

EISA gratefully acknowledges the generous financial support for this project from the Swedish International Development Agency (Sida), Harare and the Royal Danish Embassy (DANIDA), Pretoria



PROMOTING THE EFFECTIVENESS OF DEMOCRACY PROTECTION INSTITUTIONS IN SOUTHERN AFRICA

THE MALAWI HUMAN RIGHTS COMMISSION AND THE OFFICE OF THE OMBUDSMAN



Nandini Patel



EISA RESEARCH REPORT No 46



ISBN 978-1-920446-20-8



Order from: publications@eisa.org.za

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BY
NANDINI PATEL



2009

Published by EISA
14 Park Rd, Richmond
Johannesburg
South Africa

P O Box 740
Auckland Park
2006
South Africa
Tel: 27 11 482 5495
Fax: 27 11 482 6163
Email: eisa@eisa.org.za
www.eisa.org.za

ISBN: 978-1-920446-20-8

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First published 2009

EISA is a non-partisan organisation which seeks to promote democratic principles, free and fair elections, a strong civil society and good governance at all levels of Southern African society.



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PREFACE

This research report is the culmination of a project that EISA embarked on over three years, from 2007 to 2009, focusing on 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa'. The project, one of the components of a regional programme guided by the theme 'Consolidating Democratic Governance in the SADC Region: Phase II', has received financial support from the Swedish International Development Cooperation Agency (Sida) regional office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa. The seven elements of this regional programme are:

- Election quality
- Institutions of governance
- Gender equality and electoral processes
- SADC regional governance architecture
- The EISA annual symposium
- Regional resource centres
- The EISA democracy encyclopaedia

The overarching thrust of the programme is to improve governance architecture in Southern Africa, with a view to nurturing and consolidating democracy and sustaining peace and political stability, which are the key prerequisites for sustainable development and the eradication of poverty. The focus of this regional programme is consistent with EISA's vision of 'an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment'. The primary goal is to enhance the quality of electoral processes, improve the capacity of key national and regional institutions that are central to the achievement of democratic governance in the SADC region, and help to reverse gender imbalances in political participation and representation. The specific objectives of the programme are to:

- improve the quality of elections, with a view to advancing democratic governance;
- enhance the effectiveness of selected governance institutions;

- improve gender equality in the realm of governance;
- promote democratic governance and political integration through the SADC Organ on Politics, Defence and Security and its strategic plan, SIPO;
- expand and deepen the knowledge base in relation to democratic governance in the SADC region.

The aim of this particular project is to contribute to enhancing the institutional effectiveness of governance institutions.

Conventionally, studies of and research relating to the state and governance have tended to focus on the traditional arms of government – the executive, the legislature and the judiciary – and the separation of powers among them, with some attention paid to the bureaucracy or civil service. This focus has reduced the role of the state in governance to these organs of government, to the exclusion of other equally important statutory bodies established by the government itself, namely the democracy protection institutions (DPIs).

Although the establishment of DPIs is one of the more effective methods of promoting democratic governance in the SADC region, these institutions have received little attention in the existing policy and academic discourse on democracy and governance. With this research project EISA aims to fill this lacuna in the democracy and governance debate in Southern Africa by restoring these institutions to their rightful place.

DPIs are those statutory institutions established by governments specifically to protect democratic governance. They may be enshrined in the country's constitution, supported by legislation, or created by legislation. The constitutional provisions and enabling legislation reinforce their significance in governance architecture at the national level.

At the continental level, the African Union (AU) has also come to realise and recognise the importance of DPIs to the promotion of democratic governance. Article 15 of the African Charter on Democracy, Elections and Governance, which was developed with technical assistance from EISA and was ultimately adopted by the AU Heads of State Assembly in Addis

Ababa, Ethiopia, in January 2007, specifically elaborates principles and best practice relating to DPIs.

This article commits AU member states to:

- establish public institutions that promote and support democracy and constitutional order;
- ensure that the independence or autonomy of the said institutions is guaranteed by the constitution;
- ensure that these institutions are accountable to competent national organs;
- provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

The principles represent a clear commitment by African governments to strengthening the DPIs and promoting their institutional effectiveness. The aims are admirable, but, as the English aphorism goes, the proof of the pudding is in the eating. It is one thing for African governments to make such commitments, it is quite another to translate them into practice. In other words, as this report will illustrate, African governments do not always 'walk the talk'. Put somewhat differently, few African countries practise what the African Charter on Democracy, Elections and Governance preaches.

In 2008 EISA analysed three democracy protection institutions that are central to the achievement of democratic governance in the SADC region. These were: the Office of the Ombudsman, national human rights institutions (NHRIs), and electoral management bodies (EMBs) in 14 SADC member states. The analysis, which was guided by a list of questions, revealed different stages of institutional development in each country and established that the remit of the institutions differs from one country to another.

In 2009 the focus of the project shifted from the normative aspects addressed in the first stage to an assessment of the performance, effectiveness, independence and relationships of these institutions to other arms of government, other democracy protection institutions, and civil society,

within their operating environment. Empirical research was conducted by researchers in each country between March and July 2009 into two institutions – the Office of the Ombudsman and the national human rights commission – in the eight countries: Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Tanzania and Zambia.

Conventionally, the Office of the Ombudsman is established to protect the people against violations of human rights, the abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making governments responsive to people's needs and public servants more accountable to members of the public. This office has emerged as an important avenue for individual complaints against the actions of public authorities.

Typically, national human rights institutions are mandated to protect and promote human rights. A number of countries have established NHRIs which use the Ombudsman concept. The genesis of NHRIs lies in a resolution passed in 1946 by the United Nations Economic and Social Council inviting member states to consider the desirability of establishing local information groups or human rights committees to serve as vehicles for collaboration with the United Nations.

In 1991 delegates to the first International Workshop on National Institutions for the Promotion and Protection of Human Rights agreed on the Paris Principles, which were adopted a year later. The Paris Principles are a set of broad general standards which apply to all NHRIs, regardless of their structure or type. They are adopted by NHRIs and endorsed by the UN Commission on Human Rights and the UN General Assembly. Among the main principles are that the NHRI must:

- be independent and be guaranteed by statute or the constitution;
- be autonomous from government;
- be plural and diverse in its membership;
- have a broad mandate based on universal human rights standards;
- have adequate powers of investigation;
- have sufficient resources to carry out its functions.

The mandates of these two DPIs to address administrative and executive impropriety and ensure the respect and promotion of human rights suggest that they play an important role in exercising oversight over the executive and in promoting democracy, human dignity, and the rule of law. The overall objective of this research project, therefore, was to investigate the extent to which they have translated their mandate into action, thereby advancing and protecting democracy. The research examined the performance of the two institutions with regard to the following: legal framework, the effectiveness of institutional governance, independence, resources, and interaction with the other arms of government, the public, and non-state actors.

In July 2009 EISA convened a one-day policy dialogue forum during which senior officials of the 12 DPIs covered in the research, as well as the researchers, came together to deliberate on the findings. Thereafter, the researchers refined their reports, taking into account the input of the DPI officials. The culmination of the research project is eight country reports, in which the political, operational and resource conditions and constraints under which these institutions function are analysed.

The mere presence of offices of the Ombudsman and NHRIs in the SADC region is, in itself, an encouraging step, although not all SADC countries have these institutions in place. Where they do exist they do so in a variety of forms, with different nomenclatures, and each has its own character.

I acknowledge with gratitude all those whose input resulted in the successful implementation of the project. First and foremost, EISA's Executive Director, Denis Kadima, who contributed immeasurably to the conceptualisation of the regional programme on consolidating democratic governance in the SADC region, of which the DPI project is a part. I am grateful too to Ebrahim Fakir, Manager of Governance Institutions and Processes at EISA, for guiding the research process and editing the reports, thereby ensuring their quality. Without the selfless commitment and dedication of the project coordinator, Catherine Musuva, this project would not have seen the light of day. I take my hat off to her for her hard work.

The project would not have succeeded without the dedication of our research associates, based in the eight countries, who conducted the fieldwork. I

am equally indebted to the officials and staff of the democracy protection institutions, who supported the project with information and participated in the policy dialogue, and to the various respondents who willingly supplied the researchers with additional insights.

It would be remiss of me not to extend a special word of thanks to Professor Kader Asmal, former member of the South African Parliament and former Cabinet minister, who is currently a professor of law at the University of the Western Cape and who, despite his busy schedule, graced our multi-stakeholder dialogue workshop with his presence giving a thought-provoking and insightful keynote address on DPIs and setting the scene for what proved to be a lively discussion among the participants. I am pleased to report that some of Professor Asmal's ideas and thoughts have found a place in the reports.

Various other colleagues at EISA played their own distinctive roles in supporting this project and their contributions deserve acknowledgement. They are Kedibone Tyeda, Nkgakong Mokonyane, Maureen Moloi, Jackie Kalley, Alka Larkan, Oliva Fumbuka, Edward Veremu, Dipti Bava, Wallen Chidawanyika and Usha Kala. Our editor, Pat Tucker, and typesetter, Sue Sandrock, have done a marvellous job controlling the quality of our publications, for which we are hugely thankful.

Finally, I am profoundly grateful to our partners, Sida Regional Office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa, for their generous financial support.

In conclusion, I hope and trust that this research report will assist policy-makers to identify areas of organisational and institutional reform in order to improve the effectiveness, efficiency and responsiveness of DPIs and, in the process, deepen and entrench democratic governance in the SADC region.

