



Lessons from Malawi's Fresh Presidential Elections of 23 June 2020

Conference Report, Webinar, 31 August 2020



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List of acronyms and abbreviations

DPP Democratic Progressive Party

ECF-SADC Electoral Commissions Forum of SADC countries

EMB electoral management body

FPTP first-past-the-post

International IDEA International Institute for Democracy and Electoral Assistance

MCP Malawi Congress Party

MDF Malawi Defence Force

MEC Malawi Electoral Commission

PAC Public Appointments Committee

SADC Southern African Development Community

UTM United Transformation Movement

1. Executive summary

On 3 February 2020 the High Court of Malawi sitting on constitutional matters nullified the presidential election that was held on 21 May 2019. That decision was upheld by the Supreme Court of Appeal on 8 May 2020. Various reforms were ordered by the courts and legislated by Parliament, most notably a change in the electoral system, from a simple majoritarian, or first-past-the-post (FPTP), system to a two-round system where the winner must receive over 50 per cent of the votes.

A fresh presidential election was held on 23 June 2020 under the supervision of a new commission, and Malawi made history in Africa on 27 June when the opposition candidate was announced victorious in the fresh presidential election. The repeat election was held in a largely peaceful environment, and the Malawi Electoral Commission (MEC) did not receive any complaints following the announcement of the result.

Given the remarkable events that took place in Malawi, the Executive Committee of the Electoral Commissions Forum of SADC countries (ECF-SADC) recommended that the MEC should be given the opportunity to share its experience regarding the fresh presidential election of 23 June 2020 with other member commissions. The ECF-SADC in collaboration with the International Institute for Democracy and Electoral Assistance (International IDEA) organized a webinar on 31 August 2020 to strengthen peer review among electoral management bodies (EMBs) in the region of the Southern African Development Community (SADC). The webinar provided a platform for peer-learning concerning both the conduct of the fresh presidential election in Malawi and emerging regional trends in electoral justice.

The meeting focused on the following two broad areas:

- perspectives on the role of the judiciary in elections particularly in view of recent judgments in Malawi and South Africa; and
- lessons learned from the fresh presidential election in Malawi.

The flawed 2019 election in Malawi tested the resilience of the country's citizens and its democratic institutions. Opposition parties, with the support of civil society, filed a complaint regarding irregularities in the election with the High Court of Malawi sitting on constitutional matters. The court, for its part, went beyond issuing a simple judgment; it determined that the election was riddled with irregularities and ordered a fresh presidential election. In addition, the court went even further by providing an interpretation of the constitutional provision on the electoral system. The court recommended an amendment of the electoral laws to change the electoral system from a simple majoritarian system to an

absolute majoritarian system, which would result in a more inclusive electoral system for all regions of the country.

Restoring trust and confidence in electoral processes and their outcome was of paramount importance. To this end, the court also directed the National Assembly's Public Appointments Committee (PAC) to assess the competence of the MEC that oversaw the flawed 2019 elections. Overcoming some executive pushback, the fresh election was eventually overseen by a new commission. Though the repeat election was undertaken in a difficult environment—the COVID-19 pandemic, financial and time restrictions, no international observers present and an unwilling executive—it has been generally agreed that the cost of the election was worthwhile in order to overcome the political stalemate and restore a legitimate government.

Within a limited time frame, the MEC conducted the election amid the pandemic. The commission took steps to comply with health protocols, although the country did not go into a full lockdown, as other countries in the region did.

The role of international election observers in the 2019 election in Malawi highlighted the need for further discussions of the mandate of observers. A fair point of reflection may be to consider how to support election observers in their mandate and to ensure improved access to all aspects of the electoral process, especially the results management process, for more accurate reporting in future elections.

Some of the lessons drawn from the Malawian elections include the importance of a vibrant democratic culture, independent political institutions and a strong judicial system capable of applying the law to improve the democratic system, and the need for strong checks on executive powers (through the judiciary and civil society), an independent and capable EMB and communication and consultation between institutions, political parties and citizens.

