

**Malawi's Partisan Model of Electoral Management Body: Convenient Exclusion and
Democratic Antithesis?**

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Abstract

Since the reintroduction of multiparty democracy in 1993 in Malawi, there have been complaints regarding the autonomy and impartiality of the Electoral Commission. The main issue has been that Electoral Commissioners have often been deemed to be politically biased in favour of parties in government. However, calls to move away from a partisan model of choosing Commissioners in which political parties represented in the National Assembly are required to nominate Commissioners to an independent model in which Commissioners would be recruited through competitive process, have been ignored. This paper interrogates the rationale for the criterion that determines the authority to nominate Electoral Commissioners. The criterion states that a political party is eligible to nominate if it secures more than one-tenth of national votes. The paper argues that the eligibility criterion undermines democratic principles embedded in the Malawian Electoral system and principle of representative democracy. The paper shows that criterion results in exclusion of Independent MPs from participation, and at the same time denies some voters representation, in the nomination process of the Electoral Commissioners. The data for the paper was collected through literature review and purposively selected key informant interviews with individuals deemed to have relevant information to issues under consideration. Discourse analysis was used to analyse the data.

Key words: Electoral Commission, Electoral Commissioners, criterion, Democratic principles

Introduction

Since the dawn of democracy in 1993 in Malawi, there have been complaints regarding the autonomy and impartiality of the Electoral Commission (NICE; CCJP & PAC, 2020). The main issue has been that Electoral Commissioners have often been deemed to be politically biased in favour of parties in government despite the fact that some political parties have representation in the Electoral Commission. However, this paper is concerned with composition of Electoral Commission in Malawi because the manner in which Electoral Commission is composed has a bearing on the autonomy and impartiality of the Electoral Commission. This paper has main three objectives: 1) to determine whether Malawi uses Independent Model of electoral management body; 2) to show how Partisan Model can potentially undermine the independence of Electoral Commission; and 3) to interrogate the rationale of the criterion that determines the authority to nominate the Electoral Commissioners.

The paper is organised in four sections. The key concepts: electoral management bodies (EMBs); electoral system and political representation are discussed in second section, under methodological approach. The findings are presented in third section with respect to the specific objectives of the paper. The last section concludes the paper by drawing theoretical implication from the analysis.

Methodological approach

Key concepts

The focus on Malawian Electoral Commission (MEC) makes conceptual understanding of EMBs relevant. Since the main interest is in the composition of the MEC in which political parties and elections are at the center of it, this calls for consideration of issues of political representation. It is against backdrop that this section represents the conceptual understanding of EMBs, electoral system and political representation.

Conceptual understanding of EMBs

An EMB is an organisation or body that has the sole purpose of, and is legally responsible for, managing some or all the elements that are essential for the conduct of elections (IDEA, 2014, p. 5). Given the fact the EMBs have become a keystone of the process of democratisation in many African countries, their composition, mandate and activities have attracted increasing public attention (AfriMAP & OSIEA, 2015). The conceptual understanding of composition of EMBs is generally situated in the three of models of EMBs: Independent; Governmental and Mixed (IDEA, 2014). Each of these models is briefly described below.

The Independent Model of EMB is institutionally independent and autonomous from the executive branch of government. Its members are outside the executive and it may become accountable to the legislature, the judiciary or the head of state (IDEA, 2014).

With respect to composition, the aspect of independence is delivered from the fact that the members of the EMB are outside executive branch of government. However, there are two basic variants of Independent Model: partisan model and non-partisan. The independent partisan model is the one in which members of the EMB are drawn from or nominated by political parties. The independent non-partisan model is the one in which members of the EMB are drawn from competitive process or nominated by professional bodies that do not have partisan affiliation.

