

PUBLIC COMPLAINTS AND THE OMBUDSMAN IN KENYA

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Declaration

I declare that this research project is my original work and has not been presented to any other institution of learning for the award of an academic certificate.

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This research project has been submitted for assessment with my authority as the University supervisor.

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To my boys, Jordan Charles Kutwa (Jojo) and Reuben Mandela Madiba Kutwa (Tata), I love you always and because of you, I will never give up.

Dedication

I dedicate this project, as always, to my boys Jordan and Mandela

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Commission on Administrative Justice Act Number 23 of 2011

Constitution of Kenya Review Act Chapter 3A

Contempt of Court Act Number 46 of 2016

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Constitution of the Republic of South Africa Number 108 of 1996

Nigeria Public Complaints Commission Act Chapter 377

South African Ombudsman Act Number 110 of 1983

Table of International Legislation

England Habeas Corpus Act 1679

List of Abbreviations and Acronyms

AOMA	African Ombudsman and Mediators Association
AORC	African Ombudsman Research Centre
ADR	Alternative Dispute Resolution
CAJ	Commission on Administrative Justice
CAK	Communications Authority of Kenya
CEO	Chief Executive Officer
CKRC	Constitution of Kenya Review Commission
EACC	Ethics and Anti-Corruption Commission
ICJ	International Court of Justice
IEBC	Independent Electoral and Boundaries Commission
IOI	International Ombudsman Institution
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
NGO Board	Non-Governmental Organizations Co-ordination Board
NSSF	National Social Security Fund
OAU	Organisation of African Union
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Ombudsmen for Justice
OPP	Office of the Public Protector
PAJA	Promotion of Administrative Justice Act
PCC	Public Complaints Commission
SGBV	Sexual and Gender Based Violence

SRC	Salaries and Remuneration Commission
TJRC	Truth Justice and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly

List of definitions

Governance Transparent, fair, all-inclusive and representative process of decision-making and how these decisions are implemented

Ombudsman Commission on Administrative Justice Kenya

ABSTRACT

Although the Constitution of Kenya establishes an Ombudsman to resolve public complaints, the said office continues to face challenges in so far as fulfilling its constitutional mandate is concerned.

This study argues that the reason for the continued challenge; first, is that the role of public complaints resolution has traditionally been the preserve of the judiciary; secondly, the new responsibility of the ombudsman in public complaints resolution is in tension with the judiciary; the third argument is that various statutory restrictions such as scope in investigations and limitation of jurisdiction hinder the Ombudsman's ability to fulfil its constitutional mandate.

The study examines the legislative and institutional framework governing resolution of public complaints and the office of the Ombudsman. To achieve this, the study utilises doctrinal, historical and comparative research methodologies.

The study has found that there is friction in exercise of power between quasi-judicial organs such as the ombudsman and the judiciary as exhibited by the supremacy battle and tension thereof; similarly, the Ombudsman is also stifled by its Act more particularly in the framing of its jurisdiction, limitation, powers and function, together with inadequate general empowerment to achieve its constitutional mandate.

Key recommendations include amendment of the CAJ Act, cooperation of institutions, upholding of constitutionalism and finality in the decisions of the ombudsman as demonstrated in the South African jurisdiction where courts have pronounced that decisions of the Public Protector are peremptory and not optional.

CHAPTER ONE: INTRODUCTION

*"The foundation of the government of a nation must be built upon the rights of the people, but the administration must be entrusted to experts"*¹

1.0 Introduction

An ombudsman is a representative of the public who investigates and tackles complaints largely relating to violation of rights.² Such appointment may be by Government or through parliament.³

Oosting argues that the present day ombudsman acts as and is premised on the rule of law with a primary objective to prevent the state from gaining absolute power without constraints, accountability or controls.⁴

Ayeni⁵ has also argued that present day ombudsman continued involvement in human rights in spite of their key mandate being advancement of administrative justice is a critical indicator in human rights.⁶

Remarkably, numerous challenges have been encountered in public complaint resolution leading to a perception that the office has not been successful. In light of the foregoing, it is critical to understand the history, the legislative and institutional framework governing

¹ Taiwan Today ,Su Yat Sen – Later Years (1st December 1971) <https://taiwantoday.tw/news.php?unit=4&post=630_1> accessed 18 November 2017

² Wikipedia (2018): *The Free Encyclopedia* < <https://en.wikipedia.org/wiki/ombudsman> > Accessed 8 November 2017

³ ibid

⁴ Marten Oosting , *The concept and the Role of the Ombudsman throughout the world* (1999) <[www.theioi.org/.../IOI%20Canada_Occasional %20paper%2070_Marten%Oosting_...](http://www.theioi.org/.../IOI%20Canada_Occasional%20paper%2070_Marten%Oosting_...)>

⁵Victor Ayeni, 'Ombudsmen as Human Rights Institutions: the new face of global expansion,' (2009) *Journal of Human Rights*, 13 (2014) <<https://doi.org/10.1080/14754835.2014.886950>> accessed 8 November 2017.

⁶ Ibid 13 – 16.

the office of the Ombudsman, the trends in case law and best practices in existence in other jurisdictions.

1.1 Problem Statement

Although the Constitution⁷ of Kenya provides for the establishment of an Ombudsman to resolve public complaints, the said office continues to face challenges in so far as fulfilling its constitutional mandate is concerned.