During the first half of 2020, two landmark judgments were issued by the respective constitutional courts of Malawi and South Africa, both having a profound bearing on electoral justice. The Malawian court's interpretation of the definition of 'majority' in the Constitution resulted in a directive to amend the country's electoral system to an absolute majoritarian system requiring that a candidate receive 50 per cent plus 1 vote in order to be declared the winner of an election. The South African Constitutional Court determined that, to guarantee equal opportunity, as laid out in the Constitution's Bill of Rights, independent candidates should be able to run in all electoral processes in the country. In both cases, the interpretation of the laws of the respective countries has resulted in more inclusive electoral systems and a stronger democracy.

The following recommendations were made:

1. The Parliament of Malawi should continue its legal reform work to fully transform and institutionalize its revised electoral system.
2. The ECF-SADC should reflect further on, and facilitate discussion of, peer-learning on the following thematic issues: the role of election observation and how it may be strengthened; the role of EMBs in electoral reforms; the creation of equal opportunity campaigns amid the COVID-19 pandemic; and methods for strengthening the independence of the judiciary and EMBs.

2. Background

Malawi held a fresh presidential election following the High Court judgment of 3 February 2020 that nullified the presidential election that was held on 21 May 2019, and that decision was upheld by the Supreme Court of Appeal on 8 May 2020. A new commission that was appointed on 7 June 2020 conducted the fresh presidential election on 23 June 2020.

Announcing the results of the presidential election on 27 June 2020, the chairperson of the MEC, Hon. Justice Dr Chifundo Kachale, said:

First of all, we would like to express our gratitude to the people of Malawi for being patient and calm while we were undertaking the results management processes since the elections happened on 23rd of June. The Commission could not hasten to pronounce the results at the expense of quality and legality and that's why we took a bit of time.

The chairperson's speech highlighted the importance of matching the integrity of the process with stakeholder satisfaction and acceptance of the electoral outcome in Malawi.

The ECF-SADC in partnership with International IDEA organized a webinar on 3 June 2020 on the theme of '*Upholding Electoral Integrity in the Southern Africa Region in the Context of the COVID-19 Pandemic*'. One of the action points from the webinar was the need to continue to facilitate exchanges on the impact of the pandemic on electoral processes and the mandate of EMBs. These exchanges aim to facilitate peer-learning and capacity-building within EMBs in the SADC region.

In line with the ECF-SADC's mandate to strengthen peer-learning among EMBs and cooperation and support among member commissions, the ECF-SADC Executive Committee recommended at its meeting on 24 June 2020 that the MEC should be given a platform to share its experience with other member commissions concerning the fresh presidential election of 23 June 2020.

Building on the outcome of the first webinar and the decision of the ECF-SADC Executive Committee, another webinar was held on 31 August 2020 to provide a platform to facilitate conversations on the Malawian election and perspectives on the role of the judiciary in elections. The programme of the webinar is attached as an annex to this report, along with a list of the panellists. This report presents a summary of the issues discussed during the webinar.

3. Objectives

The exchanges that took place during the webinar held on 31 August 2020 provided an opportunity for EMBs and other stakeholders to draw lessons from the recently held fresh presidential election in Malawi, in particular, the impact of COVID-19 on operational aspects and the implications of COVID-19 for the overall cost of elections. The expected output is an advisory memo to inform deliberations on election management matters and related guidelines and policies at the ECF-SADC's 22nd Annual General Conference.

The meeting explored two issues:

- perspectives on the role of the judiciary in elections particularly in view of recent judgments in Malawi and South Africa; and
- lessons from the recent elections in Malawi and strengthening peer review among EMBs in the SADC region.

4. Participants

Participants included senior representatives of ECF-SADC member commissions and representatives of International IDEA; the SADC Organ on Defence and Politics; the SADC Electoral Advisory Council; and international non-governmental organizations.