*Dr Khabele Matlosa
Programmes Director-EISA, Johannesburg
September 2009*

ABOUT THE AUTHOR

Dr Nandini Patel is Head of the Department of Political Leadership at the Catholic University of Malawi. She is also Chairperson of the Institute for Policy Interaction, a governance NGO. Her research focus is democratic governance and she has several publications in this field.

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ACKNOWLEDGEMENTS

This report is part of a wider project entitled: 'Consolidating Democratic Governance in the Southern African Development Community'. This important and timely study was made possible by the support and assistance rendered by a number of staff members of the Malawi Human Rights Commission and the Office of the Ombudsman in Malawi.

I wish to express my profound gratitude to the Ombudsman, Enock Chibwana, for providing his invaluable insights and to Dr Aubrey Mvula, the executive secretary of the Human Rights Commission, for sparing his precious time to engage with the author in spite of the enormous demands imposed by the presidential and parliamentary general elections which were held on 19 May 2009. The Secretariat at the Ombudsman's office was extremely helpful and forthcoming with documentary resources and sound guidance. Mr Franklin Kalawe, the executive secretary; Martha Chalabade, chief investigations officer, and Pilila Longwe all displayed refreshing candour during interviews.

Human Rights commissioners Dr Wiseman Chijere Chirwa, John Kapito and Ollen Mwalumbunju were unstinting in divulging experiences gleaned during their tenure and displayed admirable balance and equity in their analysis.

Dr Edge Kanyongolo shared his incisive and invaluable insights on these two institutions in his own inimitable manner.

Mr Bakali Maulidi was entrusted with the essential but arduous task of data collection, doing so with unflagging fortitude and good humour.

Mr Rafiq Hajat, executive director of the Institute for Policy Interaction (IPI), contributed cogent input from his diverse store of experience to enhance this report in various ways.

Finally, I thank the board of EISA for the confidence implied in awarding this assignment – I pray that I have justified the trust that they have invested in me.

ABBREVIATIONS

ACB	Anti-Corruption Bureau
BCHI	Body of Case Handling Institutions
DDC	District Development Committee
DEC	District Educational Committee
DPP	Director of Public Prosecutions
EISA	Electoral Institute of Southern Africa
HRC	Human Rights Commission
IRC	Industrial Relations Court
LC	Law Commission
MBC	Malawi Broadcasting Corporation
MHRC	Malawi Human Rights Commission
MP	Member of Parliament
NICE	National Initiative for Civic Education
NCT	National Compensation Tribunal
OMB	Office of the Ombudsman
PEF	Public Expenditure Fund
SADC	Southern African Development Community
VDC	Village Development Committee

EXECUTIVE SUMMARY

The dawn of the multiparty dispensation in Malawi in 1994 brought about a liberal Constitution, which, among other things, created a number of independent bodies, otherwise named watchdog bodies, whose purpose was to safeguard the road to democracy with a system of checks and balances. Six institutions were particularly designated in the Constitution for this purpose, namely, the Anti-Corruption Bureau (ACB), Office of the Ombudsman (OMB), Director of Public Prosecutions (DPP), the Malawi Human Rights Commission (MHRC), the National Compensation Tribunal (NCT) and the Industrial Relations Court (IRC).

Together these institutions play comprehensive and complementary roles in the democratic consolidation process. This research focuses on the OMB and the MHRC, which, respectively, originate from Chapters 10 and 11 of the Constitution of Malawi. The task of the MHRC is to safeguard a wide range of rights against violation, while the OMB is entrusted with the task of handling complaints of abuse of authority by public institutions.

The research concentrates on four key areas:

- Institutional governance and effectiveness
- Interaction with the government
- Interaction with other democracy protection institutions
- Interaction with the public and other non-state actors

A qualitative research approach was emphasised, with empirical data gleaned through research questions developed specifically for this purpose at a methodology workshop held by EISA in Johannesburg in February 2009.

FINDINGS ON THE MHRC

- Section 131(a) and (b) of the Constitution provides for a close relationship between the MHRC and two other constitutional bodies, namely, the Ombudsman and the Law Commission.

Research shows that these two bodies have been fully involved in the working of the MHRC over the years.

- The number of cases the commission receives has risen from 78 in 1999 to 691 in 2007, with an exceptional 1 136 cases in 2004.¹ These cases cover a wide range of rights issues, as is shown in tabular form in this report.
- The commission has submitted regular annual reports, the quality of which has improved substantially over the years with the inclusion of graphs, charts and tables. The commission has also undertaken and disseminated a number of special studies/research in the areas of gender, labour rights and political and religious intolerance.
- Recently the MHRC has tried to pursue ways of enhancing interaction with civil society and the public at large. To this end it has opened regional offices.

CHALLENGES FACING THE MHRC

Though the MHRC has been in existence for over a decade it faces formidable challenges, among them inadequate investigation skills and lack of enforcement powers which are further compounded by its inaccessibility to rural masses. The commission has limited or almost negligible input in policy-making processes and some commissioners feel the institution does not seem to work consistently on policy matters but in an ad hoc manner, on a case-by-case basis.

A critical aspect impinging upon the work of the commission is the absence of financial independence. The MHRC is funded from the Consolidated Fund, that is, the government budget, which is under the control of the Treasury, thereby making it vulnerable because of financial constriction. This could be avoided by placing the allocations of democracy protection institutions (DPIs) within the 'Protected Expenditure Fund' (PEF), as provided for in s 183 of the Constitution. The PEF is currently used to cover the salaries of the president, vice-president, judges and the Ombudsman, as well as the costs of Parliament.

Currently the tenure of all the commissioners ends simultaneously, thereby leaving a vacuum.

Both civil society and the government fail to understand properly the legal framework of the commission. Civil society perceives it as a government body, while the government views it as a non-governmental organisation (NGO). This leads to suspicion and mistrust on both sides.

FINDINGS ON THE OMB

The Office of the Ombudsman enjoys a high public profile and wide respect. It has been well funded by external donors and has, over the years, established good interaction with other case-handling bodies.

The number of cases it receives has, however, resulted in a huge backlog. Another major challenge is posed by the limited options open to the complainant after the Ombudsman has made a determination. There are major flaws in record-keeping, compounded by inefficient administrative procedures. Interaction with civil society organisations (CSOs) is inadequate and the office has yet to develop a feasible sustainability plan.

CONCLUDING OBSERVATION

While these institutions may originally have emerged as a result of ‘external pressure and support’ and were expected, in some quarters, to be mere democratic ‘window dressing’, they have now taken on a life of their own – with a profound impact on the consolidation of democracy – providing viable channels for redress in cases of human rights violations and of abuse of power or authority by organs of the state.

INTRODUCTION

Democracy protection institutions are established under liberal constitutions specifically to safeguard democratic governance. It has been observed that to date these institutions have received comparatively little attention in the policy and academic discourse on democratic governance in the Southern African Development Community (SADC) region. Through this project EISA endeavours to fill this research gap by focusing on these institutions. This study scrutinises two such institutions, namely, the Office of the Ombudsman in Malawi and the Malawi Human Rights Commission, in order to enrich the debate with factual and germane data.

The study assesses the interface between the legal frameworks of the two institutions and the practical realities surrounding their operation. It focuses on the following areas that are critical to the effectiveness of the institutions:

- Institutional governance and effectiveness
- Interaction with the government
- Interaction with other democracy protection institutions
- Interaction with the public and other non-state actors

The above issues also inform the structure of the report and the findings are presented in the same order, first for the MRHC and then for the Ombudsman.

Data collection posed a great challenge as neither institution has an efficient system of record-keeping. The Office of the Ombudsman has not been punctual in producing annual reports (the Annual Report for the year 2004 is still in process). In the case of the Human Rights Commission, the library is disorganised and electronic data were apparently lost because of technical problems, a situation that is currently being corrected. Both headquarters and the regional offices have very scanty data.

METHODOLOGY

The main emphasis was on a qualitative research approach, though quantitative data were employed in assessing the number of cases handled and the financial tabulations in the resources section.

A sampling approach was applied by selecting two respondents at regional level and three at national level. Interviews were conducted using the questionnaire developed specifically for this purpose at the methodology workshop held by EISA in Johannesburg in February 2009. The interviewees varied from middle to senior managerial position-holders, drawn from departments in the two institutions. The final outcome was complemented by reference to the Constitution, legal frameworks and annual reports of the two institutions, as well various other documents that served as a literature review and as reference points for effective analysis of the interviews.

CONTEXTUAL BACKGROUND

For 30 years after it gained its independence, in 1964, Malawi endured one of the most repressive dictatorships in Africa. Control of information, a patronage system, and repression constituted the backbone of Kamuzu Banda's unrelenting grip on power. During this period the judiciary was tightly controlled, political opposition ruthlessly crushed and the human rights record was appalling (Meinhardt & Patel 2003).

The trend towards regime change in the 1990s ushered in an era of liberal democracy and, like most other constitutions drafted during that period, Malawi's Constitution, adopted in 1994, enshrines a fairly comprehensive section on human rights, with corresponding safeguards. The operation of the rule of law in Malawi, however, is complicated by the fact that there are two legal regimes – traditional customary law and state law – and the two are not always in concert. Malawi has been described as a 'hybrid, "neopatrimonial" state, where there is a framework of formal law and administration but the state is informally captured by patronage networks' (Booth, Cammack, Harrigan, Kanyongolo, Mataure & Ngwira 2006). This dichotomy obviously has a bearing on all aspects of governance.