1.2 Research Objectives

1. To analyse the history of the office of the ombudsman and challenges.
2. To examine the legislative and institutional framework governing the office of the Ombudsman.
3. To examine the trends in case law, whether positive or otherwise to the office of the Ombudsman.
4. To examine the global best practices in existence in other jurisdictions.

1.3 Research Questions

This research target;

1. What is the history of the institution and the challenges thereof?
2. Why are there shortcomings in the legislative and institutional framework?
3. What are the trends in case law?
4. What are the global best practices in existence in other jurisdictions?

⁷ Article 59(4)

1.4 Hypothesis

Although the Constitution⁸ of Kenya provides for the establishment of an Ombudsman to resolve public complaints, the said office continues to face challenges in so far as fulfilling its constitutional mandate is concerned because of the shortfalls in legislative and institutional framework.

1.5 Theoretical Framework

This study is premised on Legal realism theory,⁹ and seeks to put a sociological account of the law in action.¹⁰ It comprises demystifying how the law is applied, social engineering and decisive change of the law.¹¹ It interrogates the genesis and basis of law and the realistic function and results thereof. It followed the sociological study of law.¹²

Proponents of this theory contend that legal rules are for the good of the wider society and public policy should be based on judicial decisions.¹³ They argue that majority of the cases pose rigid questions as issues for determination that must be resolved by consideration of the good of the parties against the public good and that this is portrayed depending on inclinations of the judge.

⁸ Article 59 (4)

⁹ Michael Steven Green, 'Legal Realism as Theory of Law' 46 William. & Mary Law Review, 1915(2005) <<http://scholarship.law.wm.edu/wmlr/vol46/iss6/2>> accessed 8 November 2017.

¹⁰ Raymond Wacks, *Understanding Jurisprudence, An Introduction to Legal Theory* (2005) p.177

¹¹ Llewellyn calls Legal Realism a "Concept to be used as a thinking tool." Llewellyn, *A Realistic Jurisprudence*, 3. See also Hayman, Levit, Delgado, editors, *Jurisprudence Classical and Contemporary* 156, West Publishing, St. Paul, Minn., (2002)

¹² Roy A Mersky, Definition and Meaning of Law, *Central India Law Quarterly* [1997 Vol. X:I] p.1

¹³ Ibid.

Leiter, in one of his articles, has argued that personal biases of judges, inform the final decision of cases.¹⁴ In view thereof, Oliver Wendell Holmes Jr.¹⁵ posits that law is greatly influenced by courts and state officials.¹⁶

Realists posit that legal principles treated as uncontroversial hide controversial political and moral choices. They are engrossed in mechanisms of predicting judges with more accuracy to determine the outcome, whereas theoretical advocates are interested in the accurate interpretation of legal concepts to protect particular interests. Similarly, Holmes¹⁷ insists that in deciding cases judges reach legal conclusions with relentless logic and are , greatly swayed by other factors.¹⁸

Realism thus focused that judicial decisions were made based on fact and not personal or political basis.

The theory was however criticised on grounds that there were gaps and contradictions, in particular Ronald Dworkin and Lon Fuller criticised the separation of law and morality.¹⁹

The influence and continuing relevance of this theory is founded on the ongoing debate on judicial activism, where legal scholars hold divergent views whether it is permissible for judges to make laws and not necessarily the existing law.²⁰

¹⁴ Brian Leiter, “*Rethinking Legal Realism: Toward a Naturalized Jurisprudence*,” 76 *Texas Law Review* (1997) 267.

¹⁵ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 *Harvard Law Review* 457 (1897)

¹⁶ *Ibid*

¹⁷ See (n15)

¹⁸ These factors include fairness, public policy, and other personal and conventional values

¹⁹ Ronald Dworkin, *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, (1978) 22-28; Lon Fuller, *The Morality of Law*, rev. Ed. New Haven, CT: Yale University Press, 33-94.

²⁰ Lief Carter and Thomas Burke, *Reason in Law*, 8th ed. Chicago, University of Chicago Press, 2015

The relevance of this theory in this study is premised on the principles of governance and judicial authority from the people and firmly founded on the Constitution of Kenya.²¹ As a result, cascaded downwards for implementation and adoption in all spheres in the Kenyan legal framework. Application of the theory would therefore, strengthen the cooperation between Judiciary and quasi-judicial institutions including but not limited to the Ombudsman in promoting public complaints resolution.

The Legal Realism theory seems to be most relevant in the Kenyan context as most laws seek to protect particular interests, which give rise to rights as opposed to the law allowing human freedom by granting rights. Noteworthy however, the Bill of rights is founded in the Constitution²²and guarantees the fundamental rights and freedoms that acknowledge the interests of not only individuals but communities and vulnerable groups as well. In that regard, in the case of Republic versus “Kenya National Commission on Humans Rights” (KNCHR) Ex-Parte Uhuru Muigai Kenyatta,²³The application was for an order to overturn the decision of KNCHR to include his name in a report on Kenya 2007 Post-election violence. In declining to issue orders sought, the Judges concluded that public interest far overrides the right of an *ex-parte* applicant. It therefore follows that in certain circumstances, civil rights/interest outweighs private rights/ interest.

