



Steve Beloved Kaunga

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How have Malawi's courts affected the country's epidemic response?

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Lockdown measures in Malawi have been met with fierce public demonstrations and legal challenges, set against further constitutional orders to rerun the previous year's election. What have been the outcomes of these legal judgements, and what do they mean for citizens' livelihoods during an epidemic?

This blog is part of the series [Shifting Spaces](#), an emerging timeline of COVID-19 responses from Kenya, Malawi, Tanzania and Uganda from the [LEAD research project](#) at LSE's Firoz Lalji Centre for Africa.

Resistance to lockdown in the early days of the epidemic

In April 2020, former President of Malawi Peter Mutharika announced a 21-day nationwide lockdown to take effect until 9 May 2020 to prevent, contain and manage further spread of COVID-19. He made the announcement with the then Minister of Health, Jappie Mhango, also the chairperson of the Presidential Task Force for the virus. At the time of the announcement on 14 April, Malawi had registered 16 confirmed cases and two deaths, of which Blantyre city had eight cases and one death, followed by the capital city Lilongwe with six cases, as the second most infected place in the country.

The measure provoked discontent among many social groups including traders, religious communities and civil society organisations. Demonstrations were seen throughout the month in the country's major townships, including in Blantyre, during which **informal vendors held placards** asserting that President Mutharika was taking action without considering the well-being of the people. The demonstrators demanded upkeep money from the government to survive the lockdown period.

Most vendors in Blantyre market sit on the ground next to the polluted Mudi river, required to pay a daily **municipal vending fee** of 15,000 Malawian Kwacha (USD 20). The Chairperson for vendors at Ndirande township in Blantyre, Chancy Widoni, told **AFP news agency** that the imposed lockdown would be devastating for these workers: 'In the case of us vendors who live from hand-to-mouth, it would cripple us ... If we close the market for even one day, then we will not be able to feed our families.'

Following the outcry, the civil rights group Human Rights Defenders Coalition (HRDC) **challenged the lockdown's implementation**, claiming it would result in '**starvation and collapse of their businesses**'. The courts granted the injunction the same day to **block the lockdown**, which pending a judicial review also marked the end of the demonstrations. Speaking to one of Malawi's main media houses, Malawi News, after they successfully obtained the injunction, the HRDC chairperson said the injunction was a **victory for poor Malawians**: 'The decision on COVID-19 prevention should

be a collective decision and should not be politicized. More emphasis should also be the protection of the rights of poor Malawians’.

Regime change during an epidemic

These protests were set to a crucial political backdrop. The Malawi Constitutional Court, which annulled the 2019 elections earlier in 2020, ordered fresh presidential elections. Political parties were in electioneering mode, and before President Mutharika declared **COVID-19 a national disaster**, opposition parties were educating citizens door to door on virus symptoms and prevention measures to the **dismay of the government**. Spokesperson Mark Botoman said:

‘What we are also saying is that yes, they can be partners that would want to come in to help, but they need to go through the Ministry of Health because the Ministry of Health is the one spearheading all activities around the COVID-19’.

The political opposition at the time, United Transformation Movement (UTM), described the lockdown measures as a ploy by the ruling Democratic Progressive Party (DPP) to delay presidential elections. The party’s secretary general, Patricia Kaliati, told local news agency Zodiak Malawi that the DPP were in an election ‘fever’. Meanwhile, governance expert Victor Chipofya said the move to lockdown the economy would cause more harm than good, claiming the government could be **politicising the pandemic**: ‘You can’t just lockdown a country without involving and consulting others. We are not following the right track and we are politicizing the whole situation’.

The elections were contested, with disagreements on the date of polls between the parliamentary committee on elections and the Attorney General. Earlier, the Malawi Electoral Commission (MEC) had set 2 July 2020 as the election date. However, this was changed after the **Supreme Court** ruled that election dates should be set by parliament. In compliance with the ruling, a parliamentary committee moved the date set by the MEC

to 23 June 2020. However, the Attorney General was of the view that the **whole of parliament**, and not only a committee, should set the date.

Then-President Peter Mutharika launched an attack on the judiciary, calling the ruling a '**coup d'état**'. He also accused Malawi Supreme and High Court judges of '**participating in regime change**', and **prioritising politics** over the lives of Malawians by blocking a lockdown while allowing politicians to campaign without regard for social distancing measures.

'[O]ur fight against Coronavirus is being undermined by politics. As President of this country, this is what I have to say. This country must choose between fighting Coronavirus and going to an election. We must choose between life and death. As a country, we must make that choice.'

The verdict on lockdowns in the absence of social protections

The much awaited elections finally took place on 23 June 2020, from which President Lazarus Chakwera became President on 28 June 2020 after **defeating Mutharika** with 58.57% of votes, leading the newfound **Tonse Alliance** political coalition. During this historic change of government, the lockdown case remained pending at the Constitutional Court.

In early September 2020, three High Court at the Constitutional Court declared unconstitutional the lockdown case in response to a challenge by the HRDC. The court found the basis for announcing a lockdown to be unlawful, claiming the Public Health Act used to enforce the curfew does not cover a lockdown scenario.

'Consequences of that declaration have all the characteristics of measures that exert extreme pressures on the rights and freedoms of the citizenry'.

The court found such rules unlawful as they do not provide for checks and balances. It was the Court's view that the absence of recourse to such processes made the imposition of the lockdown conflicting with the constitutional order, and that the executive's actions were 'over-broad' and displayed 'over-concentration of power in one authority'.

Of central concern in the judgement was the regulations' effect on Malawians, who would struggle to survive under lockdown as they would lack access to basic necessities such as food and water if they could not leave their homes. The Court also emphasised the extent of poverty in the country, with 51% living below the national poverty line and 73% below the international poverty line of US\$1.90 per day. The existing social assistance programmes the government identified for reducing poverty and vulnerability were denounced as failures; social cash transfers, school meals, microcredit and village savings and loans schemes provide insufficient protection to a small number of poor and vulnerable households.

Moreover, total spending on social protection for the elderly and children is low compared to spending on programmes for the working age population. The judges also observed that specific interventions are lacking that directly address the needs of Malawi's children, besides school feeding programmes. They claimed that these interventions, which are neither timely nor widespread across the country, make Malawi's social protection system fall significantly short of the social protection floor (SPF) guarantees on healthcare and income security throughout the life cycle.

The court was also asked to decide on:

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

The judges stated that imposing a lockdown using legislation not yet approved by parliament was a violation of Section 58(1) of the Malawi

Constitution, which stipulates that any 'subsidiary legislations made', has to be 'laid before Parliament in accordance with the relevant standing orders'. To prevent the future abuse and deliberate misinterpretation of rules leading to a further lockdown, the judges ordered the Malawian Parliament to pass a new law on public health to deal comprehensively with issues of pandemics. Such legislation would establish the need for consideration over social security interventions for those Malawians in or at risk of poverty.

Noting the public outcry when lockdown measures were announced, the judges asserted the need for the government to enact deliberate social protection measures to protect vulnerable groups. Because public resistance to COVID-19 prevention guidelines is high, deliberative measures must be put in place to shield vulnerable people, such as the elderly and those with chronic health conditions. In the absence of a new Public Health Act, any government measures to lockdown the country should thus be taken with caution.

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About the author



Steve Beloved Kaunga

Steve Beloved Kaunga is a social researcher working with Research Insight for Learning as a Monitoring, Evaluation, Learning and Accountability Associate. He holds a bachelors of arts degree in Journalism from the University of Malawi Polytechnic.

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