

COVID-19 in Malawi: Civil Society Mobilization for Socio-Economic Rights and Constitutionality

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ABSTRACT

This article highlights the inequalities that the COVID-19 pandemic has revealed at multiple scales. Additionally, it analyzes civil society mobilization aimed at holding the state accountable for socio-economic rights and democratic constitutional practices in the context of such inequalities in Malawi. Its main objective is to analyze and demonstrate the political agency of local social actors in Malawi and other parts of the African continent in addressing the challenges that COVID-19 has generated.

Keywords: inequalities, agency, human rights, social protection, COVID-19

Since its emergence in the early part of 2020, the COVID-19 pandemic has brought to the forefront in more overt ways the inequalities that mark local, national, and global socio-economic arrangements. These inequalities and the role of human rights duty bearers, mainly states in producing them, and their failure to address them in any significant ways are, of course, not a new phenomenon. The dominant tendency, however, is to naturalize and de-historize such inequalities. As Ronaldo Walcott (2020) argues in the case of Canada, practices of racism against communities of African descent by state actors along with pre-existing health inequities have generated substantive vulnerabilities for such communities in the age of COVID-19. In the District of Columbia (DC) in the United States (US), the social inequities that have characterized the evolution of that city have constrained access to food for communities at its socio-economic margins. DC's Ward 7, for example, whose population is predominantly African Americans of lower economic status, has the "lowest number of full-service grocery stores per 1000 residents," while Ward 3, which is mainly populated with white and wealthy residents, has substantive numbers of such stores for the same number of people; this illustrates the phenomenon that Sabine O'Hara and Etienne C. Toussaint (2021, 2) have termed "Food Apartheid" geographies. In DC, the onset of COVID-19 not only showed these disparities in food access but also deepened them. In food apartheid spaces, limited access to food coupled with historically and structurally produced health challenges characterized by hypertension and diabetes and other pre-existing conditions have put citizens in these geographies at high risk for the COVID-19 virus (O'Hara and Toussaint 2021). The socio-inequalities that COVID-19 has brought to the surface show there is an urgent need to move beyond rhetorical pronouncements, such as we are "in this together," to enact economic, policy, and other measures aimed addressing the multiple ways intersecting sources of inequalities affect health outcomes (Bowley 2020) and overall life chances.

Beyond socio-economic inequalities at the national level, COVID-19 has also brought into focus the unequal nature of global arrangements. Although the World Health Organization's COVID-19 Vaccines Global Access platform has provided an important opening for the promotion of vaccine

equity, access to available vaccines has been “substantially unequal, and the large majority of doses have been acquired and administered in the wealthiest countries” (Tatar, Shoorekchali, Faraji, and Wilson 2021, 2). Yet, the heightened moral panic that has led to calls for immediate travel bans whenever scientists identify a COVID-19 variant in a geography outside these countries, as was the case when South African doctors called attention to the Omicron variant, tends to ignore vaccine inequalities (Gregory 2021; Constantino 2021). Reflecting on such inequalities, Larry Madowo (2021) noted that while, for him, walking “to a nearby drugstore in Washington, DC” sufficed in terms of accessing the COVID-19 vaccine, his relatives (an uncle and grandmother) passed away in Kenya due to “the accident of where they” lived.

The inequalities characterizing COVID-19 vaccine development and distribution represent unequal power dynamics that underpin regional and global institutional, financial, and political arrangements and challenge the moral and ethical language underpinning international human rights instruments, for instance, the Universal Declaration of Human Rights (United Nations 1948) and the Vienna Declaration and Programme of Action (United Nations 1993). While not discounting the normative power of the human rights language underpinning such instruments and their cosmopolitan visions (Nussbaum 1996) that invoke human interconnectedness within and beyond national borders in energizing and enabling the framing of struggles for just worlds, the “hoarding” (Bhutto 2021) of COVID-19 vaccines by powerful global actors cautions us against an overly optimistic view of embedding such visions at this juncture. As Yvonne A. Owuor argued in an interview with Bhakti Shringarpure (2022), given that COVID-19 represents “a common existential threat,” the assumptions that “petty tribalisms, the grandstandings, would be put aside because of life and humanity” are being rendered unsustainable given what has occurred since 2020.