²¹ Article 10 of the Constitution of Kenya

²² Constitution of Kenya 2010

²³ [2010], eKLR. <<http://kenyalaw.org/caselaw/cases/view/68319>> accessed 10 November 2017.

1.6 Literature Review

1.6.1 Background

Professor Okoth Ogendo²⁴ in his writings has mirrored the challenges in Africa to those of older political systems arguing that it is only then, that control, supervision, and accountability of power can be developed and internalized.²⁵ He further posits that history cannot be learned, it may have to be lived as well. Constitutionalism is, therefore, transformation of the result of political, social, cultural and economic progress.²⁶

1.6.2 Role of Human Rights

The Copenhagen Declaration of 1998 on social development resulted into ten commitments including; achievement of social development, poverty eradication, social integration and respect for human dignity.²⁷ The Declaration was cognisant, in its preamble of the importance of collective improvement and human rights for all,²⁸ urgency to address social problems that include poverty and unemployment.²⁹

To this end, Professor Yash Pal Ghai³⁰ has argued that many of these factors are intertwined with human rights violations hence the emphasis in the declaration in an attempt to attain the goals.

²⁴ Hastings Okoth- Ogendo, “*The Politics of Constitutional Change in Kenya since Independence, 1963-69*” (2001) oxford university press

²⁵ Hastings Okoth-Ogendo, “*The Politics of Constitutional Change in Kenya since Independence, 1963-69*” (2001) oxford university press

²⁶ *ibid*

²⁷ The Copenhagen Declaration on social development (1990) <www.un.org/en/development/desa/population/A_CONF.166_9_Declaration.pdf> accessed 11 March 2018.

²⁸ Para 1, Copenhagen Declaration on Social Development (1998)

²⁹ *Ibid* para. 2.

³⁰ Yash Ghai, Human Rights and Social Development ,Towards Democratization and Social Justice, UNRISD (2002)

There are official and unofficial players in human rights field³¹ with importance laid in enhancing the players towards the fortification of rights since 1993 Conference in Vienna.³²

Ghai concludes that generally there is little or no funding for human rights related activities in spite of the high-levelled engagements and negotiations at the international level.³³

1.6.3 The Ombudsman and Domestic Judicial Decisions

Marten Oosting argues that the more the bodies charged with public complaints handling are independent, there exists an element of supervision over bodies and public complaints lodged, the more a resemblance to the institution of the ombudsman.³⁴

Sunday Tunde Akindele,³⁵ has highlighted the universal functions of the ombudsman to include ; protection of citizens rights , act as check on the misuse/abuse of powers; conduct investigation, publicize abuses and initiate public litigation.³⁶

The functions of the ombudsman in Kenya are well articulated in the Act,³⁷ key amongst them being that the mandate over both National and County governments. The

³¹ See (n 24).

³² *ibid*

³³ Yash Pal Ghai, Human Rights, and Social Development, Towards Democratization and Social Justice, UNRISD (2002)

³⁴ Marten Oosting, *The concept and role of the ombudsman throughout the World*, (May 1999) <www.theioi.org/.../IOI%20Canada_Occasional%20paper%2070_Marten%20Oosting...>

³⁵ Sunday Tunde Akindele, 'Judicial Review and Ombudsman System: Examination of their Efficacy as means of Citizens Redress' (1992) in *Journal of Nigerian Public Administration and Management* Vol. 1, No. 2

³⁶ Sunday Tunde Akindele, 'Judicial Review and Ombudsman System: Examination of their Efficacy as means of Citizens Redress' (1992) in *Journal of Nigerian Public Administration and Management* Vol. 1, No. 2

³⁷ Section 8 Commission on Administrative Justice Act

ombudsman also enjoys powers of a court,³⁸ to the extent that it can issue summonses, conduct hearings and issue determinations.

The Court system in Kenya entails hearing and determination of cases, essentially the traditional dispute resolution. Subsequently, there ought to be compliance with the determination and or orders. Failure to comply with court orders amounts to contempt which is covered under the Contempt of Court Act³⁹, which Act provides an operational framework in the event of disobedience of the orders of the court. The provisions of the CAJ Act do not have any such enforcement mechanism of the determinations. There exists, therefore blatant contempt of Ombudsman's decisions. The attempt under the CAJ regulations,⁴⁰ are inadequate.

Case law and or judgments of the Kenyan Courts have also failed to empower this office. In a judicial review,⁴¹ the Court in dismissing the application, noted that state corporations, government agencies, and commissions do not have unlimited mandate and can only exercise their mandate as established.

In another case for constitutional review⁴² against CAJ in relation to its mandate to investigate, the court noted, 'that the conduct of the investigatory process fell short of the Constitutional⁴³ provisions and the subsequent Act⁴⁴; that CAJ had no jurisdiction to embark on investigation of the issues complained of during the pendency of similar

³⁸ Section 25 Commission on Administrative Justice Act, 2011.

³⁹ The Contempt of Court Act Number 46 of 2016

⁴⁰ Regulation 33 Commission on Administrative Justice Regulations 2013

⁴¹ Republic versus Commission on Administrative Justice Ex Parte National Social Security Fund Board of Trustees [2015] eKLR

⁴² Republic versus Commission on Administrative Justice & 2 Others Ex Parte Michael Kamau Mubea [2017] eKLR.