Speakers:

- Professor Adebayo Olukoshi, Director Africa and West Asia, International IDEA
- Ms Hilda Modisane, Executive Secretary, ECF-SADC
- Adv. Notemba Tjipueja, ECF-SADC Executive Committee Chairperson
- Justice Dr Chifundo J. Kachale, Chairperson, Malawi Electoral Commission
- Dr Augustine Magolowondo, Democracy Works Foundation
- Mr Sam Alfundika, Chief Electoral Officer, Malawi Electoral Commission
- Dr Sundu Madise, Faculty of Law, University of Malawi
- Mr Sy Mamabolo, Chief Electoral Officer, Independent Electoral Commission, South Africa

5. Report on the webinar

This report is not a verbatim account of the proceedings. It provides a general summary of the contributions of the different panellists and participants during the webinar. It does not express the views of International IDEA but covers the main thematic aspects discussed, the main ideas exchanged and the recommendations emerging from the webinar. Based on a retrospective and forward-looking practical analysis, the inputs aimed to inspire decision-makers, EMBs and electoral stakeholders around the thematic issues of electoral justice and the impact of COVID-19 on electoral integrity. More specifically, the report will reflect the discussions that took place around emerging issues on electoral integrity, the legal opinions on the judgments of the constitutional courts of Malawi and South Africa and the lessons on electoral justice that can be gleaned from these judgments. The report will also touch on how the MEC responded to the lessons learned from the first presidential election (the Tipp-Ex question, among others) and to the challenges posed by the COVID-19 pandemic. What, ultimately, were the implications of the pandemic and the court judgments for the overall cost of elections in Malawi? In the final section, the report will lay out some of the lessons learned on key issues, including risks and challenges, following the presidential election in Malawi.

All of the presentations and discussions that took place during the webinar may be found in a recording of the webinar accessible here: <<https://www.facebook.com/Int.IDEA.AwA>>; or <<https://youtu.be/5hFJWKb3q1g>>.

5.1. Responding to a flawed election in an institutionalized multiparty democracy

Civil society activism demonstrates the value of a vibrant democratic culture

The May 2019 presidential election in Malawi was the sixth democratic election held in the country since the reintroduction of multiparty elections in 1994. The various democratic institutions and stakeholders, including the judiciary and the MEC, gained experience conducting the five previous elections. The MEC was, however, under new leadership. The incumbent president, Peter Mutharika of the Democratic Progressive Party (DPP), was declared the winner of the May election by a narrow margin, with 38 per cent of the vote, followed by Lazarus Chakwera of the Malawi Congress Party (MCP), with 35 per cent, and Saulos Chilima of the United Transformation Movement (UTM) in third place, with 20 per cent. The four other candidates collectively received approximately 6 per cent of the vote.

The events that unfolded in the post-election context demonstrated the resilience of Malawi's democratic culture and the importance of stakeholder engagement.

With evidence of alleged widespread irregularities in hand, the election results were immediately challenged in court by opposition political parties and non-governmental organizations and through street protests. The main opposition parties, the MCP and the UTM, lodged complaints of electoral fraud, claiming that irregularities—including the much publicized Tipp-Ex scandal—affected more than 1.4 million of the 5.1 million votes cast.

The live broadcast of the court proceedings, which was widely followed, generated public debate and engagement. The level of civic activism increased with nationwide protests organized by civil society, most notably by the non-profit Human Rights Defenders Coalition. Political actors joined civil society actors to push back through regular protests calling for reforms, especially the resignation of the MEC chairperson, Justice Dr Jane Mayemu Ansah.

The reaction from Malawian civil society demonstrated that elections are not about a single event of voting, but rather about a broader context that must enjoy the confidence of the people. The MEC had amended election day forms and templates in 2019, but these amendments were not implemented according to the legal requirements. As part of its watchdog mandate in a democracy, Malawian civil society considered the conduct of the fresh polls to be necessary to build public confidence in the electoral process and its outcome.

An independent judiciary and emerging electoral jurisprudence

During the first half of 2020, two landmark judgments were issued by courts in Malawi and South Africa; both have a bearing on electoral justice. While the judgment in Malawi directly addressed an election dispute arising from the 2019 presidential election, the case in South Africa sought to interpret the Constitution on the electoral system and the right of independent candidates to run in all electoral processes in the country and to guarantee an equal opportunity to all candidates. The judgment in Malawi bore a similarity to the South African judgment regarding the court's interpretation of the Constitution's definition of the electoral system for presidential elections in Malawi. In the case of Malawi, the MEC was given 150 days to conduct a fresh election, while the court in South Africa gave the Parliament 24 months in which to enact the necessary reform processes to bring the Electoral Act into line with the judgment. These two cases highlight the increasing role of the judiciary in electoral processes in the region. Some have argued that there was an instance of judicial overreach in both countries, while others commended the judgments as groundbreaking positive developments in electoral jurisprudence in the region.