In the context of the inequalities that COVID-19 has generated and amplified, this article aims to highlight the political agency of African actors in instituting measures to address them. While the implementation of some of the measures is in the early stages and the impact of others has been uneven, this article aims to contribute to debates focusing on the agency of social actors on the African continent in political and other arenas amidst the inequalities that characterize our world. To address the inequalities that have characterized vaccine production and distribution during COVID-19 and in preparation for future pandemics, for example, member states of the African Union have demonstrated their agency by advocating for vaccine equity and committing to investing in the manufacturing of vaccines to meet the needs of their citizens. Institutionally, the African Centres for Disease Control and Prevention, which are constitutive institutions of the African Union, have played a key role in these efforts, including contributing to the strengthening of these states’ capacity in tackling COVID-19 (Africa CDC).¹ As for the African Union’s vaccine manufacturing initiative, its Partnerships for African Vaccine Manufacturing Framework for Action outlines its aims (Africa CDC 2022). One of its core objectives is to enhance “sovereign health security” by reducing external vaccine access dependency and mitigating the effects of “vaccine nationalism,” which has been the underbelly of the COVID-19 juncture (Africa CDC 2022, 10). The turn to enacting measures to enhance sovereignty in the health sector invokes the notion of and the right to self-determination, a core feature of struggles against European colonialism on the African continent that Article 20 of the 1981 African Charter on Human and Peoples’ Rights protects.² In South Africa, Afrigen Biologics & Vaccines, a collaborative project with the World Health Organization, the South African

¹ For more details on the work of these institutions in Central, Eastern, Northern, Southern, and Western Africa, see Africa CDC (n.d.).

² See the 1981 Charter at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf.

state, and other local actors, has made progress in making a COVID-19 vaccine similar to the mRNA one that Moderna developed, without the latter's participation (Gbadamosi 2022; Maxmen 2022).

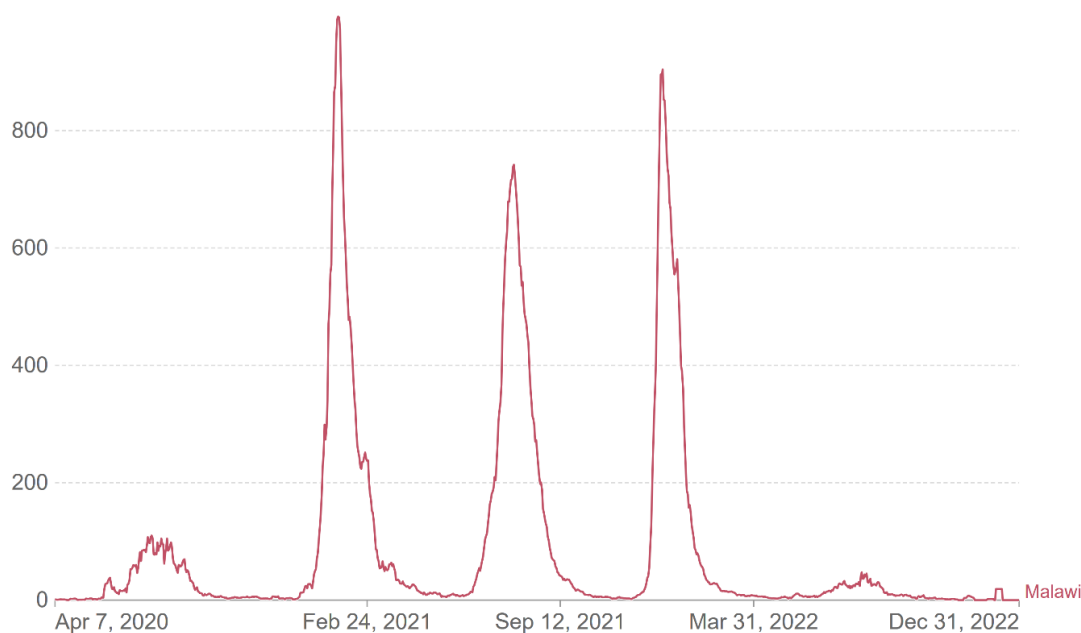
While states and regional institutions such as the African Union have been at the forefront of formulating policies concerning COVID-19 since its emergence, non-state actors have also played a significant role in mitigating the harms and social dislocations that this virus has generated. In South Africa, for example, various community-based initiatives such as the C19 People's Coalition and COVID-19 Working Class Campaign have emerged to address COVID-19's social and economic effects (Jobson et al. 2021). Nigerian non-governmental organizations, such as the Women Advocates Research and Documentation Center, Legislative Advocacy Coalition on Violence Against Women Initiative, and Education as Vaccine, have played a key role in generating gender-sensitive COVID-19 policies (Eribo 2021). With a focus on Malawi, this article explores civil society organizations' social accountability mobilization during COVID-19. The article highlights these organizations' efforts aimed at calling the state to account in terms of providing social protection measures for vulnerable social groups and upholding democratic constitutionality as it relates to public policies concerning COVID-19.

