



The ACDEG and Elections in Africa: Toward the 2009 Elections in Malawi

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October 2008

Summary

In this paper, I argue that challenges to the electoral processes in some African countries, including Malawi, lie beyond the African Charter on Democracy Elections and Governance (ACDEG) and other election monitoring protocols. The problems I am concerned with are what I suggest are loopholes, unclear and ambiguous jargon, in laws regulating elections in Malawi, which are often taken advantage of by competing parties. These can seriously affect the electoral processes and the credibility of electoral outcomes. These problems are embedded in the constitutions and laws relating to elections which even election monitoring regimes cannot easily help with.

The Context of the 2009 General Elections in Malawi

The forthcoming general elections in Malawi in May 2009 are set against a background that has potential to generate controversial elections similar to those in Zimbabwe. Experiences with the past elections and exploitable loopholes in the constitution, electoral, and media laws relating to elections point to this possibility. This is compounded by the ongoing acrimonious relationships between political parties and their leaders in Malawi that threaten violence.

Malawi embarked on periodic democratic elections in 1994, around the same time as other countries in the region. The forthcoming elections in 2009 will be the fourth in a democratic dispensation. The major contenders for the presidency in 2009 will be Dr. Bingu wa Mutharika, incumbent state president and leader of the Democratic People's Party (DPP), Dr. Bakili Muluzi, former state president (1994-2004) and leader of the United Democratic Front (UDF), and John Tembo, leader of the Malawi Congress Party (MCP) that ruled Malawi as a one party dictatorship for close to thirty years from 1964.

The potential flash points that may engender violence are mainly between DPP and UDF. DPP's Bingu wa Mutharika was elected to the presidency in 2004 on a UDF ticket. Muluzi imposed Bingu on his party after his failure to secure a third term bid for himself. However, Bingu, soon after elections, ditched the UDF and formed his own party, the DPP. Since there are no laws governing how to deal with a president that ditches the party that sponsored him into power, Bingu got away with his decision, leading a minority party in parliament bolstered by MPs defecting from other parties to join his DPP. Meanwhile, the UDF has tried to engineer parliament to expel MPs that had joined Bingu's party on the basis of a 'floor-crossing' law that bars MPs from leaving parties that sponsored them for election. The expulsions would enable the UDF and MCP to form a two-thirds majority in parliament, enough to impeach Bingu and remove him from power. Bingu's government and his MPs responded with court injunctions restraining the Speaker of Parliament from making the determinations to expel MPs and then stalling the court cases.

Against this background, it is possible to see Muluzi's UDF candidature for the next elections as trying to come back in order to get even with his nemesis, Bingu, should he win. Bingu, in his case, seems bent on trying to stop Muluzi's come-back efforts by charging Muluzi with corruption and fraud emanating from his reign and by a seemingly trumped-up treason charge. The police are also being used to frustrate Muluzi's campaign efforts by preventing him from holding meetings on the flimsiest excuses.

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In the cat and mouse political game between Muluzi and Bingu, Bingu has suspended parliament meetings three times: whenever the issue of MPs crossing the floor was coming up. The opposition has in turn delayed the passing of the national budget twice, demanding that offending MPs first be expelled from parliament. The present relationship between Bingu and Muluzi is acrimonious to the level that public statements about each other and their actions, while not yet directly inciting violence, create an atmosphere where violence is a real possibility as the next general elections approach.

Against this background and through the electoral process, serious loopholes in the electoral laws and the constitution have been exposed which, as are being taken advantage of by competing parties, could affect the electoral process and how the outcomes are received. The major areas of concern that I highlight here are three: the composition of the electoral commission, the use of the police, and the public media in relation to general elections.

The Composition of the Electoral Commission

While the independence of the Electoral Commission in the past has never been seriously questioned, the independence of the present commission that will conduct the 2009 general elections is seriously under threat. This stems from the manner it has been instituted. The electoral law empowers the sitting president to appoint commissioners in consultation with political parties in parliament.¹ The general understanding of this provision in the past had been that parties in parliament would nominate commissioners who would then be appointed by the president. President Bingu wa Mutharika, however, read the provision as not necessarily meaning that he must appoint commissioners nominated by parties in parliament, but simply seek their advice (which he was free to ignore). He therefore appointed a commission without including names nominated by parties in parliament. The opposition parties are outraged and challenged Bingu in the High Court in Blantyre. The High Court however ruled in Bingu's favour, on the basis that the law does not oblige him to accept nominations of the parties. The opposition parties are appealing the ruling to the Supreme Court of Appeal. While the opposition parties are for now co-operating with the commission as it prepares for the May 2009 elections albeit under protest the real test will come if the opposition loses the elections. The possibility that they would blame the commission of bias is high. They could also reject the results.

There are serious problems with the law that allows a sitting president, himself an interested person in the elections, to have the overriding power to decide who serves in the commission. The law may also have to make explicit what consultation entails and the specific mandate the president and the parties each have in appointing commissioners. Otherwise, as has been the case this time, the sitting president will certainly advance his own interest in choosing the commissioners. Secondly, the provision that only political parties in parliament be consulted ignores the vested interests of political parties outside parliament. When these parties field candidates, they become stakeholders in the electoral process and their interests are just as paramount as of those seeking to retain seats in parliament or the presidency. The electoral law should therefore provide for choosing of commissioners in a manner that represents the interests of all stakeholders, including parties not yet in parliament.

The Use of the Police

Holding of any large public meetings in Malawi is regulated by the Police Act, which requires that parties involved inform the police to get clearance.² The purpose of the act was for the police to keep

¹ The Electoral Commission Act 1998 (4.1) says that "the President shall, subject to the Constitution and in consultation with the leaders of the political parties represented in the National Assembly, appoint suitably qualified persons to be members of the Commission."