In its 3 February 2020 landmark judgment, Malawi's High Court sitting on constitutional matters found that evidence of fraud and malpractice in the 2019 polls was sufficient to overturn the outcome. The court unanimously moved to annul the election and called for a fresh presidential election within 150 days. This is only the second time on the continent where the judiciary has overturned a presidential election and called for a fresh election. In South Africa, the country's Constitutional Court ruled that its Electoral Act is unconstitutional on the grounds that it does not guarantee the right to stand as an independent candidate in national and provincial elections.

The context of the nullification in Malawi was important. The election results reflected a narrow margin between the winner and runner-up (2 per cent), demonstrating a flaw in the first-past-the-post (FPTP) electoral system. The High Court determined that the term 'majority' in section 80 of the Constitution should be interpreted as a two-round '50-per-cent-plus-1' absolute majoritarian electoral system. The Supreme Court affirmed the interpretation of the constitutional provision when the DPP and the MEC appealed the High Court judgment. Furthermore, the Supreme Court directed that the Electoral Act be amended by Parliament to reflect an electoral system that requires the winner to obtain over

50 per cent of the votes rather than the FPTP system. The webinar panellists stated that this was not a case of the judiciary changing the rules of the game mid-course but rather that it reflected the value of jurisprudence. In their judgments, the courts were suggesting that this interpretation should have been applied in previous elections and that it was the courts' duty to remedy democratic deficiencies as part of their role in strengthening Malawi's democratic processes.

These two cases demonstrated the value of jurisprudence. Both cases sought to level the playing field and uphold the principle of inclusion. The demographic distributional context in Malawi is such that certain ethnic groups have larger numbers and therefore stronger political power, meaning they do not need to include other groups to retain political power. The shift to the 50-per-cent-plus-1 electoral system has created a more inclusive political system where partnerships or coalitions that extend beyond ethnic lines are essential.

In South Africa, like in the case of Malawi, a complaint was filed by a civil society group (the New Nation Movement) and opposition parties, who argued that the Electoral Act infringes on the right to exercise individual political choices. It is important to note that the court's ruling of 11 June 2020 is forward-looking and as such does not bring the legitimacy of previous elections into question. Similar to Malawi, the court's rationale was to give meaning to the Bill of Rights in the Constitution. In giving Parliament 24 months to realize these reforms, the court recalled the principles that the constitution envisaged for the electoral system: fairness, inclusiveness, simplicity and accountability.

To further strengthen the credibility of the fresh presidential election in Malawi, the Supreme Court in its judgment also recommended that the National Assembly's PAC assess the competence of the MEC commissioners who oversaw the flawed 2019 election. This aspect of the judgment strengthens the accountability mechanisms for election management. The courts also provided clarity on the timelines for a fresh election. The Supreme Court was of the view that the 150 days given by the Constitutional Court was too long but upheld the decision.

A further observation by the panellists was that the judicial systems and the Constitution have not changed since previous elections, but that the judiciary made a progressive judgment that strengthened electoral processes in Malawi. It was noted that systems are as strong as the people running them and that it is therefore important to create a culture where society values democracy and will protect democracy.

Maintaining the independence of democratic institutions, including EMBs, is essential for democracy

The aftermath of the 2019 election, the ensuing protests and the complaint filed with the High Court of Malawi created a crisis of legitimacy for the newly sworn-in political administration, while political parties were divided. The governing party defended the results, and the opposition cried foul. The EMB that had overseen the process also had its capacity and abilities questioned. As a result, it was increasingly isolated. The situation resulted in a complete disintegration of trust on the part of civil society and citizens more broadly.