⁴³ Article 47 of the Constitution of Kenya

⁴⁴ Fair Administrative Action Act No. 4 of 2015

investigations by the Salaries and Remuneration Commission (SRC) and in light of the approval by SRC of the applicant's remuneration,'

There is also disregard of the determinations by public officers and public institutions against whom the decisions are made.

1.6.4 Regional

In South Africa, Montesh⁴⁵ states that the information scandal of the 1970's was the genesis of change in cases of abuse of office, misuse of public funds and leading to a need for ombudsman.⁴⁶ Montesh, advocates for legislative reforms in the operations of the Public Protector to ultimately protect individuals from abuse and the public protector being enabled to enforce its decisions through court.⁴⁷ Such legislative reforms, he argues, must uncover the structural weakness in government administrative reforms.

Interesting cases in South Africa include the case against a sitting president and renovations at his home ⁴⁸ and that of in appropriate relations with the Gupta family leading to award of contracts marred with corruption. Both reports elicited outcry from the public and civil society, however, the recommendations therein are yet to be fully implemented.⁴⁹

⁴⁵ Moses Montesh, 'the functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and balances (2009); 5(28):194-208<<http://doaj.org>> accessed 20 March 2018.

⁴⁶ South Africa, 'Ombudsman Act 110 of 1983', 1983, Pretoria: Government Printer.

⁴⁷ Moses Montesh , ' The functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and balances (2009) ;5(28):194-208 <<http://doaj.org>> accessed 20 March 2018.

⁴⁸ Public Prosecutor South Africa, 'Investigation Reports' available at < www.protect.org> accessed 19 March 2018.

⁴⁹ Public Protector South Africa, Investigation Reports, available at < www.pprotect.org> accessed 20 March 2018.

In arguing for the African Ombudsman, Akpomuvire⁵⁰ outlines the challenges facing the Ombudsman to include lack of resources, lack of independence, bureaucracy and advocates for the institution to enforce accountability of government.⁵¹

Oosting⁵² argues that the key role of every ombudsman is promotion of good governance for the public good where good governance translates to reverence of the rule of law in public service.⁵³ Accessibility and independence of the ombudsman is critical and must inspire the confidence of the public while protecting them. Complainants must have the confidence to lodge complaints without fear of reprisal. The ombudsman must be well known to the public, which efforts can be made by way of outreaches and other public forums and a general presence evenly within the jurisdiction with the aim to reach the public with ease.

The foregoing has brought to fore a case for constitutionalism, good governance, legislative and administrative reforms. Judicial decisions have also highlighted the constraint between the judiciary and the Ombudsman in complaint resolution. Perhaps in seeking a solution, the constitution⁵⁴ provides for alternative dispute resolution including mediation.

⁵⁰ Mukoro Akpomuvire., *The Ombudsman Phenomenon in African States Public Services*, Nigeria: Obafemi Awolowo University, 2007.

⁵¹ *ibid*

⁵² Marten Oosting, *The Independent Ombudsman in a Democracy, Governed by the Rule of law*, (May 1999) <www.theioi.org/.../IOI%20Canada_Occasional%20paper%2070_Marten%20Oosting_...>

⁵³ *ibid*

⁵⁴ Article 159 (2) (c) Constitution of Kenya, 2010.

1.6.5 Mechanisms

The UN Charter has made provision for settlement of disputes and in particular, makes reference to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement.⁵⁵

The Constitution of Kenya has provided for other mechanisms;⁵⁶ the ombudsman has made provision to resolve matters before it through conciliation, mediation or negotiation.⁵⁷

One common denominator is that all the alternative forms are voluntary in nature and the outcome is focused on reaching a win-win situation for the parties concerned as opposed to the traditional mechanism where one party will emerge as a winner while the other as loser. The Judiciary in Kenya is currently rolling out the court-annexed mediation to ease the backlog in the traditional setup; however, the process is voluntary.

1.6.6 Gaps

Notable gaps include constitutionalism as identified by Okoth Ogendo. Others are ; Little or no funding for human rights related activities and institutions; independence or lack thereof of bodies charged with handling public complaints ; wilful disobedience of decisions; lack of cooperation and limitation in jurisdiction.

1.7 Justification of the Study

Despite the existence of the Ombudsman in other jurisdictions from as early as 1809, the phenomenon has only been experienced in Africa from the 20th Century and in Kenya

⁵⁵ Article 33 UN Charter

⁵⁶ Article 59(2) (c) Constitution of Kenya ; alternative forms of dispute resolution to include reconciliation, mediation, arbitration and traditional dispute mechanisms

⁵⁷ Section 29(2) Commission on Administrative Justice Act

from the 21st century, the year 2011 with very little literature in existence. As demonstrated, similar research has not been undertaken. This research, therefore, is an attempt to provide an insight into the ombudsman, to make recommendations in particular legislative reforms for strengthening the ombudsman and foster better relations with other institutions.

1.8 Research Methodology

The study utilises doctrinal, historical and comparative research methodologies. It is qualitative in nature as it utilises materials bearing in mind the social context and interpretation thereof. It is grounded on the theory of legal realism and explores the case of Nigeria, South Africa and Sweden.

The research is undertaken by way of desktop review, library research, archives and other databases of the available relevant literature on this subject.

