisages that a by-election or a fresh election shall be conducted in the shortest possible time after the occurrence of the event that necessitates it' (*Chilima Case-MSCA*, p.120). It then embarked on an analysis of the Constitution and the PPEA for guidance.

Its first port of call was section 63(2)(b) of the Constitution, which addresses a vacancy in the seat of a member of the National Assembly. It provides that a by-election to fill a vacant seat in the National Assembly be held within 60 days or as expeditiously as possible. The Supreme Court further analysed section 85 of the Constitution, which governs the procedure for addressing vacancy in both the office of the president and the first vice-president. In such a case, section 85 provides that the Cabinet should elect from among its members an acting president and an acting first vice-president who shall hold office 'for no more than sixty-days, or where four years of a Presidential term have expired, for the rest of that Presidential term'.

The Supreme Court noted that the Constitution provides for circumstances where both the office of the president and first vice-president may be vacant, and that these 'circumstances are not spelt out and that the categories are not closed' (*Chilima Case -MSCA* p.121). The Supreme Court concluded that upon a declaration of an undue return or election, fresh elections should be held within 60 days. However, expediency prevented it from overturning the High Court's order to hold fresh elections within 150 days.

Twea JA touched upon this issue in his separate opinion. He pointed out that when a court declares an undue return of a member of the National Assembly, section 63(2) of the Constitution and sections 32(2) and 44 of the PPEA spell out the procedure and the timeframe of 60 days for holding a by-election. Twea JA correctly observed that there is no similar procedure in respect of the presidency.

The interpretation that fresh presidential elections should be held within 60 days is problematic on several fronts. It is incomparable and incorrect to use the timeframe applicable for holding a by-election to fill a vacancy in the National Assembly with that of a fresh presidential election. The Supreme Court may have

been confounded in its view by section 85 of the Constitution, which requires that an election be held within 60 days in the event of a vacancy in the office of both the president and the first vice-president.

The Supreme Court, it is argued, misconstrued the concept of vacancy under section 85 of the Constitution, which should be understood within the broader constitutional context of vacancies in the presidency. The scenario in section 85, where the offices of the president and first vice-president become vacant, is peculiar and not of general application.

Generally, the Constitution does not permit a vacuum in the presidency. Section 81(4) provides that the 'President and First Vice-President shall hold office until such time as his or her successor is sworn in'. Sections 85, 86 and 87 of the Constitution spell out resignation, impeachment, death and incapacity as the circumstances that can engender a vacancy in the presidency and the procedure for succession. Section 85 provides the procedure when both the offices of the president and the first vice-president become vacant. The circumstances of resignation, impeachment, death and incapacity can only trigger this state of affairs if they happen simultaneously to both offices. In such a case, there will indeed be a vacancy in the presidency both *de jure* and *de facto* within the meaning of section 85.

The Supreme Court proceeded on the understanding that the declaration of undue election and return under section 100 of the PPEA creates a vacancy, *de jure* and *de facto*, in the presidency such that the elected president should have vacated the office forthwith. A *de jure* vacancy is created where a president may no longer hold the office by law even though they might still in fact continue to occupy the office pending a transition. Arguably, a typical *de facto* vacancy is not possible because anyone who cannot hold a presidency in fact cannot do so in law. For example, in case of incapacitation, a president ceases to hold office by law and in fact.

Therefore, in order to fully appreciate the Supreme Court's misunderstanding about vacancies in the presidency, a distinction should be drawn between a vacancy *de jure*, and a vacancy that is both *de jure* and *de facto*. A *de facto* vacancy that is not *de jure* is not theoretically and practically possible such that every *de facto* vacancy creates a *de jure* vacancy. However, certain *de jure* vacancies are saved by section 81(4) of the Constitution, which allows an incumbent to *de facto* and *de jure* serve until a successor is sworn in. For example, in the event of simultaneous death of both the president and the vice-president, recourse cannot be had to section 81(4) and 83(1) of the Constitution as there is no incumbent to hold power until a successor is sworn. However, this is possible where, despite a vacancy *de jure*, an incumbent exists to govern during the transitional period

as in the case of a declaration of undue return or election under section 100 of the PPEA.

