

## Chapter 2

# Legal and Administrative Framework

As already indicated, one of the notable features in Malawi was the existence of carefully designed transitional mechanisms intended to facilitate national decision-making in the interregnum between the June 1993 national referendum and the elections of 17 May 1994. The legal structures which governed the organisation and conduct of the elections for the National Assembly and the Office of the President were thus designed to ensure free and fair multi-party elections. These structures were also aimed at neutralising the influence that the one-party system was likely to have had on the electoral process in favour of the ruling party.

The principal new legal instruments enacted during the interregnum were the National Consultative Council Act 1993, the Constitution (Amendment) (No. 3) Act 1993 and the Parliamentary and Presidential Elections Act 1993.

### **The National Consultative Council**

The National Consultative Council (NCC) was established by the National Consultative Council Act 1993 to oversee the transition from the one-party political system to a multi-party one following the June 1993 referendum.

The Council consisted of representatives of all political parties which had registered by 30 November 1993 under the Political Parties (Registration and Regulations) Act 1993. Each political party was entitled to designate not more than seven representatives on the Council.

The functions of the NCC were as follows:

- to participate in the formulation of policies and in the initiation of legislative measures necessary for the transition;
- to initiate such amendments to the Constitution as were necessary to facilitate the transition to the first multi-party general elections;
- to prepare the draft of a new electoral law suitable for a multi-party political system, to be enacted by Parliament;
- to review the law governing the registration of political parties for the attention of Parliament;
- to prepare the draft of a new Constitution suitable for a multi-party political system to become effective immediately after the first multi-party general elections; and
- to prepare the draft Bill of Rights either as part of the new Constitution or as a separate Act of Parliament.

### **The National Executive Committee**

The National Executive Committee (NEC) was also established by the Act which established the NCC. The Committee consisted of two representatives each designated from amongst the seven representatives of each of the political parties on the NCC.

The functions of the Committee were:

- to monitor the implementation of policies governing the transition;
- to receive such information relating to or affecting the transition process as required from the Government;
- to monitor the activities of all public offices which, in the view of both the Committee and the Cabinet, had a bearing on the management of the transition;
- to consult with the Cabinet on any measures relating to the transition warranted in the management of the transition;
- to bring to the attention of the Cabinet for corrective action any abuses of political authority, public finances or property in the Government or in any statutory body for political campaigning or gain;

- to monitor the implementation by the Government of legislation relating to the transition; and
- to monitor the activities of the Malawi Broadcasting Corporation (MBC) to ensure equal and fair access and coverage of the activities of all political parties generally and, in particular, in relation to the campaign for the first multi-party general elections.

A decision of the Council or the Committee requiring legislative or executive action of the Government had to be submitted by the Secretary of the Council (who was also Secretary of the Committee) to the Minister responsible for the matter in question. In turn, the Minister had to refer the matter to the Cabinet with dispatch for necessary action.

If the Cabinet did not agree with the decision of the Council or the Committee on any matter referred to it, the Cabinet had the right to refer the matter back once to the Council or Committee for reconsideration, stating in writing the reasons for doing so. If the Council or the Committee thereafter confirmed or varied its earlier decision, the Cabinet was obliged to take necessary action expeditiously to give legislative or executive effect to the decision in question.

The Council and the Committee were to cease functioning when the new government resulting from the elections assumed office.

### **Bill of Rights**

The Constitution (Amendment) (No. 3) Act 1993 established a regime in the Constitution for the protection of fundamental rights and freedoms. Among the newly created freedoms were those of expression, assembly and association. These were essential to the holding of free and fair multi-party elections.

### **The Electoral Commission**

An independent Electoral Commission was established by the Parliamentary and Presidential Elections Act 1993.

The Members of the Commission were recommended by the NCC for formal appointment by the President. There were eight members, seven of whom were in fact nominees of the seven political parties represented on the Council, the Chairperson being the eighth member. (The eighth political party, the CSR, registered too late to have a nominee on the Commission.)