1.9 Conclusion

No doubt, human rights are important to the ombudsman, which plays a bigger role in addressing public complaints. Towards this end, many authors have mapped out the existing framework and an ideal ombudsman, more particularly in Africa. The challenges as drawn require an African solution as opposed to the Scandinavian approach thus far adopted in Africa.

1.10 Chapter Breakdown

The research is broken down into the following five chapters:

Chapter One

This chapter details the introduction part of the study. It contains an introduction into the topic of research, the historical background, problem statement, research question,

hypothesis, theoretical framework, and literature review, justification of the study, methodology, conclusion and a breakdown of the chapters.

Chapter Two

This Chapter reviews the historical background, key events and the challenges affecting protection of human rights and resolution of public complaints leading to present day Kenya.

Chapter Three

This chapter analyses the legislative and institutional framework governing the institution of the Ombudsman, locally, regionally and internationally. It expounds on the shortcomings in the legislative framework on public complaints and the ombudsman.

Chapter Four

This chapter analyses the trends in case law and practices from other jurisdictions. It expounds on the notable challenges, review of case law and the trends in determinations by the Courts.

Chapter Five

This chapter provides conclusion and recommendations drawn from best practices and experiences of other jurisdictions particularly from South Africa.

CHAPTER TWO: HISTORICAL BACKGROUND

2.0 Introduction

This chapter is divided into two; regional and local history. It analyses the context and genesis of violations regionally and within the Kenyan context that led to present day Kenya. It examines the in-depth history of safeguard of rights, constitutionalism and the rule of law in society.

It uses these aspects to establish the sequence of events in the protection of rights in Kenya since independence to determine the status and concerted efforts in promoting public complaints resolution through the institutions including the institution of the Ombudsman in Kenya.

2.1 Development of Regional Human Rights

Human rights in Africa as is known began with the fight against colonialism. The 1945 Pan –African Congress ⁵⁸ envisioned basic rights such as freedom, education, decent earnings and living, expression and social equality.

The success of the African Charter on Human and Peoples' Rights in 1981⁵⁹ and subsequent recognition by “Organization of African Unity” (OAU) was partly as a result of human rights atrocities in Africa. ⁶⁰ This was followed by agitation of Tanzania and

⁵⁸ George Shepperson and St. Clare Drake, (2008) "The Fifth Pan-African Conference, 1945 and the All African Peoples Congress, 1958, Contributions in Black Studies: Vol. 8 , Article 5. Available at <<http://scholarworks.umass.edu/cibs/vol8/iss1/5> > accessed 5 June 2018

⁵⁹ African Commission on Human and Peoples Rights , African Charter on Human and Peoples Rights (1981) < <http://www.achpr.org/instruments/achpr/>>

⁶⁰ United Nations, 'Protect Human Rights' <<http://www.un.org/en/sections/what-we-do/protect-human-rights/> > accessed 27 March 2018.

the OAU to set up mechanism to prevent similar unilateral intervention.⁶¹ As a result, the African Charter established the necessary human rights mechanism.⁶²

The peace and tranquillity that is enjoyed today has come about as a result of deliberate efforts to shun violence and use alternative means to resolve complaints relating to human rights violations and maladministration; these alternative means include the utilisation of institutions such as the ombudsman.⁶³

2.2 Development of the Local Human Rights Concept

South Africa is instructive, from the apartheid era and entire struggle resulting into a new dawn in the fight for human rights.⁶⁴ The impact of the information scandal and the atrocities during apartheid era were crucial lessons leading to the need for good governance. Concerns for human rights especially gross human rights violations have found their way into the local jurisprudence dating back to the Kenya's pre-colonial era and subsequent regimes.⁶⁵

2.2.1 Jomo Kenyatta Regime 1963- 1978

The Jomo Kenyatta presidency pursued capitalist economic policies and the "Africanisation" of the economy.⁶⁶ Between the years 1965 and 1966, there were various constitutional amendments made to enhance the President's power; the 1966 constitutional amendment gave the president sweeping powers over peoples freedom and in particular the power to order , arbitrarily , the detention of individuals without trial

⁶¹ Frans Viljoen, *International Human Rights Law in Africa* (2nd edn Oxford University Press 2012)

⁶² Philip Alston and Ryan Goodman *International Human Rights*,(Oxford University Press 2008)

⁶³ ibid

⁶⁴ See (n 42).

⁶⁵ The Commission of Inquiry on Post-Election Violence in Kenya 2008(Waki Commission)

⁶⁶ Wikipedia <https://en.wikipedia.org/wiki/Jomo_Kenyatta >accessed 21 May 2018

under the guise of security threat.⁶⁷ It is also during this period that there was incessant harassment of purported dissidents, with security officers implicated in the murders of prominent personalities.⁶⁸

The Constitutional amendments were pursued with a view to have an all-powerful authoritarian presidency without checks and balances at the expense of the common man and his grievances.

Accordingly and in view of the inequities, the Ndegwa Commission, one of the most notable Commissions of Inquiry in the stated period was established in 1971.⁶⁹ Part of its recommendation, following a rigorous engagement included the establishment of an office to handle the prevalent maladministration in the public service.

2.2.2 Daniel Moi Regime 1978 - 2002

Daniel Moi ascended to the presidency following the death of the first president of Kenya. During this period, multi-party was abolished after the attempted coup of 1982, with amendments to the 1969 Constitution. Concerted efforts were made by way of constitutional amendments to suppress the population. Following political agitation, section 2A of the Constitution was repealed and Kenya became a multi-party state, with time limits to a presidential term.

