

Southern Africa Report

Malawi's 2014 tripartite elections

Electoral governance tested

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Summary

Malawi's 2014 presidential and parliamentary elections tested the country's democracy. Unlike the past four general elections (in 1994, 1999, 2004 and 2009), the 2014 electoral process was tumultuous, controversial and challenged. In particular, the High Court became involved in key decisions affecting the election outcome, and the first-past-the-post system has not had a beneficial effect on democracy. This indicates a need to review Malawi's electoral governance framework before the country's democracy is threatened. This report looks at the elections, diagnosing what went wrong, examining the implications and putting forward proposals for possible reforms.

MALAWI IS ONE OF THE FEW African countries that enjoyed a peaceful transition to a multiparty system when, through a referendum in 1993, the people chose this form of democracy. Since then Malawi has maintained its record of peaceful changes of government either through holding peaceful elections or by applying its constitution.¹ This has happened even in the most controversial of circumstances, such as when presidents have defected from their political parties or the incumbent has died. Since the referendum in 1993, Malawi has had five peaceful presidential and parliamentary elections. In between these elections there have been unexpected changes in the process of governance, but the country has moved peacefully ahead under the new governments.

Unexpected governance changes

The first unexpected governance change occurred after the 2004 elections when newly elected president Bingu Wa Mutharika resigned from the ruling United Democratic Party (UDF) – the party that had sponsored his presidential candidacy – as a result of differences with former president Bakili Muluzi over the party's leadership. He then formed a new party, the Democratic Progressive Party (DPP), which as a result effectively came to power without being voted into office. Mutharika had also adopted a zero-tolerance policy on

corruption, which made him unpopular with Muluzi and the UDF generally, while long-standing UDF members resented Mutharika because they felt he had been handpicked by Muluzi to be the 2004 UDF presidential candidate. Bitter rivalry soon developed between the two and various attempts were made to unseat Mutharika from the presidency, all of which failed.² The second unexpected change was in April 2012 when President Mutharika died. Vice-president Joyce Banda came to power, but the former president's brother, Peter Mutharika, and his DPP colleagues tried to stop the legal succession,³ because Banda was dismissed from the ruling DPP and formed her own party, the People's Party (PP), before she became president. Like the DPP in 2009, the PP under Banda's leadership became the ruling party without being elected to office.

favour of the dominant parties and those in government. In addition, Malawi's electoral laws cannot adequately resolve challenges, disputes, complaints and irregularities that arise during the electoral process. The 2014 election is a case in point. Furthermore, the Political Parties Registration and Regulation Act has occasionally been used selectively by a sitting government to eliminate potential political competitors by either deregistering political parties, delaying their registration or rejecting their applications to register.⁵

Legal dilemmas in the 2014 elections

MEC looks to the courts

The unofficial results of the 20 May 2014 elections revealed discrepancies in the vote count after political party representatives had verified votes at

Electoral campaigns are profoundly skewed in favour of those in government

Malawi's 2014 elections

institutional framework

Malawi has a consolidated legal framework for electoral governance. Three parliamentary statutes guide the electoral processes: the Electoral Commission Act 1998 (Act 11 of 1998), the Parliamentary and Presidential Elections Act 1993 (Act 31 of 1993) and the Local Government Elections Act 1996 (Act 24 of 1996).⁴ Also important in guiding elections is the Political Parties Registration and Regulation Act 1993 (Act 15 of 1993). The minutiae of the electoral laws have been robustly tested in the five elections (1994, 1999, 2004, 2009 and 2014) after the move to multiparty democracy, but over time and particularly in the 2014 elections deficiencies have been noticed. For example, electoral campaigns are profoundly skewed in

the tally centre. Serious anomalies were identified in various vote records (see 'Polling, counting and vote tabulation', below). The MEC admitted that it discovered irregularities in the course of vote tallying, e.g. the total number of votes cast was more than the total registered voters for various voting stations. The MEC therefore announced a physical vote recount, but that the tallying would continue while this recount was under way. By 27 May results from 58 polling stations had been quarantined due to 'serious irregularities'.