The Commission was charged with the general responsibility of conducting the general elections. Specifically, the Commission was expected to:

- determine the number of constituencies for the purposes of the general elections and to undertake or supervise the demarcation of boundaries of constituencies;
- organise and direct the registration of voters;
- devise and establish voters' registers and ballot papers;
- print, distribute and take charge of ballot papers;
- approve and procure ballot boxes;
- establish and operate polling stations;
- take measures for ensuring that the elections were conducted under conditions of complete freedom and fairness;
- establish the security conditions necessary for the conduct of the elections;
- promote civic education concerning the elections through the media and other appropriate and effective means; and
- ensure compliance with the Parliamentary and Presidential Elections Act 1993 and generally adopt measures necessary to guarantee that the elections were free and fair.

In discharging its functions, the Commission and every member thereof was required to act and be seen to act independently of any public officer, organ of the Government, political party, candidate, person or organisation.

For the purpose of accountability, the Commission and each of its individual members were answerable and required to report directly to the President on the overall fulfilment of the functions of the Commission.

A member of the Commission held office from the date of his/her appointment until 30 days after the publication in the Gazette of the national results of the general elections.

The Clerk of Parliament and the officers subordinate to him were also required to serve as election officers and to be attached to the Commission and act in its service for the conduct of an election.

The Commission was empowered to request by writing to the Secretary to the President and Cabinet the secondment of such number of other public officers as was required for the conduct of the elections. Any public officer who was so seconded had to perform his duties solely under the direction of the Commission.

Among the other principal features of the Act were highlights of the provisions for registration of voters, nomination of candidates to the National Assembly, campaigning by political parties, the voting process and international observers.

### Registration of Voters

The Act conferred the franchise on citizens of Malawi who were 18 years of age and over. Each eligible person was entitled to register once only in the area in which he/she was ordinarily resident, born, employed or carried on business. The Commission was required to establish registration centres in every constituency throughout the country.

The eligibility of a person wishing to register had to be proved to the satisfaction of the Registration Officer. This was done either by:

- (a) producing a passport, driver's licence (even if expired), tax certificate or marriage certificate, employment identity card, employment discharge certificate, birth certificate, or similarly authentic document of identity;
- (b) written, verbal or visual testimony of
  - (i) the Chief or Village Headman or a registered voter of the area; or
  - (ii) the Registration Officer.

When a person was registered, he/she was issued with a voter's registration certificate in the prescribed form. If a registration certificate was destroyed, defaced, torn or otherwise damaged, a duplicate copy was issued upon satisfying the Registration Officer of that fact.



*Professional, dedicated and committed... Electoral Commission Chairperson Mrs Justice Anastasia Msosa (centre) and her fellow Commissioners, here with Commonwealth Observer Group Chairman Dato' Musa Hitam (right)*

A political party or its representative or any aggrieved person eligible to be registered was entitled to complain or appeal to the Commission, which was empowered to determine such complaint or appeal.

Each voters' register was to be open to inspection by the general public, political parties and international observers.

### **Nomination of Candidates**

The Act stipulated, *inter alia*, that each parliamentary candidate should be a citizen of Malawi, of the minimum age required under the Constitution for election to the National Assembly and able to speak and read the English language well enough to take an active part in the proceedings of the Assembly. He/she was also expected to establish being a registered voter in the constituency. The Commission was expected to appoint a place, date and time for receipt by the Returning Officer of the nominations of candidates for each constituency, which should be not less than 14 days after the order notifying the elections. Nomination was to be made by at least 10 voters registered in the constituency concerned and to be accompanied by a deposit.

Similar provisions were set out for election to the Office of the President.

A notable feature of the nomination process was the right of a person whose nomination was rejected to appeal to the High Court, which was required to hear and rule on the matter at the earliest opportunity.