The Supreme Court's employment of the 60-day period prescribed under section 85 to extrapolate that a fresh presidential election ordered pursuant to section 100 of the PPEA should also be held within that timeframe, seems rather unfounded. This extrapolation glosses over the peculiarity of the circumstances in section 85. This provision applies to instances where both the president and first vice-president have vacated their offices both *de facto* and *de jure*, which vacancies trigger a transition that requires the cabinet to elect one of its members to serve as acting president and acting first vice-president. Since they both can no longer govern, it is imperative that elections be held expeditiously. This is because two unelected individuals, whose only qualification is that they were serving in cabinet at the time the vacancies arose, should not be allowed to govern without a popular mandate. In contrast to the case of a declaration of undue return or election, despite creating a *de jure* vacancy the incumbents still occupy the offices of president and first vice-president both *de jure* and *de facto* by virtue of 81(4) and 83(1) of the Constitution. A declaration of undue return or election, therefore, does not create a vacancy within the meaning of section 85 that would trigger the application of the timeframe of 60 days set therein.

In contradistinction to a vacant parliamentary seat, a by-election is held expeditiously because the National Assembly does not benefit from a similar provision where an incumbent continues to represent a constituency. In this context, the declaration not only creates a vacancy both *de jure* and *de facto* but also a representation vacuum. Further, section 67 of the Constitution determines the life of the National Assembly by providing for its dissolution on 20 March of the fifth year after its election. As a result, this makes it impracticable for a predecessor to fill the void once a vacancy is created. This scenario is impossible in respect of the presidency where the incumbents continue to serve until successors take oath of office.

Perhaps the Supreme Court should have simply deduced the timeframe squarely based on practicality. It could have assumed that if the Constitution, under section 85, envisages that it is practicable to hold an election within 60 days, then it should also be possible if a fresh presidential election is ordered under section 100 of the PPEA. There is no compelling reason to subject these scenarios to different timeframes. However, the answer did not lie in assuming that a declaration of undue return and election creates a vacancy within the meaning of section 85 of the Constitution. The Supreme Court should have conceded that there is a legislative lacuna and recommended that the National Assembly address it. Twea JA was cognisant of this lacuna and refused to draw a solution from section 85. Paradoxically, he held the view that a declaration of

undue return or election under section 100 of the PPEA creates a vacancy in the office of the presidency within the meaning of section 85 of the Constitution.

Status of the Presidency upon Declaration of Undue Return or Election

As noted earlier, the Supreme Court's reliance on section 85 of the Constitution to argue that the categories of presidential vacancies are not closed puts two constitutional provisions in conflict. Effectively, the Supreme Court and Twea JA argued that an order under section 100 of the PPEA creates a vacancy in the presidency and vice-presidency which should trigger the provisions of section 85. This would require the cabinet to elect an acting president and acting first vice-president from its members. Logically, this argument ignores sections 81(4) and 83(1) of the Constitution, which mandate an incumbent to continue serving until a successor is sworn in.

Ironically, the Supreme Court avoided holding that the cabinet should have appointed an acting president and first vice-president to fill the void. The Supreme Court ought not to have selectively used section 85 to define the timeframe for holding a fresh election and ignored the other elements in this provision. Common sense would demand that if the Supreme Court found that the timeframe for holding a fresh election is the one defined by section 85, and that a vacancy was created, then it should have concluded that cabinet should have appointed caretaker office bearers for up to 60 days.

The Supreme Court did not fully consider the finding of the High Court that the status of the presidency reverted to what it was prior to the nullification of the presidential election. Twea JA clearly disagreed with this finding. His view was that, with this directive, the High Court purported to have had the jurisdiction to extend the presidency of the previous government. He found a number of factors irreconcilable: first, the position that a declaration of undue return or election under section 100 of the PPEA creates a vacancy in respect of a member of the National Assembly but not in the office of the president and first vice-president. Second, that a presidency that is void ab initio is capable of creating constitutional offices valid at law. He thus concluded that a declaration of undue return or election renders the presidency void and creates a vacancy that ought to be filled by cabinet pursuant to section 85 of the Constitution.

The position advanced by Twea JA is problematic and contradicts some of his own findings. First, he ignored sections 81(4) and 83(1) of the Constitution, which mandate the president and the first vice-president to hold office until their successors are sworn in. In the case before the High Court, the then incumbent, President Peter Mutharika and his Vice-President Saulos Chilima did not have to cease governing until they handed over power to their lawfully elected successors,

which would take effect when the latter were sworn in. The declaration of undue election faulted only the result of the elections held in May 2019 and not the mandate from which President Mutharika and his Vice-President Chilima derived when they assumed their presidency in 2014, which sections 81(4) and 83(1) of the Constitution recognise and save until a handover of power.