Two days into the vote count and as the drama of irregularities was unfolding, President Banda ordered the nullification of the presidential and parliamentary election results and called for fresh elections in 90 days, saying that the irregularities had marred the election results. She said her decision was

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THE NUMBER OF POLLING STATIONS
THAT HAD BEEN QUARANTINED
BY 27 MAY 2014 DUE TO VOTING
IRREGULARITIES

guided by the constitutional powers vested in her, citing section 88(2) of the constitution. However, legal experts say the law that Banda used was an irrelevant section and that the constitution does not give the president the power to nullify election results. On 24 May the High Court in Blantyre issued an injunction against President Banda's order to nullify the 20 May elections. The MEC and the Malawi Law Society sought the injunction.

MEC decision to start recounting votes due to irregularities. Judge Healy Potani made the determination after the lawyer for the applicants argued against the legality of the decision by the electoral body to recount the votes, claiming that the MEC had no legal mandate to decide to recount votes, because the constitution only empowers the courts to make a determination on this issue. The MEC ignored this injunction and MEC chairperson Mackson Mbendera and

The circus of court petitions and injunctions that occurred during the vote count is indicative of the MEC's failure to properly manage the elections

On 25 May the DPP, which had been tipped to win the presidential elections and was opposed to the recount, went to court to obtain a court order to stop the MEC from implementing the decision to recount the votes, which was granted by the newly appointed Justice Lloyd Muhara. According to DPP lawyer Kalekeni Kaphale, Justice Muhara's order meant that the vote count would continue and the MEC would declare official results that could be challenged in court later. In a typical struggle for vindication the Malawi Congress Party (MCP) quickly sought a court order to challenge the DPP's injunction restraining the MEC from proceeding with a vote count. On 26 May the High Court in Lilongwe ruled in favour of the MCP, revoked the injunction obtained by the DPP, and ordered that, as an independent body, the MEC should be allowed to make decisions and provide direction on the elections without interference from other parties.

However, Judge Manda's revocation of the DPP's injunction did not end the circus of court orders. Earlier, opposition New Labour Party president Friday Jumbe, who ostensibly supported the DPP, had been granted an injunction by the Blantyre High Court against the

seven commissioners were summoned to answer contempt of court charges at the High Court on 27 May. While accepting receipt of the summons, the chief elections officer, Willie Kalonga, said the commissioners had not disobeyed the court order since the MEC had not yet started the vote recount.

The circus of court petitions and subsequent court orders and injunctions that occurred during the vote count is indicative of the MEC's failure to properly manage the elections. The MEC went to the High Court twice, firstly to seek an injunction against former president Joyce Banda's attempt to nullify the elections and, secondly, when it referred the final decision on the election results to the court.⁶ In between these two legal disputes, the legal battles described above ensued, with the MEC either observing from the sidelines or participating in the process.

Contrary to the MEC's decision to refer the final decision on the recount to the High Court and the court's ruling on the matter, non-governmental organisations, civil society organisations, academics, legal experts and many voters share the view that the MEC was not limited at all in its mandate, since it was the body

24 MAY

2014

THE HIGH COURT IN BLANTYRE
ISSUES AN INJUNCTION AGAINST
PRESIDENT BANDA'S ORDER TO
NULLIFY THE ELECTIONS

that was constitutionally mandated to manage the electoral process without any interference.⁷ A lawyer in private practice, Shepherd Mumba, argued that the decision to recount the vote was within the legal mandate of the MEC:

I do not find any provision preventing MEC from conducting a recount of the votes. Amongst others, the function of MEC is to 'determine electoral petitions and complaints related to the conduct of any elections' see s. 76(2) of the Constitution. Further, s113 of the PPE [Parliamentary and Presidential Elections Act] states that 'any complaint submitted in writing alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed the Commission shall take necessary action to correct the irregularity and the effects thereof'.⁸

following complaints of inflated figures in the vote count. However, the court denied the MEC its request to extend the period to allow a recount, arguing there was no law allowing it to do so. The court acknowledged the weight of evidence that was submitted by complaining parties,¹⁰ but due to the law's inadequacies, Justice Kenyatta Nyirenda said, 'I cannot hesitate to give positive direction for MEC to conduct a physical audit', but in his determination he said that the recount had to be done in eight days after voting had taken place – which was not possible because it was only a few hours before the expiration of this eight-day period. He further pointed out that the court could not 'go outside of its power and extend the period when there is no rule/law to do so', arguing, 'My duty as a judge is not to change the law'.¹¹ The judge therefore did not grant an extension of the period for a recount, forcing the MEC to declare