Covid-19 and Civil Society Mobilization: Context

On April 2, 2020, the state announced the first cases of COVID-19 in Malawi (Mzumara et al. 2021; Tengtenga, Duley, and Tengtenga 2021). By December 14, 2020, the country had recorded 6,070 cases, 187 deaths, and 5,4901 recoveries (UNICEF Malawi 2020). In the early part of 2021, there was a rapid spread of COVID-19 (see Figure 1). As of July 2022, the country had registered 86,750 COVID-19 cases and 2,649 deaths related to the pandemic (Reuters 2022). In terms of the state's response to the pandemic, even before the country had a confirmed COVID-19 case, President Peter Mutharika formed the Special Cabinet Committee on Coronavirus on March 7, 2020 (Mukabana 2020), which the state later named the Presidential Task Force on Coronavirus. On March 20, 2020, the president announced that because of the dangers that COVID-19 presented, he was declaring "a State of Disaster" in Malawi based on the Disaster Preparedness and Relief Act (United Nations Malawi 2020a). This was followed by the issuing of a Gazette Supplement on April 1, 2020 by the minister of health, which declared COVID-19 "a formidable disease" (Mhango 2020a), and on April 8 the same minister launched the Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (hereinafter 2020 COVID-19 Rules) (Mhango 2020b). These rules included a raft of public health measures, including banning public events and large gatherings, and allocated expansive powers to the minister of health.

Daily new confirmed COVID-19 cases

7-day rolling average. Due to limited testing, the number of confirmed cases is lower than the true number of infections.



Source: Johns Hopkins University CSSE COVID-19 Data

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Figure 1. COVID-19 trend in Malawi, 2020–22. Source: Edouard Mathieu, Hannah Ritchie, Lucas Rodés-Guirao, Cameron Appel, Charlie Giattino, Joe Hasell, Bobbie Macdonald, Saloni Dattani, Diana Beltekian, Esteban Ortiz-Ospina, and Max Roser, “Malawi: Coronavirus Pandemic Country Profile,” *Our World in Data*, https://ourworldindata.org/coronavirus/country/malawi#citation_

On April 14, 2020, the Malawi president announced that based on the 2020 COVID-19 Rules, the minister of health was declaring a national lockdown for twenty-one days on April 18 and that there was a possibility of the minister extending the lockdown as per his powers under those rules (United Nations Malawi 2020b). That development ignited a firestorm in the country in the context of an already very tense political climate due to the impending presidential elections in May 2020, following the High Court’s annulment on February 3, 2020 of the presidential 2019 elections.³ At the center of public grievances on the lockdown measures and the 2020 COVID-19 Rules from both individual citizens and civil society groups were the following issues: failure of the state to enact measures to safeguard the well-being of the majority of Malawians, who are heavily dependent on the informal sector for their livelihoods; the state neglecting to enact measures to protect the socio-economic rights of vulnerable social groups; and concerns about the constitutionality of the 2020 COVID-19 Rules announced by the minister of health. In what follows, the analysis focuses on social mobilization pertaining to these issues.

³ The High Court’s judgement on the *Saulos Klaus Chilima & Lazarus McCarthy Chakwera v Arthur Peter Mutharika & Electoral Commission*, Constitutional Reference Number 3 of 2019, which annulled the 2019 presidential elections, is available at <https://media.malawilii.org/files/judgments/mwhc/2021/59/2021-mwhc-59.pdf>.