⁶⁷ Ibid.

⁶⁸Wikipedia; Human Rights in Kenya' available at< https://en.wikipedia.org/wiki/Human_rights_in_Kenya accessed 24 March 2018; They included Pio Gama Pinto, Tom Mboya and J.M. Kariuki. C.M.G. Argwings-Kodhek and Ronald Ngala

⁶⁹ Public Service Structure and Remuneration Commission of 1971

There was international criticism with international donors and governments breaking relations pending improvement on rights violations. During this period, security forces were accused of human rights violations.⁷⁰

The “Truth Justice and Reconciliation Commission” (TJRC) investigated the Nyayo House torture chambers and the evidence of the torture cells exposed. Part of the recommendations of TJRC⁷¹ was that the government declare the chambers a memorial site to be curated as a reminder of human rights atrocities that should never be repeated by any government and compensate the affected families whose livelihoods were affected when breadwinners were taken away from their families, some for months others for years.⁷² Again, with all the efforts the recommendations of the report are yet to see the light of day.

This study notes the continued use of commissions of inquiry to delve into inequities, whose outcomes the State was reluctant to implement on most occasions. This despite the existence of the Judiciary.

2.2.3 Mwai Kibaki Regime 2002- 2013

During this period, Kenya saw economic turnaround that included the establishment in 2003 of the “Kenya National Commission on Human Rights” (KNCHR) to oversee Kenya's observance of international human rights standards. It was reconstituted as the

⁷⁰ Wikipedia; Human Rights in Kenya' < https://en.wikipedia.org/wiki/Human_rights_in_Kenya accessed 24 March 2018; including arbitrary arrest, detention without trial, abuse in custody, and deadly force

⁷¹ Truth Justice and Reconciliation Commission Report <http://knchr.org/Portals/0/Reports/TJRC_Volume_4.pdf> accessed 25 March 2018.

⁷² Wikipedia, 'Daniel Arap Moi, <https://en.wikipedia.org/wiki/Daniel_arap_Moi >accessed 25 March 2018

“Kenya National Human Rights and Equality Commission” in 2010⁷³ mainly to advance reverence for human rights in Kenya⁷⁴ with the equality function assigned to the “National Gender and Equality Commission.”

The “Constitution of Kenya Review Commission” (CKRC)⁷⁵ in 2005, recommended amongst others the establishment of specific Commissions, one of them being the “Commission for Human Rights and Administrative Justice” comprising of a “Peoples Protector” to advance and enforce rights, Human Rights Commissioner and Gender Commissioner. CKRC noted the important role of “ombudsman”, “human rights or equality commissions” alongside the Judiciary. The shortfalls within the Bill of Rights were noted, in particular lack of bodies to promote and enforce rights such as “Ombudsman” or a “Human Rights Commission.”

National policy documents and institutional reports such as the Economic Recovery Strategy and the Kenya Vision 2030 made a case for the office of the Ombudsman.⁷⁶ The Economic Recovery Strategy, in particular advocated for the ombudsman to promote governance and human rights.⁷⁷ As a result, in 2007 the President established the Public Complaints Standing Committee⁷⁸, whose mandate was limited since it was a department within the Ministry of Justice as it then was. The office of the Ombudsman came into

⁷³ Article (59) (4)(a) of the Constitution of Kenya 2010

⁷⁴ Article 59(4)(a) of the Constitution of Kenya 2010

⁷⁵ Report of the Constitution of Kenya Review Commission (2005) <www.katibainstitute.org> accessed 7 November 2017.

⁷⁶ Ministry of Planning and National Development, Economic Recovery Strategy for Wealth and Employment Creation 2003-2007

⁷⁷ Ministry of Planning and National Development, Economic Recovery Strategy for Wealth and Employment Creation 2003-2007

⁷⁸ Kenya Gazette Notice Number 5826 of 29 June 2007

existence pursuant to the CAJ Act 2011 and progressive implementation of the Constitution of Kenya.⁷⁹

Following the advent of the constitution, the Judiciary in an attempt to address some of its shortfalls, proposed numerous reforms including the multi agency approach through the launch of the “National Council on the Administration of Justice,”⁸⁰ whose members cooperate on matters of administration of justice.⁸¹ Ironically, the ombudsman is a member of the multi agency.

2.2.4 Uhuru Kenyatta Regime 2013 to date

The significant challenges highlighted include the sharp rise in cost of living, public debt, wage bill and allegations of corruption.⁸² Non-adherence to separation of powers and interference with operations of judiciary by deduction of its budget by the national assembly resulting into a threat to its programmes as well as the promises by the Chief Justice, most importantly access to justice may not be attained.⁸³

Atrocities during this period include the unilateral and unconstitutional deregistration of Non-Governmental Organisations (NGO’s) including Kenya Human Rights Commission (KHRC) on allegations of failure to pay taxes, holding illegal bank accounts and

⁷⁹ Commission on Administrative Justice Act No. 23 of 2011 and the Constitution of Kenya 2010

⁸⁰Willy Mutunga, ‘Critical Reforms Taking Root In The Judiciary’ (*Kenya Law* 22 August 2011)<<http://kenyalaw.org/kenyalawblog/critical-reforms-taking-root-in-the-judiciary/>> accessed 5 August 2018