The MEC declared the official results without resolving the complaints about an election that had 'massive' irregularities

Final results

The MEC referred the final decision on the election results to the High Court. The court denied the complaining parties a recount and ordered the MEC to go ahead announcing the results that declared Peter Mutharika the winner. This was a decision that – according to the two-thirds of Malawians who did not vote for Mutharika – did not represent the vote of the Malawian people. Although these protests tailed off, voters remain unsatisfied with the court ruling, since their claims that the election was fraudulent were merely ignored by the High Court.⁹ The court ruling did not say that there were no irregularities. Besides, the court permitted the opening of ballot boxes to allow the MEC to carry out a physical audit of the ballots cast

the official results without resolving the complaints about an election that had 'massive' irregularities.

Electoral administration and management: the MEC

Negative public perceptions about the performance of the MEC in the 2014 elections is one crucial element that has resulted in cynicism regarding the elections and the commission's credibility. The MEC started on a good footing with its electoral management and administrative activities. In the earlier stages of the electoral process the commission was hailed for its outstanding consultative process through the National Elections Consultative Forum (NECOF) and for its transparency through regular briefings, statements and



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Table 1: National registration figures by region and gender

| Region | Projected | Male | Female | Total | Percentage achieved |
|--|-----------|-----------|-----------|-----------|---------------------|
| North | 1 134 100 | 489 219 | 549 963 | 1 039 182 | 91,63% |
| Centre | 3 289 270 | 1 494 995 | 1 669 687 | 3 164 682 | 96,21% |
| South | 3 588 322 | 1 497 151 | 1 836 533 | 3 333 684 | 92,90% |
| National Total | 8 009 734 | 3 481 365 | 4 056 183 | 7 537 548 | 94,10% |
| The voters' roll verification exercise revealed some anomalies in the original calculation and brought the figure down by 66 742 totalling to 7 470 806. | | | | | |

Source: The National Initiative for Civic Education (NICE), 2014 Tripartite Elections Monitoring Report National Initiative

media releases. According to election stakeholders' observations made in NECOF meetings, the process that appointed the commissioners was not only legitimate, but also consultative, transparent and therefore representative of all political parties. The appointment of MEC commissioners had been an issue in previous elections. Former presidents had been accused of bias, while the appointments were often not representative of political parties. Many hailed the appointment of Justice Mbendera because of his well-known personal integrity and credibility as a High Court judge.¹²

However, the commission was faulted for the way in which it dealt with complaints. Firstly, it had the tendency to defuse rather than resolve matters that stakeholders brought to its attention either through NECOF meetings or through its complaints mechanism. This apparent indecisiveness resulted in the piling up of unresolved issues, with a fuller picture manifesting on polling day and during vote counting and tabulation. Secondly, as observed by various stakeholders and electoral analysts through various media outlets and platforms, the MEC completely failed to follow its own schedule of activities. For example, the schedule for the registration of voters kept changing haphazardly, while electoral materials were not procured on time and there was a last-minute appeal for vehicles to transport electoral materials to polling

centres. Malawi's electoral calendar is predetermined in the constitution. It was therefore rather unexpected that the MEC would fail to manage the election-related activities for which it was responsible because of lack of preparedness.