Although, with the dawn of multiparty democracy, Malawi has become more responsive to regional and sub-regional initiatives, it has not yet signed the African Charter on Democracy, Elections and Governance adopted by the African Union in 2007. However, Chapter IV of the Constitution, pertaining to provisions on human rights, is largely guided and inspired by the Universal Declaration of Human Rights (1948) and international covenants on human rights, which provide the philosophical and legal basis for the formulation of national legislation and institutions for the effective protection and promotion of human rights within fledgling democracies.

The provisions laid down in Chapter IV cannot be altered without the approval of the people through a referendum. Malawi is a signatory to a

range of international instruments touching on various aspects of human rights, however, domesticating these international instruments through corresponding legislation and policies has been a challenge.

There was, therefore, a grave need to incorporate these philosophical and legal frameworks into national institutional frameworks, as laid out in the 'Paris Principles' adopted by the General Assembly of the United Nations (48/134 of 20 December 1993). This provided the institutional blueprint for nations aspiring to ensure the protection and promotion of human rights by endowing such institutions with the capacity and competence to promote and protect human rights and providing them with broad mandates which must be outlined clearly in a constitutional or legislative text. The Malawi Constitution satisfies this requirement fully by providing, in Chapter XI, for the Malawi Human Rights Commission.

The Office of the Ombudsman is another constitutional body that fits into the category of institutionalised human rights defenders. Although some countries have given the institution different names, such as 'Protector of the Public', 'Defender of the People', or 'Inspector General of Government', Malawians preferred to maintain the original name (see Commonwealth Ombudsman 2007 and annual reports of Malawi's Ombudsman).

After political pluralism was legitimatised by the referendum in 1993 pressure groups such as the United Democratic Front (UDF) and the Alliance for Democracy (AFORD), which later registered as political parties, alluded to the need to create the institution of the Ombudsman in their respective manifestos, and, during the constitutional hearing, participated in creating the constitutional provision for this institution (Chirwa 2003). Consensus was achieved and the concept of the Ombudsman was provided for in the 1994 Republican Constitution.

A number of institutions, such as the Law Commission (LC), the Malawi Human Rights Commission, the Ombudsman and the National Compensation Fund, which are commonly regarded as 'democracy watchdogs' or protection institutions, were established after the adoption of the Constitution in 1994. In the course of the last decade 14 of these institutions have constituted a forum called the Body of Case Handling

Institutions (BCHI), which endeavours to avoid overlaps both within their respective jurisdictions and in relation to other legal institutions.¹ The forum further aims to improve coordination between institutions in:

- the administering of the complaints handling sector;
- maximising scarce resources through joint initiatives;
- finding practical solutions to problems arising from overlapping or unclear legislative mandates.

One line of thought is that the proliferation of such bodies can lead to unnecessary overlaps in mandate and jurisdiction and may thus be counter-productive. This view is countered, however, by the belief that countries such as Malawi, which have emerged from dark phases of authoritarian rule, need to fill a glaring vacuum in most of these areas and thus require such institutions. Furthermore, it is essential to have a backstop in case one institution falters somewhere along the line (Chibwana 2009).

While setting up these institutions may be a major step towards democratisation, their efficacy and performance relies on the depth of democratisation that has been inculcated. In Malawi the pace of democracy has been slow and has, at times, been halted or thwarted by incidents such as abortive attempts to extend the term of office of the president. Such events tend to put the country into the category of an 'electoral democracy', where elections may take place regularly but they do not necessarily enhance the growth of democratic institutions.

Malawi may be described as one of those countries where a promising beginning following a democratic transition was subsequently undermined by formidable challenges, which threatened to reverse democratic gains made in the initial years. Thus, institutions like the MHRC and the OMB, in addition to facing resource constraints, also have to cope with challenges of political and state interference.

The resource constraints emanate from the fact that the two institutions must seek funding from the government, which automatically renders them prone to state coercion.

Despite the constraints, the analysis of their performance over a decade shows that these institutions do play a substantial role in furthering democracy and good governance on the one hand, while confronting numerous challenges and drawbacks on the other. This study is an attempt to analyse and evaluate their relevance and efficacy.

CONSTITUTIONAL AND LEGAL FRAMEWORK

The Malawi Human Rights Commission became fully functional on 7 April 1999 in terms of ss 129-131 of Chapter XI of the Constitution of the Republic of Malawi. The MHRC draws its mandate and authority from the Constitution and from the MHRC Act. The independence of the commission is guaranteed by the Human Rights Commission Act (Chapter 3:8 of the laws of Malawi), which provides that all authorities, including all organs of government, bodies and persons, shall recognise the status of the Human Rights Commission as a national institution independent of the authority or direction of any other body or person.

Section 129 of the Constitution stipulates the objective of the commission, stating that:

there shall be a Human Rights Commission, the primary function of which shall be the protection and investigation of violations of the rights accorded by this Constitution or any other law.

The scope and limitation of the MHRC's mandate is defined in s 130, which states that the Commission shall,

with respect to the application of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by, or under this Constitution or any other written law, but shall not exercise a judicial or legislative function and shall not be given powers to do so.

The MHRC Act of 1998, in conformity with the international principles relating to the Status of National Human Rights Institutions (the Paris Principles), specifically mandates the MHRC to be a source of human

rights information for the government and the people of Malawi. The Act also mandates the commission to be competent to protect and promote human rights in every respect and in the broadest possible sense, including, but not limited to the following:

- assisting in educating the public and promoting awareness and respect for human rights;
- promoting human rights – particularly of vulnerable groups such as children, illiterate persons, people with disabilities and the elderly;
- deliberating, considering and making recommendations regarding human rights issues on its own volition, or as may be referred to it by government;
- studying the status and effect of legislation, judicial decisions and administration provisions for the protection and promotion of human rights;
- submitting to the president, Parliament, and so on, advisory opinions, recommendations, proposals or reports regarding human rights.

The Act further entrusts the commission with the responsibility to:

- comment publicly on violations of human rights;
- publicise human rights for the increase of public awareness;
- exercise unhindered authority to visit places of detention, including police cells, with or without notice.

The commission's strategic plan (2006-2010) commits it to ensuring that:

- people in Malawi, particularly the most vulnerable groups, know, understand and freely exercise their human rights;
- the authorities in Malawi, including the private sector, respect people's rights, including their economic, social and cultural rights, and are held accountable when those rights are violated;
- the MHRC attains effective partnership with government and non-governmental organisations and other civil society organisations;
- the commission is consolidated as a visible, accessible, outcome-

oriented and effective national focal point for human rights promotion and protection.

THE OFFICE OF THE OMBUDSMAN

In established democracies in which the rule of law is entrenched the function of the Ombudsman is largely confined to addressing the shortcomings of large governmental organisations. In nascent democracies where checks and balances among the arms of government are not effective, where human rights violations are commonly compounded by institutionalised corruption, and where the attainment of good governance is a distant dream, the role of Ombudsman assumes a wider dimension. It is in this context that the Office of the Ombudsman in Malawi came into existence on 1 January 1995. Its establishment complied with Chapter X of the Malawi Constitution, which devotes ss 120 to 128 to the institution. Section 123 of the Constitution empowers the Ombudsman to investigate

cases where it is alleged that any person who has suffered injustice, and it does not appear that there is any remedy reasonably available by way of proceeding in the court or by way of appeal from a court or where there is no other practicable remedy.

This section is further clarified by the Ombudsman Act of 1996, which stipulates that

the Ombudsman shall inquire into and investigate in accordance with the provision of the Act ... any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such officials which would be regarded as oppressive or unfair in an open and democratic society.

It is therefore quite clear that the Ombudsman in Malawi is empowered to delve into any case, be it related to public institutions or the private sector.

INSTITUTIONAL GOVERNANCE AND EFFECTIVENESS

THE MHRC

Appointments

The commission has nine appointed members, of which three are full-time commissioners, augmented by the Law Commissioner and the Ombudsman as ex-officio members. The MHRC Act of 1998 stipulates the composition of the commission and democratic and transparent procedures, which give individuals from diverse backgrounds the opportunity to apply for appointment as commissioners. These procedures are as follows:

Step 1 – A public advertisement signed jointly by the Law Commission and the Ombudsman, directed to reputable organisations representative of Malawian society and that are wholly or largely concerned with the promotion of rights and fundamental freedoms guaranteed by the Constitution.

Step 2 – The advertisement invites all appropriate organisations to nominate up to two persons who are independent, non-partisan and of high integrity and standing, from within or outside the organisation for appointment as members of the commission.

Step 3 – The Law Commissioner and the Ombudsman jointly assess the reputation of the nominating organisations and of the nominated persons and recommend nominated persons who will be formally appointed by the president.

Step 4 – A list of nominating organisations, the names of persons nominated and the resultant membership of the commission shall be published in the *Gazette*.

Tenure

The Act specifies that commissioners shall hold office for a term of three years and be eligible for reappointment.

When making recommendations for appointment after the expiry of the three-year term the Law Commissioner and the Ombudsman shall have regard to the need to maintain a reasonable degree of continuity of the membership so that half the existing members are reappointed for the next term of office.

While care is taken to ensure continuity in membership there is a latent anomaly in the current arrangement, which dissolves the whole commission after it has completed a term and the commission remains dissolved until a new one is appointed. This creates a temporary vacuum, which undermines the continuity of the office. One commissioner expressed the view that the ex officio members of the commission virtually assume the role of 'Godfathers' or 'Big Men' of the commission. The Act thus needs to be revisited to rectify this anomaly and ensure continuity at all times.