The Government Model of EMB is where elections are organised and managed by the executive branch of government through a ministry and/or local authorities. At the national level, they are led by a minister or civil servant and are answerable to a cabinet minister. With few exceptions, they have no 'members' (IDEA, 2014)

The Mixed Model usually involves two component EMBs and dual structure: 1) a policy, monitoring or supervisory EMB that is independent of the executive branch and 2) an implementation EMB located within a department of state and/or local government. Elections are organised by the component implementation EMB with some level of oversight provided by a policy, monitoring or supervisory EMB (IDEA, 2014).

From the conceptual description of these three models of EMBs, four key variables are central for classifying the models. These variables are: composition, structure/functions, budget and accountability. The focus of this paper is mainly on composition because it is fundamental variable in as far as real or perceived autonomy and independence of EMBs is concerned.

Conceptual understanding of political representation

The precise nature of democratic rule has been the subject of fierce ideological and political debate (Heywood, Politics, 2007). One of the crucial elements of democratic rule is political representation. As a political principle, Heywood (2007, p. 47) defines representation as 'a relationship through which an individual or a group stands for, or acts on behalf of, a large body of people'. Other scholars have argued that representation means to 'make present what is absent' (Pitkin, 1967; Birch, 1971). Given this understanding, MPs make decisions on behalf of their constituents whenever and wherever they decide on issues in their capacity as MPs as Jana (2014, p. 70) argues that political representation is a central axiom of indirect democracy.

Understanding Electoral system

An electoral system is a set of rules that governs the conduct of elections (Heywood, Politics, 2013, p. 206). These set of rule focus on a number of things. Larserud & Taphorn (2007) identify three main elements of the electoral system: 1) district magnitude – determining how many representatives are elected in one electoral district; 2) the ballot structure – determining whether the voter votes for a candidate or a party and whether the voter makes a single choice or express a series of preferences. Various combination of

these elements give rise to different types of electoral systems.; and 3) the formula – determining how the winner of the seat is chosen. With respect to Parliamentary Elections, Malawi uses First Past the Post (FPTP) electoral system in which a voters vote for candidates and not political parties although some candidates may be affiliated to political parties. The single member is elected in every electoral district and the one who gets more votes than any other candidate is declared a winner.

Data collection methods

The paper was predominantly qualitative. The data for the paper was collected through literature review/desk research and key informant interviews. The desk research focused on scholarly published materials to conceptually understand EMBs, electoral systems and political representation. Literature review also paid attention to the institutional legal framework for the composition of Electoral Commission in Malawi.

The purposively selected key informant interviews were conducted with individuals deemed to have relevant information to address the objectives of the research. Three key informant interviews were conducted with Justice Dr. Chifundo Kachale, Chairperson of Electoral Commission, Mr. R. Gondwe, the former Clerk of Parliament of Malawi and Mr. Arthur Nanthuru, the Electoral Commissioner. Two Electoral Commissioners never picked up phones and did not respond to both actual messages on the phone and Whatsapp messages.

Data analysis

The data from literature review and key informant interviews was analysed using discourse analysis. This involved categorizing issues according to the key themes or issues with respect to the objectives of the research. In addition to these themes, analysis sought to identify any other themes that recurred from the review of documents and key informant interviews that have a bearing in the understanding of topical issues under consideration.

Findings

Does Malawi use Independent or Mixed Model?

Although Malawi Law Commission Report states that Malawi uses Independent Model of EMB (Law Commission , 2017, p. 69) from functional point of view, this paper argues and shows that Malawi uses Mixed Model of EMB from a composition point of view. The processes of appointing the Chairperson of the Electoral Commission and other Electoral Commissioners falls within the Mixed Model of EMB. The appointment process of Electoral Commission Chairperson is established in Section 75(1) of the Constitution of Republic of Malawi. Section 75(1) of the Constitution of the Republic of Malawi provides that ‘There shall be an Electoral Commission which shall consist of a chairperson who shall be a judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may be appointed in accordance with an Act of Parliament (Government of Malawi, 2004). Although the Chairperson of Malawi

Electoral Commission is nominated by Judicial Service Commission (JSC) which is not politically affiliated, the process is neither competitive nor is JSC a professional body. This shows that the appointment process of the Chairperson of Electoral Commission does not fall within the Independent Model. However, the Chairperson of Electoral Commission is the judge who is a public servant. This means that the Electoral Commission is headed by the public servant. This observation shows that the appointment process of Chairperson of Electoral Commission falls within the Government Model.