Thirdly, rumours of vote rigging were not adequately attended to by the conducting of thorough investigations and the reassuring of voters by presenting conclusive evidence of the true situation in this regard. Rather, these rumours were dismissed as mere fabrication. In addition, although there were significant improvements in the coverage of political parties towards the end of the campaign, according to the Malawi News Agency the Malawi Broadcasting Corporation remained biased towards the ruling PPP, despite the MEC's frequent calls for equitable coverage in accordance with the media's electoral code of conduct. Furthermore, the commission's logistical performance was very obviously poor and dismally inefficient and ineffective. Failure to open polling centres on time and to deliver adequate election materials caused violent protests at several polling centres and led to the extension of polling by three days.¹³

The process

Voter registration

Although voter registration went well, the management of the voters' roll for the 2014 elections was probably the most

7 500 000

THE NUMBER OF MALAWIANS WHO WERE REGISTERED TO VOTE

287

THE NUMBER OF COMPLAINTS RECEIVED

188

THE NUMBER OF COMPLAINTS ATTENDED TO – BUT NOT RESOLVED

muddled in Malawi's history since 1994. Some people failed to register because the registration dates were changed haphazardly, while some political parties and stakeholders complained that people were not given enough time to register. The voters' roll was therefore a cause of great concern.¹⁴

On 25 March 2014 the MEC announced in a press release signed by the chief elections officer, Willie Kalonga, that 'due to logistical challenges and inadequacies in the preliminary voters' roll' the commission had 'decided to suspend the voters' roll inspection exercise'.¹⁵ This came hot on the heels of speculation that there were irregularities in the voters' roll. For example, some candidates were allegedly ferrying voters to different voting areas to allow them to vote for these candidates. Some names were missing, some names appeared in Arabic, and people's identities were mixed up, among other anomalies. A total of 7 500 000 Malawians were registered to vote. This figure was also disputed as not consistent with the figures of the voting population provided by Malawi's National Statistical Office.¹⁶

Although the MEC claimed to have rectified the voters' roll and reopened the voters' roll inspection exercise on 9 April, the exercise was marred by apathy. For example, in most centres where over 1 000 voters were registered fewer than 100 people went to verify their names.¹⁷ Where verification of the electoral rolls was carried out, a decrease in the number of voters was noted. The MEC gave no clear explanation of this questionable decline in numbers, thus creating suspicion.

Polling, counting and vote tabulation

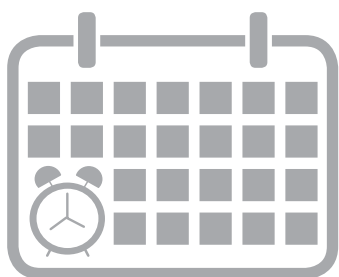
The vote count was the worst part of the elections. It was characterised by chaos, 'mass' irregularities, lack of direction, legal battles, and, as a result,

an unprecedentedly lengthy period before the results were announced. While Malawians were expecting to hear results within 24 hours of the three-day extension, reports were rife that the MEC's computerised result management system had been hacked. The commission dismissed the reports, but admitted that the system had collapsed and the vote count would proceed manually.

The unofficial results revealed discrepancies in the vote count after political party representatives verified poll records at the tally centre in Blantyre. Serious anomalies were identified. For example, the total number of votes cast was more than the total number of voters registered at a particular centre; two polling centres recording similar results and these results were signed by one returning officer; vote records were recorded on unofficial, improvised, non-standard forms; and records were cancelled and rewritten after monitors had already signed for the original. The MEC admitted discovering irregularities in the course of vote tallying. It therefore decided on a physical vote recount, but stated that the tabulation at the tally centre would continue and be completed. By 27 May the MEC had quarantined results from 58 polling centres due to 'serious irregularities'. A total of 287 complaints had been received, but only 188 had been attended to – but not resolved. According to the MEC statement made available to the media and elections stakeholders, the commission said it had sought an extension of the announcement of the results from the High Court in order to conduct a recount. On 26 May the MEC announced it would announce the results of the elections in 30 days.¹⁸