⁸¹ibid

⁸² Wikipedia , Uhuru Kenyatta, <https://en.wikipedia.org/wiki/Uhuru_Kenyatta> accessed 16 June 2018

⁸³ Shikhutuli Namusyule and Lilian Mueni, Impact of Judiciary Budget Cut , (*Judiciary* , 21 August 2018) <<https://www.judiciary.go.ke/impact-of-judiciary-budget-cut/>> accessed 22 August 2018

employing expatriates illegally and shut down the Africa Centre for Open Governance (AfriCOG)⁸⁴

KNHCR in a statement⁸⁵ noted the threatened arbitrary deregistration of the Kenya Human Rights Commission and AFRICOG as well as the delayed operationalization of the Public Benefits Organization Act as examples of the turbulence that Non-Governmental Organizations have waded through. In a landmark ruling, Mwita J. observed that the action on the part of the NGO Board cancelling KHRC's registration, ordering the freezing of its bank accounts, ordering recovery of non-existent taxes and the purported directive for deportation of the foreign staff was unconstitutional.⁸⁶

On 30th January 2018, the Communications Authority of Kenya (CAK) switched off local media outlets which action was arbitrary and plunged Kenya into information darkness, undermining the right of Kenyans to access information.⁸⁷ In the same vein, the case of lawyer Miguna Miguna, on 2nd February 2018, police broke into his home and arrested him. The culmination was deportation of the lawyer to Canada and a blatant disregard of numerous court orders amounting to contempt of Court,⁸⁸ a clear violation of constitutional rights.⁸⁹

⁸⁴ Stella Cheronon , 'NGOs : We were shut over plans to contest poll result in Court' Daily Nation (Nairobi , 14 August 2017)

⁸⁵ State of Human Rights and Fundamental Freedoms in the Republic of Kenya: (Statement by the Kenya National Commission on Human Rights Nairobi, 19 March 2018) <<http://www.knchr.org/> >accessed 20 March 2018

⁸⁶ Kenya Human Rights Commission & another v Non-Governmental Organizations co-ordination Board & another [2018] eKLR

⁸⁷ Article 35 Constitution of Kenya

⁸⁸ Otsieno Namwaya, 'Government Crackdown Threatens Rights in Kenya' All Africa February 8, 2018, <<https://www.hrw.org/news/2018/02/08/government-crackdown-threatens-rights-kenya> >accessed 20 March 2018

⁸⁹ Articles 28, 29,33,34,35, 38, 40, 48 & 49 of the Constitution of Kenya 2010

2.4 Conclusion

While efforts have been made towards the strengthening of institutions, a lot is yet to be achieved in this front. This chapter has analysed the context and genesis of human rights violations and the turning point for agitation for change, regionally and within the Kenyan context, efforts at creating and strengthening national institutions towards protection of rights. The discussion has advanced the perspective of how through the different periods in the country's development, different regimes contributed to strengthening or otherwise of human rights. It has reviewed the historical progress leading to present day regime in relation to institutions such as the ombudsman.

CHAPTER THREE: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

3.0 Introduction

This part looks into the legislative and institutional framework governing the establishment and operation of the Ombudsman globally, regionally and locally.

Years preceding promulgation of the Constitution of Kenya 2010, concerns of addressing public complaints were a preserve of the judiciary as the traditional arbiter in public complaints resolution. Kenya made significant milestones upon the promulgation of the 2010 Constitution and subsequently the inception of the ombudsman,⁹⁰ which established the new role of the Ombudsman as a quasi-judicial organ in public complaints resolution.

3.1 Legislative Framework

This section discusses the International legislative framework as well as regional and local legal framework.

3.1.1 International Legal Instruments

While the institution of the Ombudsman is premised on the principle of fairness, there lacks an international treaty, specific to it. However, within United Nations (UN) framework, state parties have endeavoured to promulgate resolutions to safeguard human rights and good governance.

⁹⁰ Commission on Administrative Justice Act No. 23 of 2011

3.1.1.1 The Universal Declaration of Human Rights (UDHR)

The UDHR ⁹¹ was adopted, proclaimed by “UN General Assembly”⁹² following human rights violations during Second World War. The declaration sought to protect human rights and promote relations between states.⁹³

It further makes provision to safeguard fundamental rights like equal protection of the law⁹⁴ , fair hearing and effective adjudication by national tribunal.⁹⁵ In Kenya, this has been captured under the Bill of Rights.⁹⁶ The rights are upheld to promote fairness and administrative justice.

3.1.1.2 International Covenant on Civil and Political Rights (ICCPR)⁹⁷

It was adopted⁹⁸ to commit members to respect civil and political rights of its nationals. It stipulates principles on fair and timely access to redress and was ratified in Kenya in 1972.

Although no specific provision is made in the ICCPR in respect of the ombudsman and fair administrative action, the principles of administrative justice are encompassed within the right to a fair trial that is protected under international human rights law.

⁹¹ Available at <www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>accessed 2 May 2018.

⁹² Resolution 217 A (III) of 10 December 1948 in Paris, France

⁹³ The Universal Declaration of Human Rights, Preamble Para. 3

⁹⁴ Ibid Article 7.

⁹⁵ Ibid Article 8.