The Secretariat

The operational arm of the commission responsible for day-to-day operations is headed by an executive secretary, whose responsibilities are laid out in s 29 of the MHRC Act, which states:

subject to the general and special directions of the Commission, the Executive Secretary shall be responsible for the Executive day to day management of the Commission and the administrative control of the other members of staff of the Commission and, in that regard, shall be answerable and accountable to the Commission.

The Secretariat comprises the following departments, headed by a director:

- administration and finance
- investigations

- research and documentation
- legal services
- education, information and training

In accordance with s 8 of the MHRC Act the commission has established seven thematic committees, namely, the Civil and Political Rights Committee, the Economic, Social and Cultural Rights Committee, the Child's Rights Committee, the Gender Balance and Women's Rights Committee, the Prisoners' Rights Committee, the Committee on Rights of Persons with Disabilities, and the Civic Education and Information Committee – each headed by a commissioner.

The thematic committees have thus far failed to function efficiently due, on the one hand, to inadequate funding and lack of direct and clear links between them and the Secretariat and, on the other, to incompatibility between the committees and the commissioners assigned to them. Measures are currently underway to establish directorates in order to link the thematic committees with the operations of the Secretariat, but, in doing so, the thematic areas should be revisited to ascertain whether a particular area should be singled out. For example, one commissioner questioned why children's rights are a thematic area on their own and are not combined with women's rights. He went on to link this with funding from the United Nation's International Children's Emergency Fund (UNICEF) for children's rights, questioning whether the existence of donor funding in a particular area should be the sole criterion for setting up such a thematic area.

Structure

Past evaluation reports of the MHRC (Situational Analysis 2006, p 10) have observed that the Secretariat is 'top heavy', which has led to heavy recurrent overhead costs to cover large salaries of top-level management. Table 1 shows that the administration unit is significantly larger than the operational units, while inadequate staffing in legal, investigative and other operational units hampers the efficacy of the commission.

Table 1
Staffing of the commission

Units	Established posts	Filled posts
Commissioners	9	9
Management	5	5
Legal department	14	5
Education, Information & Training	10	5
Research & Documentation	11	4
Investigation	12	5
General administration	42	23
Internal Audit Unit	2	1
Regional offices	16	5

Source: Schedule Offices as at 30 June 2009

Table 1 illustrates that key departments, that is, legal, investigation and research, are understaffed (50% of positions are not filled), despite being modest in size, while the general administration exceeds its staffing quota by more than 300 per cent, despite the fact that there are many vacancies. This lopsided staffing needs explanation in light of the fact that the relevant sections of the MHRC Act are quite clear:

30. (1) There shall be employed in the service of the Commission, subordinate to the Executive Secretary, such other management, professional, research, technical, administrative and other support staff as the Commission shall consider necessary for the exercise of its powers and the performance of its duties and functions and who shall be officers in the public service.

(2) The staff of the Commission under subsection (1) shall be appointed by the Commission on such terms

and conditions as the Commission shall determine: Provided that the Commission may, by directions in writing, delegate to the Executive Secretary the appointment of its staff in such junior ranks as it shall specify and the Executive Secretary shall report to the Commission every appointment he has made pursuant to this subsection.

Independence

Section 34 of the MHRC Act guarantees the independence of the commission,² but the Constitution does not guarantee immunity and privileges for the commissioners similar to those granted to other constitutional bodies such as the Ombudsman. This makes the commission vulnerable to pressure from the state and other powerful entities, which impedes the optimal efficacy of the commissioners.

The MHRC is funded from the Consolidated Fund, that is, the government budget, which is under the control of the Treasury, thereby making it vulnerable to financial constriction by the executive. This vulnerability could be avoided by placing its funding allocation within the 'Protected Expenditure Fund' (PEF), as provided for in s 183 of the Constitution, which sets out funding allocations that cannot be tampered with. The PEF is currently used to cover the salaries of the president, vice-president, judges and the Ombudsman, as well as the costs of Parliament.

The MHRC's vulnerability was exposed when it suffered funding constraints after releasing verbatim reports of the public inquiry into the prevalence of human rights violations during the open / third-term debacle of former President Bakili Muluzi.³

Resources

Section 32 (1) of the Human Rights Commission Act obliges the government to fund the commission adequately to enable it to exercise its powers and perform its duties and functions so as to ensure its independence and impartiality. The Act further permits the commission to receive donations of funds and materials, provided such donations do not compel the commission to compromise on its neutrality and independence. Table 2

reveals the level of support the MHRC received from the government and donors between 2002 and 2007.

Table 2
Government and donor funding for the MHRC
2002-2007

Year	Government	Donors	Total
2002	33 766 103*	11 911 770	45 679 875
2003	42 393 785	14 621 999	57 017 787
2004	59 103 405	36 697 851	102 697 662
2005	68 269 591	21 542 002	89 813 598
2006	No Data	No Data	No Data
2007	90 456 954	27 297 150	117 756 111

Source: Annual reports of the MHRC

*All amounts are in Malawi Kwacha

Norway has been the single major donor to the MHRC since its inception.

The Act holds the commission liable to account to Parliament for use of funding and the accounts of the commission are audited by the auditor-general.

Relationship between the commission and the Secretariat

From the inception of the MHRC until 2004 all commissioners served on a part-time basis, however, three were appointed on a full-time basis at the request of the commission. While this was an excellent move, some vital issues, such as the job description of the full-time commissioners and the demarcation of roles and responsibilities between the commission and the Secretariat were left open ended, which eventually created considerable territorial friction between the executive secretary and the commissioners.

The broad issues related to tenure, differences in recruitment procedures, roles and responsibilities, accountability, and status.

The animosity pervading the commission/Secretariat impasse of 2005 was, according to commissioners, specifically due to their perception that the executive secretary was assuming too much power and infringing the roles of the commissioners. Further, the commissioners noted gross administrative irregularities and inefficiencies in the institution and pointed out issues such as the fact that performance appraisals of senior staff were not carried out as required.

The disproportionate consumption of resources by the bureaucratic structure diminished funding for the real work of the commission, that is, investigative, legal services, public outreach, and so on, and the ground-level impact of the commission was limited. According to the current executive secretary, Dr Aubrey Mvula, valuable lessons have been learnt, restructuring has commenced to correct imbalances, and roles are being delineated more clearly to avoid future contention. However, it must be pointed out that the new commission (constituted in 2009) is comprised entirely of nine part-time commissioners, so the concept of three full-time commissioners has (temporarily?) fallen by the wayside, thereby reducing the strength and confidence of the commission.

Access by women

The annual reports indicate that the MHRC receives more complaints from men than from women. For instance, in 2005, 72.5 per cent of complaints came from men and 27.5 per cent from women, while in 2007, 65.7 per cent of the total number of complaints were lodged by males and 24.7 per cent by females. This may be linked to the cultural set-up of society, which allows men more access to these institutions. Male dominance in terms of influence and resource control, and a lower literacy rate among women, leading to a lower level of awareness about the commission and its mandate, are significant factors limiting women's access to the commission.

The MHRC has, from time to time, undertaken studies and published reports on gender, labour rights and other such areas, and these have been widely disseminated.

The commission undertakes a range of training activities for Members of Parliament on legal and international instruments relating to human rights, traditional authorities, officers in the Malawi Prison Service, and other such specific groups.

Effectiveness

Table 3 reflects the cases that came to the MHRC between 2005 and 2007 and the current status of those cases.

Table 3
Schedule of cases

Year	No of cases	No of cases advised/ resolved	No of cases referred to other bodies	No of cases rejected/ withdrawn	No of cases carried over
2005	605	112	48	08	437
2006	867	604	130	39	94
2007	691 (+94 previous cases = 785)	348	213	11	213

Source: Annual Reports of Human Rights Commission

Challenges facing the commission

The National Action Plan for the Promotion and Protection of Human Rights in Malawi (2004-2011) and the 2006 Situation Analysis Report of the MHRC have identified the following challenges facing the commission:

- Inadequate investigative skills due to limited technical capacity. This impediment is difficult to surmount because of the lack of human rights expertise and training facilities available locally. The problem is further exacerbated by the fact that the civil service tends to monopolise foreign scholarships

and bursaries, thus leaving no opportunity for the MHRC to seek specialised training abroad.

- Lack of direct enforcement powers. While the commission may not directly prosecute perpetrators of human rights violations it has developed ways of exerting indirect pressure to influence the courts, for instance, by using the '*amicus curiae* (friends of the court)' mechanism to join cases, as it did in *Kafantayeni et al v Attorney General* (Constitutional case no 12 of 2005), a landmark case in which the MHRC successfully challenged the section in the penal code which stipulated a mandatory death sentence for murder. Another example of indirect influence exerted by the MHRC is manifested in *Republic of Malawi vs Joshua Cheuka et al*,⁴ in which the MHRC paid for comprehensive post mortems on victims of police shootings and subsequently used the findings to convince the court about its stand with regard to the unlawful use of firearms and undue force by police officers. These cases have established the commission's authority in human rights determinations, which would otherwise have largely been ignored.
- Inaccessibility to rural communities. The commission's head office is in the capital city and regional offices are not yet fully operational. Even when they eventually become operational it cannot be assumed that the rural population will be able to access them unless the commission initiates extra outreach measures using means such as mobile clinics, radio/TV programmes, and so on, but these would require funding to which the MHRC does not currently have access.
- Limited capacity to fulfil its constitutional mandate effectively, that is, 'to protect and promote human rights in every respect in the broadest sense of the term'. The commission has been unable to satisfy the inordinately high public demand and expectations. Thus, while it may have performed quite well in promoting awareness, conducting studies and receiving complaints, the MHRC has encountered challenges in conducting investigations and mainstreaming human rights issues among policy-makers. But this constraint can also be

viewed positively, in that the broadness of the mandate provides valuable space for the MHRC, if it is used fully, to expand into new human rights areas as and when the need arises.