Second, since the constitutional scheme under sections 81(4) and 83(1) extends this mandate to avoid a vacuum, Twea JA's argument that the cabinet appointed by an unduly elected president would appoint an acting president and acting vice-president is irreconcilable with these provisions. Twea JA's position was that a cabinet that would appoint an acting president and acting first vice-president would have been the one in place before the presidency became voidable. According to him, the presidency becomes voidable the moment that a petition is filed challenging the due return or election of a candidate. In this regard, Twea JA argued that the cabinet appointed by President Peter Mutharika before the filing of the petition should have taken action under section 85 of the Constitution. Strangely, Twea JA's analysis does not address the question why the presidency cannot continue pursuant to sections 81(4) and 83(1), but instead the cabinet appointed by the very president who would cease to hold office should appoint caretakers to govern. This position fails to appreciate that the continuation of incumbents is by operation of the law under sections 81(4) and 83(1). The High Court, therefore, correctly found that the election was void ab initio and the presidency reverted to its position before the assailed election.

Concurrent Holding of Presidential and Parliamentary Elections

Holding a fresh presidential election after a scheduled general election distorted the electoral calendar. The May 2019 general election elected members of the National Assembly, the president and the first vice-president. The declaration of an undue return and election nullified only the presidential election. While the National Assembly survived and began its mandate, a new presidential mandate remained in abeyance. This created a discrepancy between the life of the National Assembly and the presidential term of the successful candidate in the fresh presidential election. Yet, section 80(1) of the Constitution provides for the concurrent election of the president and members of the National Assembly. Mindful of this gap, and the need to preserve electoral concurrency, the High Court recommended that the National Assembly should consider extending the term of the incumbent members of the National Assembly and shift the election date from May to July.

The Supreme Court noted this recommendation and only observed that the High Court was entitled to hold this view. However, Twea JA held a different view. His starting point is that the High Court's directive purports to find that the

presidential term is affected by presidential elections. He located his analysis in section 77 of the Constitution, which recognises five types of elections, namely a general election, by-election, presidential election, local government election and referendum. He then explained the three instances where a presidential election can be held other than by a general election under sections 54(d), 100 and 114 of the PPEA, namely where a candidate dies before a poll begins; where a court declares an undue return or election; and where, on appeal against a complaint lodged before the Electoral Commission, the High Court declares the election void.

Twea JA then delved into tenure of the president to solve the conundrum of holding concurrent elections. On this point, he argued that pursuant to sections 67(1) and 80(1) of the Constitution, 'tenure of the President runs from one general election to the next, which is called a term' (*Chilima Case - MSCA*, p.140). He then held that a declaration of undue return or election under section 100 creates a vacancy that should be filled by holding a fresh presidential election and the 'candidate returned and his running mate cease to have the right to occupy the office of the President' (*Chilima Case - MSCA*, p.141). Twea JA then found that the person elected during the fresh presidential election fills a vacancy and, therefore, should serve a non-term presidency. He argued that this is similar to a vacancy that arises in the National Assembly where a member serves the remainder of the term of that parliament. Accordingly, this averts the need to amend the Constitution to create a full-term presidency and ensure concurrent presidential and parliamentary elections.

As noted earlier, his opinion misconstrues the distinct vacancies that can arise in the presidency under the current constitutional scheme. A declaration of an undue return or election under section 100 of the PPEA, as earlier alluded to, creates a de jure vacancy but the incumbents continue to serve until their successors are sworn-in, pursuant to sections 81(4) and 83(1) of the Constitution.

According to Twea JA, a declaration of undue election or return under section 100 of the PPEA voids the presidency from the time of the declaration, as opposed to it being void ab initio. Accordingly, the candidate who is sworn in as president following elections that are later nullified begins a term of office such that a candidate elected in subsequent fresh presidential elections continues the remainder thereof and serves a non-term presidency. This position is untenable because it implicitly validates the ascendancy to the presidency of an unduly elected person.

Twea JA also argued that based on sections 67(1) and 80(1) of the Constitution, tenure of office of the president is determined from one general election to the next one. This suggests that there can never be a full presidential term where a candidate is elected in a fresh presidential election. Accordingly, the presidential term of five years took effect after the general election held in May 2019 when the successful candidate took oath of office, irrespective of the subsequent declaration

of undue return and election. Consequently, the nullification of the presidential election did not affect the presidential term such that the candidate elected president during the fresh presidential election would only serve the remainder of that term. Strangely, Twea JA used the constitutional provisions governing the term of the National Assembly and the requirement for concurrent holding of presidential and parliamentary elections to determine presidential tenure.