Mobilizing for Socio-Economic Rights and Constitutionality

Since the 1990s, Malawians have individually and collectively engaged in mobilizations to protect constitutional rights and to contain undemocratic practices by those who hold public power. In the early 2000s, for example, civil society groups made significant contributions in mobilizing against a constitutional amendment project led by President Bakili Mulizi and his allies to amend constitutional provisions pertaining to presidential term limits to enable him to run for a third term (Morrow 2006). In recent years, despite attacks, including the petrol bombing of the home of Timothy Mtambo (Pensulo 2019), one of the leaders of the Human Rights Defenders Coalition, in 2019–20, the latter held numerous public demonstrations and used popular media platforms, particularly Twitter, in its mobilization for electoral justice following what it considered as the failure of the Malawi Electoral Commission to hold fair and free presidential elections in 2019. Their mobilization played a key role in the abovementioned invalidation of those elections by the Supreme Court of Appeal following an appeal of the February 3, 2020 judgement by the High Court.⁴ The foregoing developments are in stark contrast to the constraining of civic spaces in the eras of British colonial rule and of President Hastings Kamuzu Banda.

In response to the declarations by the minister of health, particularly the lockdown measures, Malawians embarked on mobilizing against them. Their mobilization epitomized what Enrique Peruzzotti and Catalina Smulovitz (2006) conceptualize as practices of social accountability, which represent “nonelectoral yet vertical mechanism of control” over holders of public power and involve “the actions of an array of citizens’ associations and movements and the media” (10). Such practices include demonstrations, legal mobilization, and others (see generally Peruzzoti and Smulovitz 2006). Following the lockdown announcements, traders in various urban areas held demonstrations criticizing the state’s actions. In the cities of Blantyre and Mzuzu, traders in the informal sector demonstrated in front of the offices of their respective city councils’ officials (Widoni 2020). The negative effects on the ability to engage in activities to facilitate their livelihoods informed their public protests. According to Chancy Widoni, the chairperson of a Blantyre-based association of vendors, considering that members of the association “live from hand-to-mouth,” shutting down markets “even one day” would have had devastating effects on them and their dependents (Widoni 2020). Given the significant impact that legal mobilization by civil society for the protection of socio-economic rights and norms of constitutionality had on the trajectory of COVID-19 policies in Malawi, particularly those formulated by the minister of health, the remainder of the article examines petitions on these matters and the responses of the courts.

Civil Society’s Advocacy for the Right to Social Security

One of the cases that had a significant impact on COVID-19 policies in Malawi was the joint petition by Esther Cecilia Kathumba, Monica Chnag’anamuno, and two civil society organizations, namely the Human Rights Defenders Coalition and the Church and Society programme of the Livingstonia Synod of the Church of Central Africa Presbyterian.⁵ On April 17, 2020, the High Court authorized the petitioners to file a judicial review petition. Further, in response to the petitioners’ request for an interlocutory order, the court issued an injunction for seven days

⁴ The *Mutharika & Anor. v. Chilima & Anor.*, MSCA Constitutional Appeal No. 1 OF 2020 court judgement is available at <https://media.malawilii.org/files/judgments/mwsc/2020/1/2020-mwsc-1.pdf>.

⁵ *Judicial Review Cause No. 22 of 2020*, available at <https://media.malawilii.org/files/judgments/mwhc/2020/7/2020-mwhc-7.pdf>.

prohibiting the state's enforcement of its lockdown measures pending a further review and warned state officials of potential contempt of court proceedings if they ignored its decision.⁶ Following the court's April 17, 2020 decision, public demonstrations against the COVID-19 measures ended. Commenting on that development, the chairperson of the Human Rights Defenders Coalition, Gift Trapence, stated that "the injunction was a victory for poor Malawians" and highlighted the need to protect their human rights during the COVID-19 pandemic (Kasanda 2020).