The appointment process of other Electoral Commissioners is provided for in Sections 3(2) and 3(3) of the Electoral Commission (Amendment) Act No. 22 of 2017. The Sections 3(2) and 3(3) of the Electoral Commission (Amendment) Act No. 22 of 2017 provide as follows in that order:

“Leaders of political parties represented in the National Assembly which secured more than one tenth of the national vote in election to that Parliament, shall submit to the President three nominees as members of the Electoral Commission and that where the President notes that all the nominees are not qualified, the President shall return the names to the nominating political parties within reasonable time, and in any event, before appointing the commissioners; and the nominating political parties shall submit a final list of the nominees within seven days of receipt of such notification”.

“upon receipt of the nominees, the President shall appoint the Electoral Commissioners in proportion to the nominating political parties’ representation in the National Assembly as determined by the previous General Elections.”

The fact that candidates for consideration to be appointed as Electoral Commissioners are nominated by political parties shows that the appointment process for Electoral Commissioners falls within Independent Model of EMB, particularly, partisan one.

Given the observations that the appointment of Chairperson of the Electoral Commission falls within Government Model and the appointment of other Electoral Commissioners falls within the Independent Model, then, Malawi uses the Mixed Model. Although the reservation of Chairpersonship of the Electoral Commission for judges remains contentious issue, this paper is not interested in that. This paper concerns itself with the aspect of Independent Model in the Mixed Model of Malawian EMB which is the subject of discussion in the subsequent section.

Partisan Model and Independence of Electoral Commission

Independence in relation to EMB is understood as ‘An EMB having a degree of institutional and organizational autonomy and not receiving or responding to undue pressure’ (UNDP, 2012, p. 11). Therefore, independence implies that electoral authorities have legally, in practice, a degree of institutional autonomy, and are free from undue pressure by the executive branch of government, political parties, interest groups and

individual candidates (UNDP, 2012). However, the manner in which the Electoral Commissioners are nominated and appointed in Malawi potentially casts doubt on the independence of the Electoral Commission. The Electoral Commissioners come from political parties that are most likely to be competitors in the following General Elections. Given the appointment process of Electoral Commissioners, it shows that Electoral Commissioners are in the first place the representatives of some of political parties represented in the National Assembly. This means that the manner in which the Electoral Commission is constituted already polarizes the Electoral Commission on party lines. It is therefore naïve to expect that these Electoral Commissioners would be free from undue pressure, especially from their nominating authorities. The prospects of reappointment in the case of Electoral Commissioners would act as an incentive for the Electoral Commissioners not to withstand the undue pressure from their nominating authorities.

Following the above insights, the Malawian partisan model creates the potential ground for political interference from political parties which would essentially undermine the independence of the Electoral Commission. The potentiality of political interference is enhanced with limited transparency mechanisms in the process of nomination of both the Chairperson of the Electoral Commission and other Electoral Commissioners which would make the process prone to abuse. The nomination process of both the Chairperson of the Electoral Commission and the other Electoral Commissioners is hedged with high level of secrecy to the extent that some people who are nominated do not even know which political party nominated them and others do not even know their fellow nominees. For instance, the four Electoral Commissioners were summoned by the High Court to explain their appointment (Kamlomo, 2020) and Electoral Commissioner, Mr. Steve Duwa is on record that he does not know which political party nominated him (Mwale, 2020). Additionally, Electoral Commissioner Arthur Nanthuru who is serving his third term stated that his first two terms he was not aware of his nomination until the appointment was made.¹ The list of nominated candidates from political parties are never in public domain. For the Chairperson of Electoral Commission, it is not known how many and which individuals have been nominated for the position. For instance, although Justice Dr Chifundo Kachali was aware of his nomination, he does not know other individuals that were nominated for the same position.² Given the fact that Electoral Commission is a public institution and conduit of determining the will of the people in as far as self-determination is concerned, it is not enough just to know the nominating authorities. It is important to run the nomination and appointment process transparently to tame suspicion in, and propensity to abuse, the system.