Resolving election-related disputes

According to the MEC chairperson, Justice Maxon Mbendera, the MEC set



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up a complaints-handling unit to speed up all grievances to do with the conduct of the election. Mbendera said that the unit would provide an impartial, objective and efficient platform for dealing with complaints from all stakeholders who felt aggrieved by the electoral process. He urged voters and electoral stakeholders to exercise their rights by submitting complaints to the unit if they noticed any apparent violation of the laws during the remaining electoral process.¹⁹ However, details of this unit's procedures were not made publicly available except for a complaints form provided on the MEC's website.

that had already started in the media on these subsequent two days of voting is believed to have influenced voters' choices and decisions, and some might have made up their minds not to cast their votes at all. It is clear also that the way in which the results were determined does not fully inspire confidence among stakeholders as to whether those who won did so according to the will of the people or according to the rulings of the courts. It is therefore probably reasonable to say that the elections were peaceful, but not satisfactorily free and fair. 'Some reports and indeed personal accounts of those who were

When human error is allowed to the extent that it distorts an election, the will of the people has not been expressed

Were the 2014 elections free and fair?

The key question is whether the 2014 Malawi tripartite elections were 'free' (i.e. were they characterised by the unrestricted activity of electoral participants?) and 'fair' (i.e. did all participants have the same opportunity to be elected?). Another related question is whether the election was peaceful (i.e. conducted in an environment free of threats and intimidation).²⁰ People were able to choose their candidates at all levels, ranging from political party conventions to political party primaries, without significant cases or levels of intimidation. Voters were free to vote for presidential, parliamentary and local government candidates of their choice on polling day without intimidation or threats. However, the widespread late opening of some polling centres and lack of polling materials that caused violent protests at some polling centres marred the polling process. Voters were allowed to vote in these centres on the following two days. The announcement of unofficial results

close to the process ... show that the management of the election results was highly compromised',²¹ and therefore that the outcome was based on erroneous results. This therefore renders the elections not credible.

It is acceptable that there will always be some margin of error in an election, since it is difficult to ensure that such a large-scale operation is not occasionally plagued by lack of ballots, unavailability of voters' lists, incomplete voter registers, inaccuracies in counting, voter impersonation and other such flaws. Indeed, human error is often a factor, but 'if these errors are random and do not accumulate to determining the outcome of the election, then electoral credibility survives'.²² However, when human error is allowed to the extent that it not only distorts an election, but also becomes the basis for judging its freeness and fairness, then the will of the people has not been expressed. This becomes worse when there is a lack of will to investigate serious electoral irregularities.

IN MALAWI'S PAST ELECTIONS,
PRESIDENTS AND GOVERNMENTS
HAVE BEEN ELECTED BY A
MINORITY OF VOTERS – IN MOST
CASES NOT EXCEEDING

36%

The way forward

The anomalies that occurred in the 2014 electoral process described in this report were largely due to the nature of the electoral governance system and the operationalisation of the electoral process. Although the elections were peaceful, the credibility of the entire process and outcome of the elections remains questionable. There is therefore a need to review and strengthen the electoral governance system and mechanisms. If this area of governance and democracy is not given the required attention and priority, Malawi's elections will continue to be plagued by failings that in the long run will result in national indifference to the democratic process, or worse.

determination of the election results. For the first time in the country's post-independence history the determination of the result depended on a court decision, because the MEC referred the matter to the High Court. The court could not allow the MEC to extend the period for the announcement of the result because there was no law on which to base that decision. The electoral laws thus went through a rigorous test during the 2014 elections, revealing dilemmas and deficiencies that had not been experienced in previous elections. There were mixed views on whether this was a sign that the constitution and electoral laws need to be revised. Some felt there is no need to review the laws because they do not consider them to be

The credibility of the entire process and outcome of the elections remains questionable

A thorough investigation

Malawians do not know what exactly caused the various problems in the elections on 20 May and the following eight days that resulted in a near-failed election. The causes of the serious logistical lapses; the widespread lack of polling materials and late opening of some polling centres resulting in violent protests; the collapse of the MEC result management centre during the national tally; the failure of the MEC complaints unit; the irregularities that the MEC and the media described as 'massive'; and, indeed, whether the MEC was limited in its mandate to make a decision on the recount all remain a mystery. Until an expert panel is established to thoroughly investigate these issues Malawians will remain in the dark and democracy in the country will suffer.

inadequate, while others supported such a review.