In its deliberation and determination on the Kathumba et al. petition, the High Court consolidated it with another one that had raised similar questions concerning human rights and the constitutionality of the state's COVID-19 measures, and for which the court had also granted an interlocutory order. In its April 28, 2020 judgement on the consolidated petition, the High Court ruled in favor of the petitioners, who had requested that the High Court extend the interlocutory order.⁷ According to the court, its decision was informed by the fact that the petitioners had raised critical constitutional questions; thus, the court had a duty to consider them, and failure to systematically review them would have been unjust.⁸

The High Court's final judgement by Justices K.T. Manda, F.A. Mwale, and D.A. DeGabriele on the consolidated petition, entitled at that stage *Constitution Reference No. 1 of 2020* (hereinafter *Constitution Reference 2020*), on September 3, 2020, marked an important development in socio-economic rights jurisprudence in Malawi and addressed significant constitutionality questions in the context of pandemics and other junctures.⁹ First, in terms of socio-economic rights, it offered constitutional clarification on the right to social security. The protection of that right and other socio-economic rights, for example, the right to housing, health, and food, is not clear given its exclusion from the list of justiciable rights in Chapter IV of the 1995 Constitution (hereinafter Constitution). However, echoing the arguments of the petitioners, the High Court ruled that Article 13 of the Constitution of Malawi, which outlines the principles of national policy, implies the protection of the right to social security. Among other things, the stipulations of that article (a–o) assign the state the primary obligation of enacting national policies that promote the realization of several rights, including health, education rights, the creation of conditions that facilitate gender equality, and the promotion of livelihoods and well-being for communities in rural geographies.¹⁰

In its determination on the petition, the court also invoked Article 14 of the Constitution. From its perspective, while that section stipulates that the norms of national policy that Article 13 articulates are "directory in nature," it nonetheless authorizes courts to reflect on them in their interpretation and application of the Constitution as well as other laws, and when considering matters pertaining to "the validity of decisions of the executive." Thus, it was imperative for the court to take seriously the provisions of Article 14 in its deliberation of the COVID-19 related consolidated petition.¹¹ In addition, for the court, the Constitution's protection of the rights to life and livelihood, respectively, informed its conclusion regarding the state's duty to protect and promote the right to social security.¹² According to the justices, without the existence of "enabling

⁶ *Judicial Review Cause No. 22 of 2020*.

⁷ The R (*oao Kathumba & Ors*) v *President & Ors* (*Judicial Review 22 of 2020*) [2020] MWHC 8 (28 April 2020) is available at <https://malawilii.org/mw/judgment/high-court-general-division/2020/8>.

⁸ R (*oao Kathumba & Ors*) v *President & Ors*.

⁹ The *Constitution Reference 2020* judgement is available at <https://malawilii.org/mw/judgment/high-court-general-division/2020/29>.

¹⁰ For more details, see Constitution of Malawi 1995, Article 13 (a–o).

¹¹ *Constitution Reference 2020*, paragraph 8.4.

¹² *Constitution Reference 2020*, paragraph 8.5.

factors,” the realization of the right to life was unfathomable.¹³ As such, the court concluded that “it would be unconstitutional for the state to enforce ‘lockdown’” measures “without paying particular regard to the rights to life and livelihood, which” the pandemic had endangered,¹⁴ and in their view, such a development would also be an infringement of the right to human dignity, which the Constitution’s Article 19 protects.¹⁵

In addition to clarifying the constitutional bases of the right to social security, the court deployed a gendered analysis in its determination. Drawing on the Amicus Curiae brief of the Women Lawyers Association of Malawi, the court paid attention to the gendered effects of COVID-19 measures, particularly as they pertained to girls and women. For the court, the state had a duty to protect their right to health, including sexual and reproductive rights.¹⁶ Further, considering that most of the nursing staff in the country are female,¹⁷ it was imperative for the state to take steps to ease the compounded workload they faced due to extended hours in hospitals and the gendered society’s expectations of women’s roles in the domain of social reproduction. In terms of the rights of girls, the court called on the state to address the negative implications of its COVID-19 measures. For the court, the closing of schools, which the state instituted in March 2020, placed girls at risk of unwanted pregnancies and other experiences that limited their life chances. The court’s concerns were on the mark in this regard, for the interruptions that COVID-19 generated in Malawi increased such pregnancies. According to the Plan International Malawi and Organisation for Sustainable Social Economic Development Initiative, in the first eight months of the enforced school closures, 40,000 teenage girls became pregnant, representing “an increase” of “26 percent” (Chingaipe 2021).