¹ Interview with Electoral Commissioner Arthur Nanthuru on 17th December, 2020.

² Written response from Justice Dr Chifundo Kachale on 22nd December, 2020

Interrogation of the Eligibility criteria to nominate Electoral Commissioners

The eligibility of political party to nominate candidates for consideration to be appointed as Electoral Commissioner is provided for in Section 3(2) of the Electoral Commission (Amendment) Act No. 22 of 2017. The Sections 3(2) of the Electoral Commission (Amendment) Act No. 22 of 2017 provides as follows:

“Leaders of political parties represented in the National Assembly which secured more than one tenth of the national vote in election to that Parliament, shall submit to the President three nominees as members of the Electoral Commission and that where the President notes that all the nominees are not qualified, the President shall return the names to the nominating political parties within reasonable time, and in any event, before appointing the commissioners; and the nominating political parties shall submit a final list of the nominees within seven days of receipt of such notification”.

From this provision, two variables emerge in determining the right to nominate candidates for consideration for appointment to the position of Electoral Commissioner: political party and national vote. The subsequent two subsections, I show how the eligibility criterion established in Section 3(2) of the Electoral Commission (Amendment) Act of 2017 violates democratic principles by examining the implications of these two variables.

The exclusion of Independent MPs: Legal but technically inadequate

The Malawian electoral system recognises individuals with or without political affiliations as candidates in an election. It is for this reason that during elections there political party affiliated candidates and independent candidates. The provision treats political party affiliated candidates as the only candidates in the election and completely ignores the independent candidates. This is to assume that only political parties will continue to field candidates in elections and as such they must have representation in the Electoral Commission, yet elections would still take place if there were only Independent candidates. This view was echoed by a number of MPs during the debate on Electoral Commission (Amendment) Act of 2017. The following quotes are evident:

“Committee is of the view that political parties represented in the National Assembly will need to be involved in the appointment of Commissioners as is the case with political parties playing a crucial role in acceptance of elections’ results and sharing post-election stability by allowing persons nominated by them to oversee the management of elections.”³

³ The Chairperson of the Legal Affairs Committee (Hon. Thyolera), DAILY DEBATES (HANSARD): Second Meeting – Forty-Seventh Session Seventh Day Tuesday, 13th February, 2018

“There are times when an election can be free and fair indeed but if all the commissioners come from one political party, then this could be the genesis of chaos and violence because people would not trust that particular Commission.”⁴

“I pray that we sober up on this issue and maintain the status quo. The status quo should be political parties making recommendations as to who should sit on the board according to the size of the party, of course.”⁵

“I support the recommendation from the Legal Affairs Committee about the appointment of commissioners. Elections are about political parties and not about Non-Government Organisations (NGOs) or anybody else. It is the responsibility of the political parties. Madam First Deputy Speaker, it is us in the political parties that are supposed to submit three or four names whereby the President chooses two names from the list. It is not logical to leave the powers completely to the President to appoint the commissioners as he or she is also a President of a political party”⁶