There were, however, more calls in favour of a review of the electoral laws. For example, political parties (the MCP, PP and UDF) complained, blaming the country's constitution, calling it 'weak' that the law unfairly forced the MEC to declare a winner using results that were clearly full of irregularities. They said that this is because there was no law to allow it to extend the period within which the results had to be announced in order to regularise the anomalies. Constitutional law experts agree on the need to review the constitution because of the challenges that Malawians have faced in the last five elections. However, most of the changes have to be made to the electoral laws (the Parliamentary and Presidential Elections Act and the Local Government Elections Act) and not necessarily to the constitution. The Law Commission had put forward suggestions for changes to some sections of the electoral law in 2007. The



THERE ARE MIXED VIEWS ON WHETHER THE CONSTITUTION AND ELECTORAL LAWS NEED TO BE REVISED

A review of electoral laws and the constitution

The 2014 elections were characterised by many legal battles prior to the

cabinet ought to expedite the process by asking the Ministry of Justice to formulate a bill that should be tabled in Parliament for debate.²³

Changes to the electoral system

Malawi uses the first-past-the-post (FPTP) form of the electoral system. This means that the presidential candidate who gets more votes than the others is declared the winner, even though he/she may have received less than 50 per cent of the vote. Experience in the past five elections has revealed that the FPTP electoral system has not benefited voters as was envisioned. Firstly, there have been high levels of wasted votes. Secondly, presidents and governments have been elected by a minority of voters – in most cases not exceeding 36 per cent. Thirdly, the system has promoted regionalism because a presidential candidate may need, for example, 25 per cent of the votes from his/her regional base and only 10 per cent from elsewhere in the country. Although past governments have endeavoured to balance regional representation through their public appointments, the tendency has largely remained one of regional bias. Malawi's democracy has thus not been fairly representative of the will of the people. Finally, although the FPTP system is usually liked for its simplicity and its ability to prevent the complications that go with coalition governments by producing a single-party government, Malawi seems not to have benefitted from these advantages. The country has largely been a victim of the *disadvantages* of the FPTP system. This is why it is not only imperative, but also urgent to review the electoral system.²⁴ This 'would go a very long way in altering the country's political settlement and the nature of politicking with significant spinoffs in as far as the question of nation building is concerned'.²⁵

Improvements to the MEC's capacity

For any body that manages an election to be credible and effective, sufficient and timely funds must be made available to it, while it should be staffed with adequate human resources (election officials). Administering democratic elections requires that such officials be – and be seen to be – impartial and independent of government or other influence. This is a critical area, as the election administration machinery takes and implements important decisions that can influence the outcome of the elections. Chijere Chirwa identifies six problems that impinge on the work of the MEC: the commission's credibility; the status of the national voters' roll; the weak enforcement of the electoral code of conduct; the lack of a legislative framework for election funding; the failure of local government elections; and the shortcomings of the unmodified FPTP system that Malawi uses.²⁶ These challenges, including inadequate human resource competencies and capacity, must be thoroughly and promptly looked into through an organisational development process, legal reviews and other appropriate interventions.

Conclusion

Fundamentally '... elections are instruments of *choice* that the electorate remains free to produce outcomes...' ²⁷ The 2014 Malawi tripartite elections did not fulfil this fundamental role, given the failings identified in this report. While the elections were peaceful, their level of freeness and fairness was not satisfactory and the outcome is therefore not credible. If a thorough evaluation of the elections does not take place and if the electoral governance system and the management of elections are not improved, elections in Malawi will cease to fulfil their proper democratic role and belief in democracy will wither.

Notes

- 1 However, the High Court ruling on Malawi's 2014 elections was controversial. The MEC referred the final decision on the election results to the court, which issued a judgment that, in terms of the two-thirds of Malawians who did not vote for Peter Mutharika, does not represent the will of the Malawian people (*ISS Today*, 9 June 2014). Nonetheless, legal procedures were followed, however controversial the outcome.
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