Concurring with the petitioners, the court also argued that the state’s emergency COVID-19 Urban Cash Initiative for the most vulnerable households was inadequate. According to the court, the cash transfer targeting “200,000 households” living in poverty in urban areas, mainly in Zomba, Lilongwe, Mzuzu, Lilongwe, and Blantyre, in a country where “89% of Malawians constitute the informal workforce,” was too limited. Moreover, these payments, which the state capped at MK35,000, were significantly low given that in most parts of the country, food-related costs amounted to over “MK1 00,000.00 per month.”¹⁸ The call for the state to address economic vulnerability during COVID-19 was all the more important for, according to the United Nations Development Programme’s (UNDP) multidimensional poverty index in its *Human Development Report 2021/2022*, 51.5 percent of Malawians live below the country’s poverty line and 46.6 percent face intense human capability deprivation due to poverty (UNDP 2021/2022, 296). As per that report, based on overall human development measures, Malawi falls under the lower human development category, coming in at 169 out of 191 countries (UNDP 2021/2022, 301).

Even though the minimum wage-based COVID-19 Urban Cash Initiative, which provided MK35,000 per household for a three-month period, was a limited response,¹⁹ civil society social accountability mobilization for social protection measures and the response by the High Court have had an impact on public policy. As a result of that mobilization, the state has committed to

¹³ *Constitution Reference 2020*, paragraph 8.5.

¹⁴ *Constitution Reference 2020*, paragraph 8.5.

¹⁵ On the court’s perspective on the right to human dignity, see *Constitution Reference 2020*, paragraph 10.1.6.

¹⁶ *Constitution Reference 2020*.

¹⁷ According to the court in Malawi, the majority of doctors are male, while “most professional nurses are female (91.5%)” and a large proportion of “associate nurses are female (84.7%)” (*Constitution Reference 2020*, paragraph 8.8).

¹⁸ *Constitution Reference 2020*, paragraph 8.6.

¹⁹ *Constitution Reference 2020*, paragraph 8.6.

reviewing its current Social Cash Transfer Programme (SCTP)²⁰ and to developing a robust and permanent urban-based social cash transfer policy based on the lessons it learned from the COVID-19 Urban Cash Initiative. Additionally, its plans to increase the SCTP's national coverage from 10 percent of the most poor households to 15 percent, while also paying attention to the differential needs of individuals in such households based on their age, health, and other aspects of social status, will mark a policy shift from its current focus on “labor-constrained” vulnerable households (Government of Malawi 2022, 13) by 2027. The extent to which the state will implement these measures within the next five years is an empirical question that remains open. However, considering the significant contributions by civil society groups to the emergence of public policies in Malawi in recent decades, such as the *HIV and AIDS (Prevention and Management) Act, 2017*, which the president assented to on February 9, 2018 (Malawi Government 2018), the state's declaration of its commitment to rethinking its approach to the current SCTP has provided these organizations with an opening to monitor the implementation of its new approach to social protection.

Containing Unconstitutionality

Civil society groups were also concerned about the possibility of the state ignoring constitutional provisions in the name of addressing the effects of COVID-19. The use of violence and disrespect for democratic constitutional norms was already apparent in some instances in other countries. In South Africa, for example, the South African National Defence Force-led response resulted in numerous deaths, arrests, and extensive complaints by the public about the “gross use of excessive force” and the militarization of COVID-19 (Rebello, Copelyn, Moloto, and Makhathini 2021, 3–4; Powers 2021). The directive given to the National Defence Force by military leaders was to “find, fix and neutralize non-compliers” and to allow COVID-19-related “harsh measures to take their course” (York 2020, as cited in Powers 2021, 61). The state also deployed the historical practice from the apartheid era of forcefully removing marginalized Black South Africans from certain areas, in this case those who had moved to marginalized townships because of the socio-economic dislocations generated by the pandemic (Powers 2021). For example, state agents rendered “1,000 men, women, and children homeless by destroying 575 shacks and homes over a two-day period across southern Johannesburg” (Powers 2021, 61). The South African state has not been the only one to use violence in response to COVID-19. Hungary, Nigeria, and Sri Lanka are some of the other countries that have deployed violence in the era of the pandemic (Rebello, Copelyn, Moloto, and Makhathini 2021), as well as Kenya (Human Rights Watch 2020).