Unsurprisingly, Twea JA's proposition is irreconcilable with the provisions of the Constitution that specifically deal with tenure of office of the president. Sections 83(1) and (2) provide that the president holds office for five years from the time an oath of office is administered until a successor is sworn in. The first vice-president and second vice-president hold office from the date of administration of the oath of office until the end of the president's term, unless their offices end sooner in accordance with the Constitution. Unlike the presidency, members of the National Assembly, which Twea JA used as a comparator to justify the serving of the remainder of the term, do not per se have an individual tenure of office. As noted earlier, their term of office is determined by the life of the National Assembly under section 67(1) of the Constitution. Twea JA's attempt to address concurrency in presidential and parliamentary elections was to subject presidential tenure to the life of the National Assembly while ignoring the clear dictates of sections 81(4) and 83(1) of the Constitution. A serious constitutional question arises regarding whose term the person elected in a fresh presidential election will be serving the remainder thereof if it is conceded that the then incumbent ceased to occupy the office. Clearly, it cannot be argued that holding a general election and taking an oath of office by an unduly elected candidate determines the beginning of a presidential term of office. On this point, the High Court correctly recommended that the National Assembly should consider extending 'the term of the incumbent members of the National Assembly' to preserve electoral concurrency (*Chilima Case-HC*, para. 1484(b)).

THE LITIGATION AND ITS AFTERMATH

The two judgments brought into focus issues related to the conduct of elections in Malawi, two of which are discussed below.

The Judicial Resolution of Electoral Disputes

The two judgments brought to prominence the need to resolve electoral disputes timeously. The expedited resolution of electoral disputes is acknowledged under Order 19 of the Courts (High Court) (Civil Procedure Rules) 2017 (CPR).

The Supreme Court also confirmed that ‘... electoral matters are urgent matters and electoral disputes must be resolved expeditiously’ (*Chilima Case -MSCA* pp.120- 121).

Under Order 19 of the CPR, the law envisages the conclusion of an electoral dispute in about 27 days. This timeframe was not adhered to in the *Chilima Case-HC* as it took about eight months to conclude the case. When the Supreme Court delivered its judgment, the entire litigation had lasted eleven months. This was an inordinate delay. The uncertainty engendered in relation to the presidency was not ideal. The delay could, however, be attributed to the voluminous documentary evidence and oral testimony before the High Court.

Three possible solutions could be employed in future to expedite electoral dispute resolution. First, the High Court should resolve such disputes on the basis of the parties’ sworn statements and only permit examination of witnesses exceptionally – if witnesses are allowed, the time permitted for their testimony should be seriously controlled. Second, amendments to electoral laws should be effected so that the Supreme Court is the court of first and last instance for electoral disputes involving the presidency. Third, every effort should be employed, especially by the Courts, to enforce compliance with the timelines for the management of electoral disputes as prescribed under the CPR.

The Need for Electoral Law Reform

Both the High Court and the Supreme Court conceded that there is need for electoral law reform and suggested some areas for reform. These include the delegation of authority by the Electoral Commission under section 9 of the Electoral Commission Act. This was against the background of the High Court’s finding that the Electoral Commission could not delegate its quasi-judicial powers. Parliament was also called upon to develop legislation to ensure that the winner of the fresh presidential election can serve the constitutionally prescribed five-year term. Recommendations were also made to amend the Constitution to accommodate the interpretation of ‘majority’, in section 80(2) of the Constitution, to mean 50% + 1 and to provide for the procedure to hold runoff elections.

Ironically, in the run-up to the 2019 general elections, the Malawi Law Commission proposed a raft of recommendations to reform the electoral law framework similar to some of the directions given by the High Court that were also endorsed by the Supreme Court (Cf. Malawi Law Commission, 2017). Poignantly, one of the recommendations was to change the system for electing the president to a 50% + 1 system. Barring a few cosmetic changes, the reform proposals were rejected by the National Assembly (Chitete 2020). In hindsight, the country could have been spared the expense of a fresh election and the attendant political turmoil

if parliament had, early on, adopted the 50% + 1 system, together with relevant provisions to govern a runoff.

CONCLUSION

The hallmark of the litigation challenging the 2019 presidential election remains the decision to nullify the presidential election result and to order a fresh one. Overall, the judgments of the High Court and Supreme Court represent significant developments in electoral law in Malawi. Notwithstanding the clarity that they provide on numerous electoral questions, there are issues where both courts could have applied themselves more rigorously in order to interpret the law correctly. In this article, an attempt was made to conduct a balanced analysis of some of the key issues that arose. Although the judicial intervention in the May 2019 elections has been applauded globally, the unfastidious and pedestrian approach to some of the crucial findings will continue to eclipse the courts' jurisprudential effort. Overall, it is clear that the judicial intervention that resulted in the nullification of the May 2019 presidential election was not a judicial coup d'état, considering the overwhelming evidence of systematic and widespread electoral irregularities presented to the High Court. This evidence was a clear invitation for the courts to pronounce themselves on the integrity of the electoral processes in fulfilment of their constitutional mandate.

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