The 3 February judgment of the High Court sitting on constitutional matters and the 8 May Supreme Court judgment demonstrated the independence of the judiciary. While providing some much-needed clarity on the way forward after the disputed outcome of the 2019 election, it also created a high-level confrontation between institutions. The opposition parties that petitioned the courts were celebrating; meanwhile, there was a marked change in the narrative from the ruling party, insinuating the judicialization of the election. In a backlash, there was a danger of the politicization of the judiciary, particularly in the form of the executive trying to meddle in, and even stifle, judicial proceedings. The DPP accused the judiciary of a judicial coup, while its leader, former President Mutharika, accused the judges

of taking bribes. It was alleged that five judges faced myriad pressures and inducements to rule in the governing party's favour.

The court rulings necessitated a coordinated approach from the various arms of the Government to ensure a successful fresh election within 150 days. Each arm had to remain independent and play its role. The processes following the judgment were a major test of the extent to which democracy was institutionalized in Malawi because the context was deeply polarized.

To proceed, Parliament was required to amend the Electoral Act. Given the political context, generating consensus was a major challenge. Nonetheless, Parliament passed all the Court-ordered electoral reform bills, including amendments to the Parliamentary and Presidential Elections Act. A fresh election date was set for 23 June 2020.

At the centre of Malawi's flawed election storm was the compromised MEC. The case filed by the opposition after the 2019 elections demonstrated the extent to which EMBs are essential to democracy and that their mandates should not be taken lightly. The Supreme Court in its judgment also recommended that the National Assembly's PAC should assess the competence of the MEC. The premature announcement of the election results without addressing concerns about irregularities, the irregular amendment of election day forms and the MEC's perceived proximity to the ruling party contributed to the PAC's findings that the MEC commissioners were liable for the flaws in the 2019 electoral process and were therefore subject to removal. Protesters had also been calling for the resignation of the MEC Chair, Justice Ansah, since the February ruling. Dr Ansah eventually resigned in May 2020. After much resistance to do so, President Mutharika appointed four new commissioners, opting, controversially, to retain two commissioners from the previous commission.

While the legislative arm played its part, the executive again attempted to quash the process. President Mutharika did not assent to the electoral reforms ordered by the courts and bypassed Parliament. There was an obvious lack of the required political will on the part of the executive to ensure the release of required funds to facilitate a fresh election. Continued pressure from the opposition and civil society resulted in a commitment from Mutharika to appoint a new electoral commission by 5 June.

The Malawi Defence Force (MDF) protected protesters following the 2019 election, consistently resisting calls by the DPP to end protests forcefully if necessary. President Mutharika dismissed the MDF commander, General Vincent Nundwe, replacing him with a general from the president's ethnic region—hoping for a more compliant leader. The MDF remained professional and impartial, however, throughout the period leading up to the repeat election.

Malawi's democratic institutions—including the judiciary, Parliament and the military—proved resilient in the face of a determined effort to weaken checks and balances on the executive. It was noted, however, that the context of the 2019 and 2020 elections in Malawi put the MEC in a difficult position, where the decisions and actions of the three arms of government limited the MEC's independence as a democratic institution. It highlighted the need for clear timelines for legal amendments and a clear chain of accountability for the MEC to strengthen its independence. The need to strengthen the MEC's fiscal independence was also highlighted during the 2019 and 2020 elections.

A spotlight on the role of development partners and observers

Various regional international observer groups were on the ground for the 2019 election, many of which issued preliminary statements saying that the election had been reasonably free, fair and credible. These statements were essentially nullified along with what was found by the Malawian courts to be a flawed election result. The situation left a sour taste in the mouth of the opposition and civil society groups campaigning against irregularities in the

electoral system, but it also posed a bigger question about the role of observer missions and development partners in ensuring democratic elections.

While the outcome of the Malawian court cases and ultimately the fresh presidential election certainly give pause for thought on how to improve on these observations/interventions, it is also fair to say that observer groups oftentimes work with incomplete information. The Malawian courts were able to reach a verdict based on the scrutiny of an enormous amount of evidence and with access to information from the MEC and other relevant state institutions over several months. It was noted that observers undertake an assessment of the process based on direct observation and stakeholder consultations; they do not have a mandate to investigate fraud, nor do they have the capacity to do so. The onus therefore rests on the EMBs and the judiciary in countries where elections are being observed to investigate and address fraud.