In efforts to contain the abuse of state authority in Malawi, the petitioners in *Constitution Reference 2020* raised important questions concerning the power of the executive branch. For the petitioners, the adoption of the earlier mentioned 2020 COVID-19 Rules, a piece of subsidiary legislation, was unconstitutional, for parliament had not reviewed and approved these rules before the minister of health announced them.²¹ Additionally, they questioned if the minister had the constitutional authority to generate health regulations that were beyond the scope of the foundational statutory law, namely the *Public Health Act 2014* (hereinafter *Public Health Act*),²² as well as the constitutionality

²⁰ After a pilot program in some parts of the country, the Malawi state rolled out a targeted social cash transfer in its twenty-eight districts in 2018. For the history, achievements, and challenges of this program, see Government of Malawi (2022). See also the Malawi Cash Transfer Programme Strategic Plan 2022–2027 (2022).

²¹ *Constitution Reference 2020*.

²² The Public Health Act is available at <https://media.malawilii.org/files/legislation/akn-mw-act-1948-12-eng-2014-12-31.pdf>.

of the minister's lockdown announcement in a context in which the president had yet to declare "a state of emergency."²³ Further, from the petitioners' perspective, the minister of health's amending of the *Public Health Act* was a violation of the Constitution, and the expansion of the minister's powers was at the expense of human rights and the constitutional autonomy of other institutions.²⁴ These powers, for instance, included the ability of the executive branch, through the minister of health, to change the 2020 COVID-19 Rules as it deemed fit and to impose regulations about the modalities of other public institutions of "intrastate accountability" (Mainwaring 2003, 11), such as the judiciary and parliament. Apart from a statement indicating that the attorney general, whose office falls under the executive wing of the state, would assess the COVID-19 related rules prior to their publication in a gazette, the broad powers that these rules gave to the minister of health provided an opening for the minister to impose and change them without regard for citizens' constitutional rights or for the separation of powers doctrine that is a core feature of the Constitution. Further, in the context of the economic insecurity generated by COVID-19, the 2020 COVID-19 Rules gave state officials the power to impose a MK20,000 fine or a three-month prison sentence on anyone who violated them, thereby disregarding the human suffering the pandemic was causing, especially for those at the economic margins.²⁵

In its judgement, the court agreed with the petitioners' arguments concerning the unconstitutionality of the foregoing issues. To begin with, regarding the unrestrained powers that the executive had given itself through the minister of health, the court deemed them unconstitutional and stated that they exemplified an "over-concentration of power in one authority."²⁶ For example, the justices argued that the 2020 COVID-19 Rules 18 and 19 concerning the workings of the judiciary and parliament were unjustified, for contrary to the minister of health's claims, Section 13 of the *Public Health Act* did not offer a foundation for such rules. Overall, Rule 18 was an "affront to the" modalities of "rule making powers in subsidiary legislation" in the country.²⁷ In the case of the judiciary, it was the chief justice and not the minister of health who had the "rule-making power" to generate such a policy, as the statutory law governing courts stipulates.²⁸ The chief justice had already exercised such powers through issuing COVID-19 "directives" for the courts once the president declared the country was in "a State of Disaster."²⁹ For the court, even though the stipulations of Rule 18 1, 2(a-f), 3(a-g), and 4 might seem to be a limited "encroachment in the doctrine of the separation of powers, no breach of such separation should ever be diminished."³⁰ As for Rule 19 1(a-f), 2(a-j), and 3 regulating the work of the parliament, the court declared it unconstitutional, for the Constitution authorizes parliament to adopt its own procedures.³¹ The preceding conclusions by the court were all the more important considering the historical memory of colonial and pre-1994 authoritarianism and the state's violations of human rights, developments that the concentration of power in the executive branch in Malawi had enabled.