² The Police Act under CAP 13.01 in Section 2 says, "Any person who wishes to convene any meetings, assembly, or procession on a public road or any public place shall give notice in writing to the Officer-in-Charge of Police of his intention so to do." In Section 4, the act further says that "if the Officer-in-Charge considers the meeting is likely to cause a breach of the public peace or disaffection amongst inhabitants of Malawi...he may prohibit or impose conditions to protect the public peace."

a log of all meetings in their areas of operation to prevent competing groups clashing at the same venues or holding meeting too close to each other. However, the terms “give notice” and the discretion given to the Officer in-Charge allow the police to decide whether any group can hold rallies in the country or not. The police can technically cancel a meeting by declaring that they cannot guarantee public peace, for whatsoever reason or no reason at all. As a result, the police have been abused by the ruling parties to frustrate meetings of the opposition on many occasions. For example, in the past six months, the police have cancelled three major rallies of the UDF candidate Bakili Muluzi in Blantyre, Lilongwe, and another whistle-stop tour of Dowa district, by refusing to give clearance. As the elections approach, these police actions only serve to raise tensions between parties to dangerous levels.

The National Public Media

There are two national public radio stations, Malawi Broadcasting Corporation (MBC) radio I and II. There is only one national public television station, Television Malawi (TVM). There are several independent private radio stations, but the national public radios and television have by far the widest coverage of the whole country and are major sources of critical information particularly in an election year. The media law provides for fair coverage of political activities of all parties involved in elections by the public broadcasters but does not spell out in specific terms what “fair,” for example, actually means.³ The law also does not provide for what exactly are consequences of what would be “unfair” coverage or no coverage at all.

The opposition accuses the public broadcasters of not airing any positive news concerning opposition parties except when they are in bad light. Sometimes they have refused to air paid for news conferences of the opposition parties. The public broadcasters have instituted programs which can only be said to be aimed at undermining the opposition parties. These include programmes called ‘Mizwanya’ (experts), ‘Mapungwepungwe pa Ndale’ (experts in politics) and ‘Mayikolobasi’, a satirical presentation of opposition figures in the country. These actions in themselves do not constitute illegal actions according to the media law.

In retaliation, the opposition parties, using their parliamentary majority, reduced the budgetary allocation of MBC and TVM in the 2007/8 and 2008/9 national budgets to less than 1 US\$ for each year. Parliamentarians too are within their legal limits, which allow them to vary but not cancel allocations to budget votes.

Fears are that these actions seriously undermine the preparations for the forthcoming elections. There are also sufficient loopholes in the act that government and ruling parties take advantage of to interfere with the public media stations. For example, the government has the power to appoint the overseeing board of the public broadcasters, a board which in turn hires and fires executives at the public media. Unless there is a mechanism of constituting an independent board to oversee the public media, the public media will continue to operate under the direction of the governing party and serve their interests against the interests of the opposition parties.

³ For example, the Malawi Communication Law 1998, Section 45(f) asks broadcasters to “ensure equitable treatment of political parties and election candidates,” repeated in Section 51(3a) where it asks for “balance and equitable reporting during any election period.” The Parliamentary and Presidential Elections Act Section 63(1a) says specifically of the MBC that it “shall maintain neutrality in the manner of reporting news of the campaign propaganda of political parties,” while the Media Code of Conduct of 2009 Elections says the code is to “ensure full and balanced political coverage is given at all times in news and other media output, most especially relating to the campaign of all registered candidates and parties.”



Conclusion

The above cases show that there are too many unsatisfactory and ambiguous provisions in the constitution and other laws relating to elections that are taken advantage of by competing parties and threaten fair and free elections in Malawi. The attempt by former president Bakili Muluzi to return to the presidency, despite having already served two terms, is also taking advantage of similar ambiguities in the constitution. In his case, the Malawi Constitution, CAP VIII 83(3) says an individual may serve as president for a “maximum of two consecutive terms” allowing for the possibility of more than two none consecutive terms.

The African Charter on Democracy Elections and Governance does not deal adequately with these sorts of problems embedded within the laws of the country. The Charter provides for States Parties to establish independent electoral bodies, election dispute resolution mechanisms, equitable access to state-controlled media, and binding codes of conduct for all stakeholders.⁴ But it has very weak monitoring and enforcement mechanisms to deal with breaches of these principles.⁵ In particular, it will be difficult to envisage the African Union using the Charter effectively to respond to laws governing elections that seem fair on the surface but whose ambiguity provides scope for abuse by opportunistic individuals.

While present norms such as ACDEG have the potential to help African countries conduct elections in an open and transparent way, they need to be more specific and more effectively enforced. In the meantime, I suggest strengthening election monitoring and advocacy to help countries in Africa to develop laws and constitutional provisions that provide for a level playing field and clear and enforceable principles of free and fair elections. Such reforms should start with the countries’ own laws. This should be a long-term project that works with each country to systematically examine every law that has bearing on elections and suggesting appropriate changes would possibly help.

I suggest these measures, fully aware that some countries will resist and that there is no one perfect constitution or law. But even in Africa we should be able to come up with credible benchmark of standards that guarantee free and fair election and remedies for botched elections to avoid in Malawi and elsewhere what we have seen in Kenya and Zimbabwe recently.

The views expressed in this paper are those of the author and do not necessarily reflect those of AfriMAP or the Open Society Institute or Soros Foundation Network.

⁴ African Charter on Democracy Elections and Governance, Article 17.

⁵ See papers on the ACDEG published on the AfriMAP website in May 2007, available here: <http://www.afriMAP.org/papers.php>.