### **Campaigning by Political Parties**

The Act set out provisions which governed the campaign activities of the political parties. It stipulated that all parties had the right to campaign in an election. It fixed the period of campaign in public at two months – closing 48 hours before the opening of the poll. However, a longer period was specially permitted for the 1994 election campaign.

A political party had to notify the District Commissioner in writing and the Officer-in-Charge of Police of the area in which campaigning in a public place was to be conducted. Permission to conduct any such campaign activity was granted on the basis of the notification received first by the District Commissioner.

The Act guaranteed complete and unhindered freedom of expression and information to every political party representative, member or supporter thereof during the election campaign period. However, the use of language which was inflammatory, defamatory or insulting, or which constituted incitement to public disorder, insurrection, hate, violence or war was prohibited. The Commission had the power to prescribe a Code of Conduct to be observed by every political party in conducting its election campaign.

The Act also conferred the right of every political party to have the substance of its campaign propaganda reported on radio news broadcasts of the MBC and in any newspaper in circulation in Malawi. Where the Commission made arrangements with the MBC to allocate radio time to political parties during the campaign period, equal time had to be allocated to every political party (see Chapter 4).

### **The Voting Process**

Voting was to take place by secret ballot. Ballot papers would carry distinctly identifiable features for each candidate for election as Member of Parliament and for each presidential candidate. These included the name of the candidate printed clearly and legibly, or an abbreviation thereof and his/her election symbol or the election symbol of his/her party and any other particulars which identified the candidate distinctly (see election symbols at *Annex IX*).

Voting hours were prescribed to begin at 6.00 a.m. and close at 6.00 p.m. The first persons required to vote at each station were the Presiding Officer and other polling station staff, representatives of political parties and officers responsible for ensuring order and security at

the polling stations. Other persons were required to vote according to the order of their arrival at the polling stations.

The procedure for voting required a voter to present his/her voter's registration certificate at the polling station. Once the polling staff were satisfied with the identity of the voter, the officer concerned marked the voter's name and registration number. The right index finger of the voter was then dipped in indelible ink. The voter was handed a set of perforated ballot papers for the parliamentary candidates in the constituency and one specially printed envelope (sample ballot at *Annex X*). He/she was next directed to the voting booth for the parliamentary poll and required to tear out the ballot paper indicating his/her preference, place it in the envelope and discard the remaining ballots into a 'discard box' positioned inside the voting booth. The voter then left the booth and placed the envelope in the ballot box provided for the parliamentary elections, which was sited in the open where it could be seen by all polling station officers and others present.

The voter was then ushered to the desk which dealt with the presidential election where the right index finger was first checked to verify that it had been dipped in the indelible ink. Thereafter, the voter's left index finger was dipped in indelible ink and he/she was given a set of perforated ballot papers for the presidential candidates and another specially printed envelope of a different colour. The procedure for balloting for the presidential candidate of the voter's choice was identical to that for Members of Parliament.

### **International Observers**

The Act provided for international observers to verify the various stages of the elections. The terms of reference of international observers were defined as follows:

- to verify and monitor the impartiality and the functioning of the Commission and its officers in conformity with the Act;
- to verify and monitor the impartiality and legality of decisions taken by the Commission and its officers in settling disputes;
- to verify and monitor the registration of voters;
- to observe the campaign;
- to verify and monitor the voting process;
- to verify and monitor the determination of the results of the elections at all stages; and
- to observe access to and use of the media.

International observers were required to report any irregularities observed to the Commission or to its competent officers. A wide range of rights were conferred on international observers, the principal ones being:

- unimpeded access to all election events and to observe all aspects of the civic education programmes, the registration of voters, the nomination of candidates, the campaign, the voting and the counting of votes at all stages;
- freedom of circulation throughout Malawi;
- freedom to communicate with any political party and any organisation or person;
- access to information transmitted by or to the Commission and its officers; and
- access to complaints and responses about any occurrence on matters related to the conduct of elections.