- Resources. The major source of funding has been Norway, through the United Nations Development Programme. This is complemented by a modest allocation from the government and augmented by funds from other donors for specific activities. This raises serious questions about the long-term sustainability of the institution. But there are encouraging signs of a growing swell of goodwill towards the MHRC within the government and the donor community, which may suggest that the situation will improve when reformed management structures instil more confidence.
- Lack of a systematic approach in the commission's work. The commission has tended to over focus on individual and specific cases rather than on systemic approaches to human rights issues based on in-depth research and analysis. This problem has, however, been recognised, and efforts are underway to roll out a new structure premised on a programmatic approach (ie, input into policy formulation, etc) that will augment the hitherto prevalent case-led approach.

In the past few years important steps have been taken to address some of the above gaps and challenges:

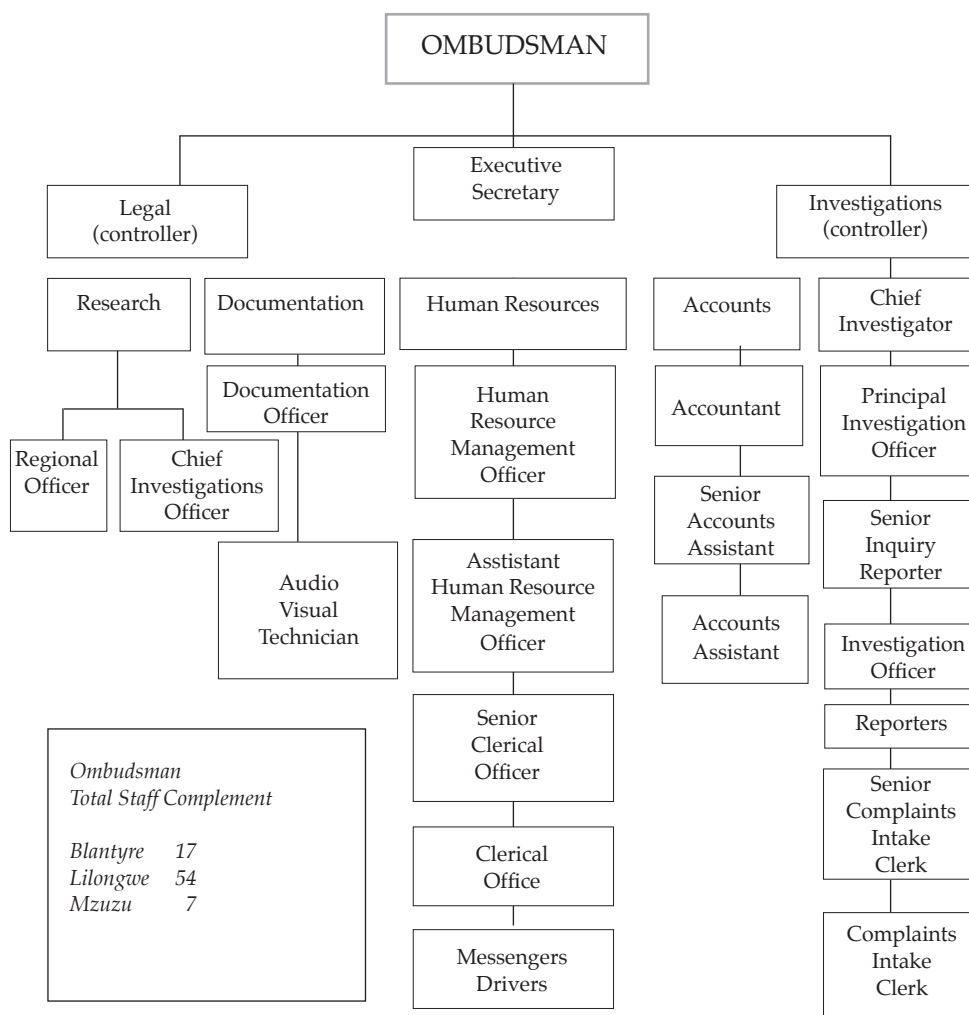
- In its first five years the commission (quite understandably) placed inordinate emphasis on civil and political rights, but the current strategic plan has shifted focus towards economic, social and cultural rights. A scrutiny of cases received in recent years vindicates this assessment.
- Input into law-making. The commission has contributed to the review of a number of pieces of legislation, for instance, the Police Act, the Wills and Inheritance Act, child-related legislation, gender, penal code and HIV/AIDS legislation, and continues to review extant legislation in order to infuse human rights sensitivities into these somewhat archaic legal instruments.

THE OMB

Appointment and tenure of the Ombudsman

Sections 122 and 128 of the Constitution stipulate that nominations for appointment as Ombudsman should be solicited from the public by way of a public advertisement placed by the clerk of the National Assembly; that the successful candidate should be appointed by the Public Appointments Committee; that the Ombudsman reports to the National Assembly and that he or she may only be removed from office for reasons of misconduct or upon reaching the retirement age of 65.

Structure



Source: Office of the Ombudsman

Section 121 of the Constitution clearly stipulates the independence of the Ombudsman's office, stating that:

in the exercise of his or powers, functions and duties, the Ombudsman shall be completely independent of the interference or direction of any other person or authority, but shall otherwise be answerable to Parliament.

Section 128 lays down a five-year term of office which may be extended for a further five years if the Public Appointments Committee considers it appropriate to do so.

Section 127 stipulates that the Ombudsman

shall lay, each year, before the National Assembly, a report which shall include a record of all complaints and applications to the Office of the Ombudsman, a record of exercise of powers in relation to applications, of the remedies afforded to applicants in respect of his / her grievances and shall include a record of the general recommendations of the Ombudsman in respect of grievances.

Section 125 of the Constitution guarantees the Ombudsman the same protection and privileges as those enjoyed by Members of Parliament, in so far as they are appropriate. His or her salary, which may not be reduced without his or her consent, is paid out of the Protected Expenditure Fund.

The first Annual Report states that the financial accountability of the office is monitored by the auditor-general. The Constitution and the Ombudsman Act 1996 guarantee the institutional, functional and personal independence of the Ombudsman (Fifth Annual Report, p 11).

While these legal provisions are significant in entrenching the independence of the Ombudsman, the question is whether the Ombudsman enjoys that independence in practice. As is often the case in Africa (Malawi

being no exception), the fact that something is set down in writing does not mean it will be implemented as intended – weak institutions, a lack of regard for the rule of law, and non-adherence to due process frequently prevent good legislation from being put into practice.

Closely linked to the issue of independence is the question of funding. Section 12 of the OMB Act stipulates that the OMB's overheads, that is, all costs of running the office, must be paid by Parliament. These expenses do not include the OMB's salary, which is specifically provided for in the Protected Expenditure Fund. This suggests that money is earmarked by Parliament for the functioning of the Ombudsman's Office but, in practice, the Ombudsman is very much part of that anxious cadre of officials who constantly call Treasury with appeals for funding. This creates a very real danger of ascendancy of the executive over the OMB, which may undermine the independence of the OMB (Dokali 2000).

According to the Ombudsman the absence of political interference thus far may be due to his personal principle of not associating himself with the political leadership (interview 28 April 2009).

Institutional Governance

In a bid to deliver efficiently and effectively the service required by the Constitution, the Ombudsman Act empowers him/her to recruit staff to assist him/her. Section 4 of the Act thus reads:

The Ombudsman shall, in the performance of his functions under this Act, be assisted by staff appointed by him for that purpose on terms and conditions to be determined by agreement with such staff.

In terms of this section, in 1999 the Ombudsman drafted and partially implemented staff conditions of service.

A common challenge confronting institutions like the OMB is rapid staff turnover. In 2008 the office conducted research into this issue with financial support from the government. The objectives were to identify the reasons behind the rapid staff turnover, its impact and possible remedies. While

the report is still under review and is not yet accessible staff interviewed (both current and past) raised some of the key problems. These include low pay, inadequate training opportunities, and unclear promotion criteria.

A number of senior staff felt there was a need for better communication between the leadership and the rank and file and that interpersonal relations within the institution need to be improved. The feeling of the staff was, on the whole, that the overall mandate of the OMB would be better served if the institution were a more congenial place to work.

The popularity of the Ombudsman in Malawi has grown steadily since its establishment. This is attributed to the credibility and high integrity the office has demonstrated thus far, which, in turn, has contributed towards nurturing democracy. Against this background incidents that might lead to negative publicity are treated with grave sensitivity, so complaints lodged by Ombudsman staff with the IRC, the MHRC, or any other such institution are handled extremely discreetly, if not entirely suppressed, because of concerns that any negative repercussions emanating from open proceedings may seriously damage the one institution the nation reveres as a moral model and may impair its efficacy.

Taking cognisance of this, the Ombudsman has instituted a board to preside over staff matters. The board comprises a High Court judge and other eminent persons in public service. This is indeed an important step towards resolving a number of staff issues.

Effectiveness

In 1999 the second Ombudsman, Mr E D A Chibwana, took office and began to improve the profile of the institution. His success is attested to by the fact that in 2001 the general public voted him Best Malawian of the year.