A fair point of reflection may be to consider how the mandate of election observers may be fully supported and enabled to ensure improved access to all aspects of the electoral process, especially the results management process, for more accurate reporting in the future. Observers are on the ground for a limited time frame during which they have access to limited information. The quality of information they have access to will determine the depth of the report they deliver. There is very limited access to the results system, for example, which is often where election issues arise. International election observers can ‘check the temperature’ of a political system but need closer observation to provide in-depth analysis. As they stand, observer reports may not then be truly reflective of an election outcome. It is up to bodies such as the ECF-SADC to reflect on how to facilitate improved engagement between EMBs and election observers to improve their methodology and make election observation more valuable. Peer review is essential, and it is therefore necessary to discuss the extent to which countries’ EMBs allow access to all aspects of the election process.

5.2. Fresh elections: restoring trust and confidence in democratic processes

Professional election management

At the centre of the controversy surrounding the failed 2019 election was the performance of the MEC. It is the responsibility of EMBs to set standards and deliver their mandate in a manner that promotes confidence in the electoral process. To its credit, the MEC focused on the court judgment directives and was able to correct the mistakes of 2019 swiftly.

Following some confusion between the directive of the High Court sitting on constitutional matters, that the election should take place within 150 days, and then clarification from the Supreme Court noting that the winner should be announced by the 150th day, the date of the fresh election was set for 23 June 2020. Based on a recommendation from the PAC, the MEC commissioners were changed. The old commission expired on 5 June, and the new commission began its mandate on 7 June. Upon assuming their office, the new commissioners found that many of the pre-election activities had already been carried out by the previous commission, thus facilitating a relatively smooth and professional transition.

Election forms that had been modified to enhance credibility in 2019 but never legalized were modified and redesigned for 2020 to ensure legality. The 2019 voter register was used again to ensure the same voters would determine the outcome of the fresh election. Only those candidates who ran in 2019 were able to compete in the repeat election, and there were no issues in this regard.

It is generally perceived that the MEC did a professional job within a very short period. Perhaps the most obvious difference between the 2019 and 2020 commission was the level of communication with the public. Justice Kachale brought Malawians into the fold and alerted

them to issues but also shared what was being done to remedy the situation. This open channel of communication not only demystified the MEC but restored trust in the body, which is necessary to ensure a credible process.

Credible elections are worth the cost

To be conducted properly, elections require large amounts of resources—in terms of finances as well as time and personnel. Malawi's national budget is already heavily dependent on foreign assistance. The MEC required another MWK 48 billion (approximately USD 25,000) to run another election. It was therefore worth debating whether a fresh election was feasible and indeed prudent—particularly without international assistance and international observers. The logic that was ultimately followed in Malawi was that democratic peace comes at a premium, and that the cost of not running a fresh (credible) election would be higher. If protests and conflict continued or even escalated, the breakdown of law and order would have a far greater long-term cost.

5.3. Holding elections during COVID-19: health, politics and democracy

The politicization of the COVID-19 pandemic

The fresh presidential election in Malawi demonstrated how the COVID-19 pandemic was politicized. The political environment was characterized by high levels of polarization and conflict, for example, how the government's declaration of a state of disaster was seen as an attempt to limit the space for the political opposition to campaign.

A proposed COVID-19 lockdown was equated with a 'lockdown of democracy'. Regardless of President Mutharika's declaration, parties moved forward with nationwide campaigning amid the COVID-19 threat. The nature of campaigns in the country made adherence to restrictions impossible. Thousands gathered at a time for rallies, with few people wearing masks.

While political parties continued with their rallies and political participation remained high, the election itself saw a drop in voter turnout (64.8 per cent in 2020, compared with 74.4 per cent in 2019), which may have been due in part to concerns about the virus. There was, however, a general sense in the country that, while COVID-19 was a challenge, the election was necessary to resolve the political impasse.

Respect for institutional mandates

Elections may take place in a less than ideal context, such as during the COVID-19 pandemic, but EMBs must focus on their mandate. They cannot defy other public institutions. The MEC did what it could to comply with health regulations, but it was not fully compliant; there were aspects of the electoral operations that required adaptation. Under normal circumstances, parties would be on-site to witness the printing of ballot papers; however, COVID-19 regulations changed the way the election was conducted, meaning the ballot printing was not monitored.