This error arises from ignorance in the unity of analysis in the candidature in elections. The fact that Malawian electoral system allows both Independent and political party affiliated candidates shows that the unity of analysis is individual candidate. The inconstancy in the unit of analysis between the electoral system with respect to candidature and the criterion of nominating Electoral Commissioners creates preposterous exclusion of the Independent MPs. This results in an erroneous treatment of political parties as candidates in elections or assumes that all candidates are affiliated to political party in elections. In conformity with the error, only political parties are eligible to nominate Electoral Commissioners. This results in the exclusion of independent MPs in the nomination process of Electoral Commissioners. The exclusion of Independent MPs in the nomination process of Electoral Commissioners infringes on freedom of association of Independent MPs. The choice of Independent MPs not to belong to any political party is the basis of their exclusion from participating in nomination process of the Electoral Commissioners. This is the case because exclusion of Independent MPs from participating in the nomination process of Electoral Commissioners is simply because they are elected not on any party ticket. In view of this, the emphasis of the criterion on political parties is narrow-minded as it ignores the broad electoral framework in Malawi.

The exclusion of Independent MPs: voters without representation

The criterion makes use of national vote. The requirement for a political party to have secured more than 10 per cent of the national vote to qualify to nominate Electoral

⁴ Hon. Chimwendo Banda (MCP—Dowa East), DAILY DEBATES (HANSARD): Second Meeting – Forty–Seventh Session, Fifteenth Day Friday, 23rd February, 2018

⁵ Hon. Mwenifumbo (AFORD—Karonga Central), DAILY DEBATES (HANSARD): Second Meeting – Forty–Seventh Session, Fifteenth Day Friday, 23rd February, 2018

⁶ Hon. Lilian Patel (UDF—Mangochi South), DAILY DEBATES (HANSARD): Second Meeting – Forty–Seventh Session, Fifteenth Day Friday, 23rd February, 2018

Commissioners is grounded in legitimate political representation. This is evident comments made by MPs in the course of debate of the Bill to Amend Electoral Commission Act (Parliament of Malawi, 2018a; Parliament of Malawi, 2018b). The following are some of the quotes:

“The Committee was of the view that not all political parties represented in the National Assembly have the privilege to submit nominations to the President. The Committee borrowed a leaf from the position obtaining on funding of political parties from Parliament. It is only those political parties that secured votes equal to or greater than 10 per cent of the national vote that receive funding from government. These political parties, if they are also represented in the National Assembly, are the only ones that should submit names as they have wide support and their views are significant enough in so far as post-election violence and peace is concerned.”⁷

“The issue of 10 per cent came in because in our country we have so many political parties and some of them are just being formed. As of now, we have 52 political parties. We cannot afford, as a country, to accommodate all the 52 political parties to submit names of Commissioners... parties should work extra hard to achieve a representation of 10 per cent in the National Assembly in order for them to have a chance of presenting the list of names to the President from which the President can appoint Commissioners.”⁸

“...having proportional representation will bring confidence to all Malawians. They are human beings indeed but if they come from different political parties according to the representation in Parliament that is going to create a conducive environment for Malawians to trust the Electoral Commission”⁹

“They used a borrowed principle from funding of political party. The argument is that we need strong parties it is not necessary to accommodate political parties that even fail to get 10 per cent of national vote”¹⁰

In addition to 10 per cent requirement, Section 3(3) of Electoral Commission (Amendment) of 2017 focuses on proportionality in the appointment Electoral Commissioners. Section 3(3) of the Electoral Commission (Amendment) of 2017 provides that ‘Upon receipt of the nominees, the President shall appoint the Electoral Commissioners in proportion to the nominating political parties’ representation in the National Assembly as determined by the previous General Elections’ (Government of Malawi, 2017). The emphasis on both 10 per cent of national vote and appointment of Electoral Commissioners on proportionality basis is meant to link the level of support of a political party (measured by both total votes acquired by a party in parliamentary elections

⁷ The Chairperson of the Legal Affairs Committee (Hon. Thyolera), DAILY DEBATES (HANSARD): Second Meeting – Forty-Seventh Session Seventh Day Tuesday, 13th February, 2018

⁸ Hon. Lunji (Independent—Nkhotakota North East), DAILY DEBATES (HANSARD): Second Meeting – Forty-Seventh Session Seventh Day Tuesday, 13th February, 2018