As a consequence, the office was flooded with cases from all sectors – public, private and parastatals – in such volumes that it was unable to cope with the demand. The informal and friendly way in which complaints are handled and the absence of the legal technicalities inherent in court proceedings won the people's favour. But this very popularity created

serious challenges for the institution as the huge volume of cases created such backlogs that delays soon became as lengthy and tedious as those of the courts the plaintiffs were trying to circumvent.

In addition, the Ombudsman has twice been challenged on jurisdictional issues – in *MBC v The Ombudsman* (Civil Appeal no 23 of 1999) and *Air Malawi v The Ombudsman* (Civil Appeal no 1 of 2000). In both these cases, each of which related to the (allegedly) unfair dismissal of employees, the statutory bodies involved challenged the powers of investigation of the Ombudsman in matters where remedies were supposedly available in a court of law.

The two institutions tried to stop the OMB investigation by requesting a judicial review on the grounds that reasonable remedies were available for the employees through the courts. The Ombudsman, for his part, argued that he was merely investigating the issue and had made no determination. He thus questioned whether the court had any cause or power to stop the investigation. In the *MBC* case it was held that the court could review the investigation while in *Air Malawi* it was held that the court could not limit the Ombudsman's investigations but could review his final decision.

Whilst the Constitution (Section 123) gives wide powers to the Ombudsman to investigate any and all cases, the same section limits the Ombudsman's powers of investigation, in that he can undertake investigations only in cases where it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy, this jurisdiction shall not oust the jurisdiction of the courts.

However, the decision in the latter case restored the mandate of the OMB, which was essential to safeguard institutional identity and efficacy.

The number of complaints received each year indicates the level of public awareness of the office and the number of determinations is an effective indicator of institutional efficiency (see Tables 4 & 5).

Table 4
Summary of case statistics from 2005-2008

2005			2006			2007			2008		
R	C	A	R	C	A	R	C	A	R	C	A
1 349	823	526	1 478	811	667	1 153	336	817	790	227	563
R – Received, C – Closed, A – Active											
Received						4 770					
Closed						2 197					
Active						2 573					

Source: OMB Effective Investigation Workshop Report 2008

Table 5
Categories of determinations (2005-2008)

Issues	2005	2006	2007	2008	Total
Unfair practices (general malpractice)	305	241	75	103	724
Unfair dismissal	34	119	6	38	197
Unfair termination	22	13	11	21	67
Terminal dues	35	37	15	56	143
Death gratuity	33	31	12	31	107
Unpaid arrears	45	19	8	26	98
Unpaid allowance	15	1	6	14	36
Interdicts	20	18	14	14	66
Salary arrears	34	18		3	55
Deceased estates	12	19	3	12	46
Unpaid dues	83	130	86	56	355
Suspension from duty	7	14	9	16	46
Delays	17	12	13	11	53
Compensation	38	88	69	50	245
Unfair treatment	14	7	8	63	92
Land dispute	21	34	9	28	92
Totals	735	801	344	542	2 422

Source: Annual Reports of the Ombudsman

An analysis of complaints handled in the past four years reveals that the most prevalent violations are unfair practices, followed by complaints about compensation, and that most of the determinations relate to unfair dismissal and to the amounts paid out on termination of employment (Ombudsman 28 April 2009). About 50 per cent of the complaints received are deferred.

The popularity of the OMB can largely be attributed to the fact that about 70 per cent of determinations go in favour of the clients.

Special hearings are the OMB's most effective instrument. Though it may have to contend with case backlogs, interference from the executive arm of the government, and other such constraints, these are countered by the seriousness with which high-ranking government officials responded when called to special hearings held in Salima (a lakeshore town).

Reports of these special hearings indicate that the highest number of cases of unfair practice was brought against the Ministry of Education.

Challenges

- **Backlog:** Though the lack of availability of current data makes it hard to establish the exact annual backlog it is safe to assume that the backlog is considerable. A study conducted in 2007 reveals that in September 2006 the backlog was 3 600 cases (Andreassen & Oftedal 2007). While the office had set an ambitious target of clearing 80 per cent of cases within three months, it is nowhere near attaining that target (Andreassen & Oftedal 2007, p 10). The reason for this backlog is a shortage of investigators – there are only ten to cover the whole country – three each in the north and south and four in the central region. The Ombudsman alone cannot overcome this challenge, as the creation of any extra positions rests squarely on the shoulders of the human resource department of the government (Chibwana 23 July 2009).
- **Resource constraints:** Poor financing, insufficient numbers of motor vehicles and an inadequate Secretariat. Government funding for the institution has decreased and donor funding

constitutes 80-85 per cent of its income, a situation which poses its own limitations and constraints.

- **Government negativity:** In spite of the fact that s 121 of the Constitution clearly provides for the Ombudsman several government departments have little regard for the institution, regarding it as just another civil service department, and therefore not impervious to the interference that is the norm within the civil service culture. The negativity manifests itself in the form of unexplained delays in responding to letters of inquiry, non-co-operation during inquiries, and non-compliance with instructions to take administrative action (Fourth Ombudsman's report, p 24).
- **Slow pace of handling complaints:** Although the two strategic plans envisage reducing to a maximum of six months, the length of time it takes to handle a complaint it is not clear how this is to be achieved and currently it takes more than 12 months to conclude some cases.
- **Unquantified determinations:** Although the Ombudsman determines cases, the actual quantification of compensation is left to the responding parties, leaving complainants with no option but to accept whatever is offered. Although this practice makes the processing of complaints speedier it compromises the Ombudsman's mandate to ensure fair administration of justice delivery as it leaves the victims at the mercy of the offenders. This flaw is, in some measure, countered by the fact that the Ombudsman may not only recommend but may also determine remedies.
- **Limited options:** The Ombudsman handles complaints with the help of his legal officers, who are, essentially, investigating officers. These officers can only make recommendations to the respondents, whereas the Ombudsman makes determinations. However, there are indications that investigations by officials from the Ombudsman's office are generally taken seriously by all stakeholders.
- **Remedial provisions for non-compliance** include instituting contempt proceedings in the High Court against any person or authority, as per s 124 of the Constitution. Alternatively, the

matter is reported to Parliament and Cabinet. However, in the normal course these options are reserved as it is assumed that the respondent is constitutionally obliged to honour the Ombudsman's decision.

Methods of enhancing institutional efficiency

Efforts are currently under way to enhance organisational effectiveness through staffing and the creation of departments such as investigations, documentation, finance and administration. The Ombudsman's organogram indicates a significant hierarchy under the investigations controller.

Operations are evenly distributed throughout the three regions of Malawi and workshops on standard operating procedures have been conducted.

A mechanism has been put in place to improve administrative procedures and performances through the creation of three internal fora: the budget committee, the finance allocation committee, and the executive committee, comprising the Ombudsman and three senior members of staff.

Resources

The annual funding of the Ombudsman's office has been borne jointly by the government and the donor community. Tables 6 and 7 show the allocation and sources of funding from 2004 to 2008.

Table 6
National funding

Year	Government of Malawi Consolidated Fund (MK)	Allocation from other national funding (MK)	Amount spent (MK)
2004	38 500 000	–	37 980 000
2005	52 547 374	3 000 000	54 453 400 ⁵
2006	61 942 190	–	61 800 150
2007	77 850 000	–	77 147 971
2008	81 000 000	–	55 076 405

Source: OMB Annual Reports (draft)

Table 7
Donors
(Norwegian Church Aid)

Year	Allocation (MK)	Amount spent (MK)
2005	4 241 100	2 378 340
2006	24 110 457	24 110 457
2007	8 708 840	2 973 961
2008	36 102 100	6 911 460

Source: OMB Annual reports (draft)

Table 6 shows that budgetary allocations to the Ombudsman for the past five years, both from government and from the donor community, have increased steadily. Unlike in earlier years, in which reports highlighted funding as a factor limiting effective service delivery, the current annual funding now seems adequate.

Although donor funding is ostensibly earmarked for specific projects the additional inflows serve to complement the operations of the Office of the Ombudsman and are used to strengthen various departments.

INTERACTION WITH THE GOVERNMENT

THE MHRC

While the MHRC should be playing an advisory role to the government, particularly by providing analyses of policies from a rights-based perspective, this has not happened with any depth or regularity. The Ministry of Justice, which should play a leading role in raising the image and effectiveness of the commission has remained strangely subdued in this respect and should, perhaps, be searching for ways to shake itself out of its stupor.

In the first annual report of the commission (1999) it was noted that, the MHRC, as a public institution, works and collaborates with other organs and agencies of state, one year's operational experience has revealed that many departments within the executive branch of government do not yet fully appreciate the constitutional and independent status of the MHRC. The commission, therefore, urges the government to encourage all relevant departments to cooperate fully with it to enable it to fulfil its mandate.

In 2006 the MHRC, after monitoring the human rights accountability of the executive, legislative and judicial arms of the government, concluded that, despite some positive developments, there were limitations to the performance of each that required to be addressed. A detailed report was prepared and presented to each (MHRC 2006). This was perhaps the first time the commission directly assessed the performance of government as a whole and the report makes extremely pertinent and insightful recommendations, such as:

- The judiciary should introduce time limits for handling various cases, which would reduce the burgeoning backlog that has created long delays in the administration of justice.
- The executive should, at all times, be seen to observe the independence of the watchdog institutions.
- The president should always uphold the Constitution on

matters of appointment and removal of public officials. This recommendation is particularly relevant in the light of occurrences in the past five years.

- The National Assembly, too, was urged to relegate partisan issues and focus on national matters.