Communication from the commission was key, as the MEC met with the parties and managed to achieve understanding and buy-in. Most of the polling stations in Malawi are in public facilities such as schools. These were already closed during the pandemic and were therefore not disinfected before election day.

6. Lesson learned and key recommendations

The fresh 2020 presidential election in Malawi was run with a general level of satisfaction in a largely peaceful environment, and the courts did not receive any post-election appeal. The deliberations at the webinar indicated that there were several contributing factors that worked together for the success of the fresh election.

1. **Role of the judiciary and emerging jurisprudence:** Panellists and participants highlighted the value of emerging electoral jurisprudence in the region, particularly the value of ensuring equal opportunities and an inclusive electoral process. The recent judgments in Malawi and South Africa provide the basis for further discussions on electoral systems in the Southern African region. Specifically to review the extent to which existing electoral systems in the region guarantee inclusive representation. Introduction of the 50-per-cent-plus-1 electoral system in the fresh presidential elections helped to address the challenge of regional politics in Malawi. In South Africa, the Constitutional Court judgment guaranteed the right of independent candidates to contest in national elections, thus opening up the political space in national elections.
2. **An open civic space and vibrant democratic culture:** The two countries reviewed during the webinar (South Africa and Malawi) highlight the importance of a vibrant democratic culture and an active civil society. The Malawian civil society demonstrated its vibrancy through protests and court cases. In South Africa, the court case filed by the New Nation Movement sought an interpretation of the Constitution on the rights of independent candidates in national elections.
3. **Check and balances:** The presidential elections in Malawi highlight the importance of a strong institutional framework that effectively entrenches the principle of checks and balances. Though the Executive attempted to overreach its powers during the elections, an independent judiciary checked its powers.
4. **Autonomy of EMBs:** The MEC faced challenges to its powers and operations during the 2019 and 2020 elections. The context of the 2019 and 2020 elections in Malawi put the MEC in a difficult position where the decisions and actions of the three arms of government impacted on the MEC's independence as a democratic institution. The experience from Malawi highlighted the need to establish within the legal framework, clear timelines for legal amendments and a clear chain of accountability for the EMB

to strengthen its independence. Beyond the institutional independence of the MEC, the Commission's experience with financing a rerun presidential election amid the COVID-19 pandemic highlighted the need to further consider its fiscal independence. The MEC experienced challenges to gain the required approval for its revised budget and to secure early disbursement of funds for the conduct of the fresh presidential elections.

5. **Continued relevance of international and citizen election observers:** Though the Malawi elections raised questions about the role of election observers, their presence and assessment of electoral processes in the region remain crucial and relevant for the integrity of elections and democratic development. However, observers require improved access to all aspects of the electoral process and improved access to information to enable them to make an informed assessment of all aspects of the electoral process.
6. **Election campaigns and a level playing field amid the pandemic:** The MEC has been commended for its efforts at conducting the fresh presidential election in Malawi amid the pandemic. It was, however, noted that Malawi did not impose strict restrictions like other countries in the region. The election day procedures proceeded with necessary health protocols in place in Malawi. However, there remain concerns that if the existing restrictions of movement and gathering in response to the pandemic remain in place, such limitations on the freedoms of movement and association during the campaigns raise the question of the extent to which the playing field is levelled.
7. **Open communication and consultation:** One of the contributory factors to the successful conduct and the accepted outcome of the 2020 fresh presidential election was the MEC's openness to consult electoral stakeholders within the short period it had to deliver the elections. The Commission provided ongoing updates on the process especially during the results management process. The live broadcast of the court proceedings also contributed to public trust in the process.

Next steps

1. Follow through with transformation: Parliament has the responsibility and mandate to follow through on electoral reforms with appropriate legislation. In this reform process, there should be widespread consultation and public outreach.
2. The ECF-SADC should reflect more deeply on how to strengthen the role of election observers in promoting the integrity of electoral processes in the region. This requires discussion among its member commissions to develop modalities to grant observers access to fully observe all aspects of the elections—particularly the results tallying and management process.
3. Facilitate a follow-up discussion on achieving a level playing field and equal opportunity to campaign amid the pandemic.