⁹ Hon. Chimwendo Banda (MCP—Dowa East), DAILY DEBATES (HANSARD): Second Meeting – Forty-Seventh Session, Fifteenth Day Friday, 23rd February, 2018

¹⁰ Interview with Mr. R. Gondwe, the former Clerk of Parliament on 5th January, 2020.

and the number seats the party wins) to the number of Electoral Commissioners the party has in the Electoral Commission. However, given the criterion of nominating Electoral Commissioners, the issue of representation is only limited to MPs that are affiliated to political parties. By denying Independent MPs a voice in the nomination process of Electoral Commissioners, the criterion denies voters who voted for independent candidates to be represented in the nomination process of the Electoral Commissioner. When decisions on issues of national importance are restricted to political party affiliated MPs, it defeats the whole purpose of National Assembly being a national representative body.

In terms of the value of the vote, the votes cast for both Independent and political party affiliated candidates in parliamentary elections have equal value only with respect to determination of whether or not a political party has acquired at least 10 per cent of the national vote. It does not matter whether the Independent or political party affiliated candidate wins or loses the election. However, when it comes to determination of proportionality of Electoral Commissioners in the Electoral Commission, the votes which are cast for winning MPs who are affiliated to political parties continue to matter while the votes that are cast for winning Independent MPs have no value in as far as nomination process of Electoral Commissioners is concerned. This implies that whether the vote cast for a winning MP has value or not depends on whether the winning MP is affiliated to political party or not in as far as the nomination of Electoral Commissioners is concerned. This observation means that proportionality based on representation in political parties has broken link to the voters and to that effect is not true proportionality. In its ingenuity, untrue proportionality is against the principle of one vote-one value because the value of the votes cast for winning Independent and political party affiliated MPs is different.

Conclusions

Malawi use Mixed Model of EMB

Although others have argued that Malawi uses an Independent Model of EMB from functional point of view, this paper has argued and shown that Malawi uses a Mixed Model of EMB from a composition point of view. This means that the approach of focusing on a single variable (composition, structure/functions, budget and accountability) in determining the form of the EMB in country is most likely to going to lead to different conclusions about the form of the same EMB. This implies that the approach of focusing on a single variable to determine the form of EMB in a country is inadequate. There is need to devise a way in which all or most of the variables (composition, structure/functions, budget and accountability) can be simultaneously used to determine the form of EMB in country.

Partisan Model of EMB undermines independence of EMB by Design

The partisan model of EMB, by design, creates the potential ground for political interference from political parties which would essentially undermine the independence

of Electoral Commission because the Electoral Commissioners are in the first place, representatives of the political parties in the Electoral Commission. Given the polarization of the Electoral Commission along party lines, it is naïve to expect no political party influence on the electoral Commissioners and ultimately on the Electoral Commission itself.

Interrogation of the eligibility criteria to nominate Electoral Commissioners

The exclusion of Independent MPs from participating in the nomination process of electoral commissioners infringes on the freedom of association of Independent MPs because their exclusion is on the basis that they do not belong to a political party. The inconsistency of unity of analysis between candidature in elections and criterion of nominating Electoral Commissioners where political representatives are at the central of it results in questionable exclusion of some Independent MPs from participating in the nomination process of Electoral Commissioners. This means that designing the criterion for nominating Electoral Commissioners has to pay attention to broad electoral framework to have consistency in the unit of analysis between candidature and nominating authority.

The exclusion of Independent MPs in the nomination process of the Electoral Commissioners denies people who voted for Independent MPs representation. This is a serious frontal assault on the representative democracy as this creates a situation in which voters are left without representation and Independent MPs are reduced to political representatives without representing. This means that the value of votes cast for winning Independent candidates and those cast for winning party affiliated candidates have different value. This implies that the value of the vote depends on whether one votes for political party affiliated candidate or an Independent candidate.

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