THE OMBUDSMAN

Over the years the Ombudsman has interacted positively with Parliament, a cordial relationship developed through many channels, such as the initiative taken by the Ombudsman to familiarise MPs with the activities of his office at least twice a year, whenever a new Parliamentary Legal Committee is formed. This exercise enables MPs to better appreciate the significance of the Ombudsman in Malawi's multiparty era.

The relationship with the executive is, however, less cordial, which is understandable in view of the fact that this branch of government is more prone to maladministration and may thus become the focal point of OMB investigations. This is borne out by the fact that the executive arm of government has been the source of a large number of complaints about unfair labour practices.

INTERACTION WITH OTHER DEMOCRACY PROTECTION INSTITUTIONS

The MHRC is more closely linked to the Law Commission and the Ombudsman than to other institutions, by virtue of s 131(a) and (b) of the Constitution, which endows the two with ex officio membership of the MHRC.

The 'Body of Case Handling Institutions' is an area in which the MHRC may interact and work closely with other watchdog bodies. This body, comprising 14 institutions, meets periodically to deal with issues of jurisdictions and overlaps.

There are also instances of friction and tension among these bodies over jurisdiction. A case in point was the situation in 2001, when nurses and medical personnel at the Queen Elizabeth Central Hospital in Blantyre went on strike for salary increases and other allowances. The commission mediated to end the strike and government agreed to withdraw interdicts, suspensions and transfers that had been imposed on some members of staff. However, the Ministry of Health later made a u-turn, alleging that the strike was illegal as there was no trade union, and the Industrial Relations Court did not appoint the MHRC as a mediating agency.

The MHRC had had no intention of usurping the powers of the Industrial Relations Court but was merely guided by the urgency of the matter and the need to protect patients from suffering. While the MHRC conceded that the striking medical staff should have followed proper procedures it felt that the exceptional circumstances of the case warranted action that would end the strike as rapidly as possible (MHRC 2001).

INTERACTION WITH THE PUBLIC AND NON-STATE ACTORS

THE MHRC

In the first few years after its inception, while finding its feet, the commission remained within the confines of the capital city, a situation which, it was to realise, limited its national outreach and accessibility to key stakeholders. Having identified gaps in its national coverage it is now working on strengthening thematic committees that will provide more opportunities for it to interact with civil society organisations (CSOs) and is setting up regional offices which will enhance both its visibility and its accessibility to the public at large.

Commissioners who were interviewed expressed concern that CSOs do not play a proactive role. They maintain that the CSOs they represent on the commission do not demand reports or any other information.

It must also be noted, however, that the commission has not tapped into the skills and competence available in civil society. One commissioner believes there is, perhaps, an attitudinal problem, namely that of 'us' and 'them'. Notable civil society activists who have joined as commissioners tend to be perceived by their erstwhile peers as having 'abandoned the cause for greener pastures'.

THE OMB

The activities and decisions of the OMB are well covered by the press and the institution tends to enjoy high esteem amongst its peers, such as those in the Human Rights Commission, which commends the OMB and claims that the Ombudsman is the main source of redress for those with grievances pertaining to misuse of public office. The office clearly has a positive public image and seems generally to play an important role in the governance process in the country.

The Ombudsman has recently made some strides towards raising

awareness, especially by closer engagement with the public, mainly through the media. According to annual reports and interviews the Ombudsman has also reached out to government ministries and departments through workshops and meetings with district development committees, district educational committees and village development committees, the latter being grassroots level structures.

Meetings have also been held with MPs, parastatals, the military and the police. According to members of staff at head office some public officers do not fully understand the Malawi Public Service Regulations and tend to stick to the original 1966 document despite the fact that several circulars concerning changes have been issued since then. This revelation bears testimony to the fact that many people are victimised arbitrarily because both parties are ignorant of the regulations.

Staff claim that the increase in the number of cases coming into the office is testimony to the level of appreciation of the work of the OMB. However, these figures may be misleading, as there is no yardstick to determine whether the mere number of cases recorded in a given year is valid evidence of efficiency.

There are instances where discontent has been expressed, particularly in relation to delays in the handling of complaints, the dismissal of cases that lack merit, and determinations that end in favour of respondents. Interviews revealed that there is no official mechanism currently in place to cater for the expression of public discontent about the work done by the Ombudsman. Disgruntled supplicants are thus pacified informally.

The office also is still lagging in terms of efficiency of service delivery. The admission that annual reports from as far back as 2004 have not yet been released and the fact that there is a backlog of documented information, which may be largely irretrievable, is cause for concern.

KEY RESEARCH FINDINGS

- While the Act is quite clear on the roles and functions of both the commission and the Secretariat there is no clear demarcation within the MHRC between policy formulation and direction on the one hand and administrative/implementation areas on the other.
- The independence of the commission is not fully secure because of its lack of immunity and its financial dependence on government.
- The fact that the terms of office of all commissioners end simultaneously creates a vacuum until the next commission is constituted.
- The relationship between the commission and the Secretariat has been tense, even acrimonious, in the past and this has, at times, disrupted the work of the commission.
- The departments and the thematic areas of the commission do not correspond, thereby virtually nullifying the thematic committees.
- The investigation and legal departments are deficient in capacity and skills, resulting in large numbers of cases being deferred.
- Women do not access the services of the commission as much as men, largely for economic and cultural reasons.
- There is limited, and sometimes strained, interaction between the government and the MHRC.
- There is limited and arms-length interaction between the MHRC and civil society.
- Malawi is not one of the 29 African states that have signed the African Charter on Democracy, Elections and Governance, and those international human rights instruments Malawi has ratified have not yet been domesticated and implemented. This will have an adverse impact on the country's international human rights credibility and status and should be corrected.

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- Rural communities and vulnerable groups, the sectors of society most in need of these services, do not have sufficient access to the offices of the OMB and the MHRC.
 - It is extremely difficult to access information and data from the MHRC and the OMB and the public has limited access to their reports. The libraries of both institutions are in a poor state. Access to OMB documents and relevant materials could be facilitated by a frequently updated website which would provide a valuable conduit for the free flow of information between the institution and the public at large.
 - The Ombudsman's Office continues to suffer from a huge backlog of cases and there is no indication that the inflow will abate in the near future. It is, therefore, essential to boost the human resource capacity of the legal offices in order to restore the balance.
 - Annual reports of the OMB are currently about four years behind, with the 2005 report still in its draft form. This tardiness affects the relevance of the information and, indeed, casts a shadow over the office, which has been unable to advance plausible reasons for the delays.

CONCLUSION

The MHRC has made major strides towards achieving its mandate by conducting several studies in problematic areas such as labour rights and gender issues. In addition, it has, during sensitive political times, produced detailed reports of its investigations, even at the risk of incurring official displeasure. The annual reports of the commission are regular and accessible. While there is an increasing diversity of cases coming before it, it needs to move towards influencing the mainstreaming of human rights in governmental policy formulation. In addition, the commission may benefit considerably from cultivating closer links with civil society by way of programmatic and systematic collaboration instead of the current haphazard and ad hoc cooperation.

The MHRC could perform its mandated role more effectively if its independence in terms of funding and immunity were guaranteed and if the appointment and tenure of commissioners were construed in a manner that would ensure continuity of office.

The same could be said of the OMB, which has seen a remarkable increase in the number of cases handled per given year in the 14 years since its establishment. The fact that the incumbent has been in office since 1999 could be construed as a sign of stability emanating from the competence and credibility of the office bearer. The trend is commendable, considering the fact that this office requires unblemished integrity to sustain its image as a model of high ethics and morality. The institution does, however, face numerous challenges. First and foremost is the dismally poor level of record-keeping and, by extension, the erosion of the institutional memory. The constitutional requirement that reports be submitted annually has not been complied with.

The level of communication and interaction with civil society is markedly lower than that of sister bodies like the MHRC. Relations with Parliament tend to be constrained and must be nurtured by more active interaction.

POLICY RECOMMENDATIONS

- The Human Rights Commission Act should be revised immediately, through an inclusive approach with all stakeholders, in order to secure the independence of the commission in terms of financial independence and immunity of commissioners as well as to secure continuity of tenure of the commissioners.
- Effective and urgent measures should be put in place to establish cordial working relationships within the MHRC. Commissioners and heads of department should work seriously on building more harmonious interpersonal and inter-departmental relations. The current initiative of the MHRC to establish directorates to link thematic committees with the operations of the Secretariat is certainly a commendable way of ensuring efficiency and should be pursued with unflagging commitment.
- The MHRC requires additional human resource support to handle the increasing number of cases and deliver results on time. This will have to be done by the government agency responsible for filling vacancies in key departments and will also require a cross-institutional pool of trained investigators from which personnel can be recruited. Such a pool would help not only the MHRC but other case-handling bodies as well.
- Women's access to the MHRC should be enhanced by establishing effective links with gender activist organisations. This should be undertaken by the appropriate directorate of the commission, with specific strategic plans to achieve the desired cohesion between disparate gender advocacy / interest groups.
- Relations between the government and the MHRC should be further strengthened by regularly engaging in discussions over policy issues similar to those conducted in 2006 when

the MHRC outlined the challenges facing government in performing its accountability role.