4. ECF-SADC to facilitate peer review platforms for EMBs to share experiences on conducting elections in the context of COVID-19 and to initiate guidelines/strategies to respond to emergencies.
5. In light of the recent judgments in Malawi and South Africa and the ongoing reform processes, the ECF-SADC should consider facilitating a follow-up discussion on the role of EMBs in electoral system reforms.
6. The webinar identified the need to carry on discussions on strengthening the independence of EMBs and the role of the judiciary in the electoral process.

Annex

**Webinar: Lessons from Malawi's Fresh Presidential Elections, 31 August 2020,
11:00–13:00 CAT.**

Programme

- 11:00–11:05 **Introduction, welcome and ground rules**
- Facilitator, Ms Olufunto Akinduro, Senior Programme Officer, International IDEA
- 11:05–11:25 **Welcome remarks**
- Professor Adebayo Olukoshi, Director Africa and West Asia, International IDEA
 - Adv. Notemba Tjipueja, ECF-SADC Executive Committee Chairperson
- 11:25–11:30 **Overview of the programme and purpose of the meeting**
- Ms Hilda Modisane, Executive Secretary, ECF-SADC
- 11:30–12:10 **Lessons learned and perspectives from the 23 June 2020 presidential election in Malawi:**
- **Political context of the fresh presidential election**
Dr Augustine Magolowondo, Democracy Works Foundation
 - **Technical conduct of the Malawi elections**
Mr Sam Alfandika, CEO Malawi Electoral Commission

- **Lessons on electoral justice**

Justice Dr Chifundo J. Kachale, Malawi Electoral Commission

Dr Sundu Madise, Faculty of Law, University of Malawi

12:10–12:45 **Discussion**

- Comments by SADC Electoral Advisory Council
- Comments from Independent Electoral Commission South Africa on lessons on electoral justice, Sy Mamabolo, Independent Electoral Commission
- Remarks and responses from EMBs

12:45–13:00 **Wrap-up and next steps**

- Ms Hilda Modisane

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity-building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

<<https://www.idea.int>>

About ECF-SADC

The Electoral Commissions Forum of SADC countries (ECF-SADC) is an independent, regional organization, established in July 1998, comprising electoral management bodies (EMBs) of the SADC member states. The members include the electoral commissions of: Angola, Botswana, DRC, Eswatini, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zanzibar and Zimbabwe. Among its objectives, the ECF-SADC: encourages the establishment of independent and impartial electoral commissions in the region; and encourages the development of electoral laws that adhere to regionally and internationally accepted principles of election management.

It is through this forum that the electoral commissions strengthen one another's capacity, share experiences, expertise and resources, and promote conditions conducive to credible and transparent elections in the SADC region.

The ECF-SADC Secretariat has been hosted by the Government of Botswana since 2005 with its Permanent Secretariat based in Gaborone, Botswana.

<www.ecfsadc.org>

On 3 February 2020 the High Court of Malawi sitting on constitutional matters nullified the presidential election that was held on 21 May 2019. That decision was upheld by the Supreme Court of Appeal on 8 May 2020. Various reforms were ordered by the courts and legislated by Parliament, most notably a change in the electoral system, from a simple majoritarian, or first-past-the-post (FPTP), system to a two-round system where the winner must receive over 50 per cent of the votes.

A fresh presidential election was held on 23 June 2020 under the supervision of a new commission, and Malawi made history in Africa on 27 June when the opposition candidate was announced victorious in the fresh presidential election. The repeat election was held in a largely peaceful environment, and the Malawi Electoral Commission (MEC) did not receive any complaints following the announcement of the result.

Given the remarkable events that took place in Malawi, the Executive Committee of the Electoral Commissions Forum of SADC countries (ECF-SADC) recommended that the MEC should be given the opportunity to share its experience regarding the fresh presidential election of 23 June 2020 with other member commissions. The ECF-SADC in collaboration with the International Institute for Democracy and Electoral Assistance (International IDEA) organized a webinar on 31 August 2020 to strengthen peer review among electoral management bodies (EMBs) in the region of the Southern African Development Community (SADC). The webinar provided a platform for peer-learning concerning both the conduct of the fresh presidential election in Malawi and emerging regional trends in electoral justice.