As to the constitutionality of the minister of health issuing a lockdown measure through the 2020 COVID-19 Rules, which constituted subsidiary legislation in the absence of a declaration of a state of emergency, the court declared that it did not meet the constitutional threshold. Under the

²³ *Constitution Reference 2020*, paragraph 2.2.1.

²⁴ *Constitution Reference 2020*.

²⁵ *Constitution Reference 2020*.

²⁶ *Constitutional Reference 2020*, paragraph 5.9.

²⁷ *Constitutional Reference 2020*, paragraph 5.9.

²⁸ *Constitutional Reference 2020*, paragraph 5.9.

²⁹ *Constitutional Reference 2020*, paragraph 5.9.

³⁰ *Constitutional Reference 2020*, paragraph 5.9.

³¹ *Constitutional Reference 2020*, paragraph 5.10.

Constitution, it is only the president who has the authority to declare that the country is in such a state. Yet, the president's declaration was limited to the country being in a state of disaster. As such, the minister had in essence ignored Article 45(2–5) of the Constitution and introduced “a state of emergency...through the back door.”³² In the view of the court, the minister's actions were “an overly bold arrogation of the powers” that characterize dynamics of governance once a president announces a state of emergency.³³ Moreover, through the 2020 COVID-19 Rules, the minister had arrogated “to himself more sweeping powers than those the president has under a state of emergency,” an action that from the court's perspective “visited violence upon” Malawi's “constitutional scheme.”³⁴

In terms of whether the minister of health's institution of the 2020 COVID-19 Rules without the approval of parliament was unconstitutional, the court did deem the minister's action as such, for it contravened Article 58(1) of the Constitution.³⁵ Further, the court invalidated the rules, for they ignored the constitutional provisions stipulating that subsidiary legislation should not weaken the rights that the Constitution protects. According to the court, the 2020 COVID-19 Rules negated a multiplicity of rights, including, but not limited to, the right to engage in economic and livelihood activities, to have access to justice, to enjoy freedom of movement, to get an education, and to hold public demonstrations.³⁶ While acknowledging the role of the executive branch in enacting public health measures geared toward containing the spread of COVID-19 and its attendant effects, the court's position was that the 2020 COVID-19 Rules were contrary to articles 44 and 45(1) of the Constitution, which stipulate the litmus test for limiting human rights.³⁷ In its view, these rules “went beyond limiting the rights in the Bill of Rights in Chapter IV of the Constitution as the impact of the restrictions was to actually negate the essential content of these rights.”³⁸

Conclusion

With a focus on Malawi, this article has highlighted examples of the inequalities that the age of COVID-19 has brought to the public domain in more acute ways. Further, it has demonstrated the role of civil society organizations' mobilization to safeguard socio-economic rights and to hold state actors accountable during the COVID-19 pandemic. The article's analysis of the struggle to secure the right to security shows the role of these organizations in activating the courts to provide content pertaining to that right, and to interpret the Bill of Rights and the place of principles of national policy in the adjudication and promotion of human rights under the Constitution. While highlighting the achievements of the legal mobilization aimed at protecting rights and containing the abuse of power through unconstitutional means by state actors, the article signals the underlying tensions between the protection of rights and the overall upholding of constitutional norms in the context of pandemics such as COVID-19. As a constitutional democracy, Malawi is not the only country marked by such tensions, as experiences from Canada, the US, members of the European Union, and other countries have indicated since the ascendancy of COVID-19. While these tensions remain, this analysis has indicated the normative power of human rights protection in terms of enabling civil

³² *Constitutional Reference 2020*, paragraph 7.10.

³³ *Constitutional Reference 2020*, paragraph 7.9.

³⁴ *Constitutional Reference 2020*, paragraph 7.9.

³⁵ *Constitutional Reference 2020*, paragraph 7.9.

³⁶ See generally *Constitutional Reference 2020*.

³⁷ *Constitutional Reference 2020*, paragraph 7.8.

³⁸ *Constitutional Reference 2020*, paragraph 7.8.

society organizations to mobilize for social accountability in Malawi. Further, it has shown the importance of having courts and other institutions with the authority and independence to hold state actors accountable.

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