- Regional governance instruments and charters must be endorsed and ratified promptly in order to generate momentum in domestic initiatives. This process could be initiated by relevant constitutional bodies in liaison with governance NGOs, and the relevant committees of Parliament.
- International instruments already ratified by Malawi must be translated into domestic legislation and applied. The current leadership of the MHRC is already demonstrating commitment to this objective but needs support from bodies such as the Malawi Law Society, Women and Law in Southern Africa and the law faculties of universities.
- Regional offices of the MHRC should be put into operation more quickly to enhance accessibility for the masses, particularly in the rural areas. This must be a collective effort, although government must take the lead in terms of financial support as well as the requisite political will to support such institutions. In addition, mobile clinics would provide a valuable tool for such outreach initiatives.
- MHRC-civil society relations must be strengthened in order to realise their inherently complementary roles. This requires that human rights NGOs and the MHRC work together in the thematic committees of the MHRC and undertake joint activities. The current collaboration between the MHRC and the National Initiative for Civil Education can be used as a model to reach out to other bodies with a presence in the districts.
- The Ombudsman's Office must improve its record-keeping and keep up to date with annual reports and other publications in order to maintain accountability as well as relevance.
- The Ombudsman's Office needs more investigation officers to clear the burgeoning backlog. This could be achieved by training a cross-institutional pool of investigation officers drawn from within extant staff as well as by external recruitment, as suggested by the current Ombudsman, and should be a collective effort between the Ombudsman's Office,

the MHRC and other case-handling bodies, in collaboration with the government.

- Information from both the MHRC and the Ombudsman's Office should be made more easily accessible to the public by various means, including print and electronic media. Radio and television would provide very effective channels for outreach – especially in view of the high rate of illiteracy in the rural areas. More effort should be made by the public relations officers in these institutions to produce cogent and factual periodicals for public dissemination.

ENDNOTES

1 The 14 bodies are:

- Anti-Corruption Bureau
- Civil Service Commission
- Malawi Electoral Commission
- Health Service Commission
- Malawi Human Rights Commission
- Industrial Relations Court
- Judicial Service Commission
- Local Government Service Commission
- National Compensation Tribunal
- Office of the Ombudsman
- Police Service Commission
- Malawi Police Service
- Prison Service Commission
- Teaching Service Commission

2 'No organ of the Government and no member or employee of an organ of the Government nor any other person or body of persons, shall interfere with, hinder or obstruct the Commission, any committee of the Commission, any member of the Commission or of such committee of the staff of the Commission or any person duly authorized to act in the service of the Commission in the exercise of its or his or her powers or the performance of his or her duties and functions.'

3 President Muluzi tried to retain power at the end of his second term, in 2004 by attempting to amend the Constitution to allow for a presidential third term and, when Parliament failed to pass the amendment, he tried to remove all limitations on presidential tenure, but retreated in the face of widespread public indignation.

4 Alluded to in an interview with MHRC Executive Secretary Dr Aubrey Mvula.

5 Additional funding was sourced from the National Aids Commission (NAC) for a two-year project, of which only MK400 000 was carried over to the next year.

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Interviewees

Pilila Longwe	Ombudsman, principal investigations officer, Southern Regional Office, Blantyre
Martha Chilabade	Chief Investigation Officer, Ombudsman, HQ Lilongwe
Ollen Mwalunbunju	Human Rights Commission (former commissioner), Lilongwe
Aubrey Mvula	Human Rights Commission (executive secretary), Lilongwe
Wiseman Chirwa	Human Rights Commission (former commissioner), Zomba
Dr Edge Kanyongolo	Expert on Constitutional Law
Enock Chibwana	The Ombudsman
Mrs Malonda	Legal Section, OMB
John Kapito	Human Rights commissioner
Konjakapanzi	Head of Investigations MHRC
Franklin Y Kalawe	Executive Secretary Office of the Ombudsman
Mr Sabwera	Research & Documentation Office of the Ombudsman

APPENDIX

Questionnaire

A. General	
1.	How long has your institution been in existence? How and why was it established?
2.	Please provide a description of your understanding of your institution's constitutional / legal mandate. Does it include a right of initiative?
3.	What role or function does your institution perform that is not carried out by other institutions, whether in government or civil society?
4.	What other democracy protection institutions exist in your country? How does your institution relate to them?
5.	In what way, if any, does the role and function of your institution overlap with or potentially overlap with that of the other democracy protection institutions?
6.	Does the founding legislation provide a clear, workable and comprehensive legal framework that supports and empowers the institution to successfully fulfil its core mandate?
7.	What outcomes do you strive for in order to realise the constitutional/legal mandate set out in 1 above? How often do you engage in strategic planning?
8.	What have been / are the major constraints facing your institution and how have these impacted on its ability to achieve its mandate?
B. Institutional effectiveness	
9.	What mechanisms are in place to deal with public complaints, to follow through on such complaints and to successfully resolve them?
10.	How many cases/ complaints have been brought to you over the last year?
11.	How many of these were resolved? How many are outstanding and what are the reasons for this?
12.	How do you measure and assess your own effectiveness? What instruments do you use for monitoring and evaluation purposes?
13.	Have you carried out any external evaluation looking at the successes or otherwise of your functions?
14.	Do you produce annual reports? If so, are they publicly available?
15.	What strategies do you employ in carrying out public outreach and ensuring public trust of your institution?

C. Independence
16. How do you view your relationship with the executive and parliament?
17. How do you view your relationship with political parties (both ruling and opposition)?
18. What legal and other mechanisms are in place to ensure and strengthen the institution's independence?
19. Who is your institution accountable to?
20. What is the extent of collaboration and coordination of the work carried out by your institution and similar / related work carried out by other institutions of a similar nature?
21. What safeguards exist to protect your institution from political encroachment?
D. Institutional governance
22. What are the institutional governance arrangements in your institution? Are these arrangements clearly set out and do they allow for a smooth running of the institution? Do you embrace gender issues? What suggestions do you have to improve institutional governance arrangements?
23. Is there a clear, logical and workable division between the members of your institution appointed by President (on advice of the National Assembly) and the Secretariat?
24. Does your institution have mechanisms in place to deal with internal conflict in your institution? If yes, what are these mechanisms and are they effective?
25. What mechanisms are in place for Chief Executive Officers, Chairpersons and Commissioners to disclose and / or seek permission for private / commercial / financial interests or involvement as well as membership in any organisation? Are such mechanisms effective or sufficient to ensure transparency and avoid conflict of interest?
E. Interaction with the public and non-state actors
26. What is the extent of collaboration and coordination of the work carried out by your institution and similar / related work carried out by non-state actors?
27. What was the intended relationship between your institution and the public? To what extent has this relationship been realised?
28. Does your institution have mechanisms in place to deal with complaints by the public about the work done by your institution or the failure to attend to issues?
29. How accessible are the offices of your institution to the public?
30. What kind of complaints do the public bring to you?

31. Do the public have a sufficient appreciation of your role and mandate?
32. Are public expectations of your institution realistic/ unrealistic?
F. Resources
33. Is your institution funded through a designated ministry/ government department or through the consolidated fund voted directly by parliament?
34. Please give an indication of your budget allocation, additional funding and expenditure over the past five years.
35. Please illustrate the budget process followed by your institution, including the process of allocation of funds.
36. Please provide detailed information of the remuneration packages for office-bearers and Commissioners.
37. Are the current budgetary and administrative arrangements sufficient to ensure autonomy of democracy protection institutions?
38. To what extent are the resources allocated to your institution directly spent on meeting its key responsibilities?
39. What are the resource constraints faced by your institution?
40. How does this hamper the work of your institution?

ABOUT EISA



EISA is a not-for-profit and non-partisan non-governmental organisation which was established in 1996. Its core business is to provide technical assistance for capacity building of relevant government departments, electoral management bodies, political parties and civil society organisations operating in the democracy and governance fields throughout the SADC region and beyond. Inspired by the various positive developments towards democratic governance in Africa as a whole and the SADC region in particular since the early 1990s, EISA aims to advance democratic values and practices and to enhance the credibility of electoral processes. The ultimate goal is to assist countries in Africa and the SADC region to nurture and consolidate democratic governance. SADC countries have received enormous technical assistance and advice from EISA in building solid institutional foundations for democracy. This includes: electoral system reforms; election monitoring and observation; constructive conflict management; strengthening of parliament and other democratic institutions; strengthening of political parties; capacity building for civil society organisations; deepening democratic local governance; and enhancing the institutional capacity of the election management bodies. EISA was formerly the secretariat of the Electoral Commissions Forum (ECF) composed of electoral commissions in the SADC region and established in 1998. EISA is currently the secretariat of the SADC Election Support Network (ESN) comprising election-related civil society organisations established in 1997.

VISION

An African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment

MISSION

EISA strives for excellence in the promotion of credible elections, participatory democracy, human rights culture, and the strengthening of governance institutions for the consolidation of democracy in Africa

VALUES AND PRINCIPLES

Key values and principles of governance that EISA believes in include:

- Regular free and fair elections
- Promoting democratic values
- Respect for fundamental human rights
- Due process of law / rule of law
- Constructive management of conflict
- Political tolerance
- Inclusive multiparty democracy
- Popular participation
- Transparency
- Gender equality
- Accountability
- Promoting electoral norms and standards

OBJECTIVES

- To enhance electoral processes to ensure their inclusiveness and legitimacy
- To promote effective citizen participation in democratic processes to strengthen institutional accountability and responsiveness
- To strengthen governance institutions to ensure effective, accessible and sustainable democratic processes
- To promote principles, values and practices that lead to a culture of democracy and human rights
- To create a culture of excellence that leads to consistently high quality products and services
- To position EISA as a leader that consistently influences policy and practice in the sector

CORE ACTIVITIES

- Research
- Policy Dialogue
- Publications and Documentation
- Capacity Building
- Election Observation
- Technical Assistance
- Balloting

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