⁹⁶ Article 47 of the Constitution of Kenya and subsequently the Fair Administrative Action Act No. 4 of 2015

⁹⁷The ICCPR adopted by the UN General Assembly Resolution 2200A (XXI) of 1966, available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>accessed on 2 May 2018.

⁹⁸ United Nations General Assembly 1966

3.1.1.3 The Paris Principles⁹⁹

The Paris Principles laid foundation for “National Human Rights Institutions” (NHRIs), and was passed by the “UN General Assembly” in 1993.¹⁰⁰The principles emphasised on competence in protection of human rights, broad mandate cast in the constitution or legislature, adequate powers for effectiveness and independence, dispute resolution including conciliation, adequate resources and powers for investigations. All these principles laid a foundation for NHRI’s as quasi-judicial institutions.¹⁰¹

In South Africa, for example these include the institutions under chapter 9. In Kenya, this has ably materialised under the new constitutional dispensation more particularly the institutions under chapter fifteen of the Constitution of Kenya. Prior to the new constitutional dispensation in Kenya, there were concerted efforts to empower national institutions albeit with challenges faced.

3.1.1.4 UN General Assembly Resolution 63/169 of 2008

The resolution makes provision for the role of the Ombudsman,¹⁰² and advocates for their autonomy and independence.¹⁰³

It reiterates the blue print that had been laid down under the Paris principles and emphasised the establishment of the institution in instances where it was non-existent,

⁹⁹ See Annex 6, ‘Paris Principles, available at <http://www.info.gov.hk/info/eoc/annex6_e.pdf> accessed on 2 May 2018.

¹⁰⁰ UN General Assembly Resolution 48/134 – the 85th plenary meeting of 20 December 1993, available at <<http://www.un.org/en/ga/sessions>> accessed on 2 May 2018.

¹⁰¹ See the Paris Principles generally

¹⁰² Resolution adopted by the UN General Assembly on 18 December 2008; Resolution 63/169 of 2008, available at <<http://www.un.org/en/ga/sessions>> accessed on 2 May 2018.

¹⁰³ Ibid

strengthening of the institution in instances where it existed. It also identified cooperation of institutions and mandatory nature of decisions of the ombudsman. Ultimately, the resolution triggered a monitoring system and reports submitted on status of implementation.

3.1.1.5 UN General Assembly Resolutions 65/207 of 2010

These later UN Resolutions also reaffirmed the responsibility of the Ombudsman in the promotion and protection of human rights.¹⁰⁴ This specifically refers to the Ombudsman in promotion of good governance in public administrations.¹⁰⁵

The UN demonstrated keenness on the status of implementation of resolutions with a view to continue advocating for constitutionalism. Kenya pronounced herself resoundingly in the new constitutional dispensation.

3.1.1.6 European Code of Good Administrative Behaviour¹⁰⁶

It was adopted to provide a framework for administrative behaviour of European bodies including the ombudsman in the engagement with the public for purposes of public administration.¹⁰⁷ It makes provision for the dual role of the ombudsman to investigate and recommend corrective action and acts as a non-binding code whose intention was to be made law.

The code has a bias for service delivery, redress of maladministration and the rights of the citizens thereof. In addressing public complains as mandated, the ombudsman seeks

¹⁰⁴ Resolution adopted by the UN General Assembly on 21 December 2010; Resolutions 65/207 of 2010, available at <<http://www.un.org/en/ga/sessions>> accessed on 2 May 2018.

¹⁰⁵ International Ombudsman Institute (IOI) (ed.) (2013) *Australasia and Pacific Ombudsman Institutions: Mandates, competences and good practice*. Heidelberg: Springer at 8.

¹⁰⁶ European Ombudsman 'The European Code of Good Administrative Behaviour', available at: <<http://www.ombudsman.europa.eu/resources>> accessed on 5 May 2018.

¹⁰⁷ Ibid

to demonstrate that service delivery is a critical component. Public bodies are therefore monitored through a number of ways including the performance contracting with the national government.

3.2 Regional Framework

3.2.1 African Charter on Human and Peoples' Rights¹⁰⁸

It is referred to as the “Banjul Charter” and was adopted by the “Organization of African Union” (OAU) to protect and promote human rights in Africa. Desirability to adopt a regional convention was seen as a milestone towards the fortification of human rights and identifying with local issues affecting African people to alleviate human rights related atrocities.¹⁰⁹

It is noteworthy, that African Charter does not make reference to the institution of the ombudsman; however, the instrument recognizes the principles of fair hearing as a fundamental cornerstone for affording equal protection of the law.¹¹⁰

3.3 Local Framework

The local framework for regulating public complaints and the institution of the ombudsman in Kenya is drawn from the Constitution of Kenya 2010 and the subsequent legislation thereto.

¹⁰⁸ The African Charter also known as the Banjul Charter, adopted 27 June 1986 by the OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. (1982) 58, entered into force 21 October 1986; <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf >accessed on 3 May 2018.

¹⁰⁹ Ibid see preamble.

¹¹⁰ Article 7 of the African Charter guarantees every individual a right to a fair hearing by a competent national organ and the right of presumption of innocence, right to defense, as well as the right to be tried within a reasonable time by an impartial court or tribunal.

3.3.1 The Constitution of Kenya 2010

The promulgation of the constitution brought with it ideals and parameters which have been operationalised by way of individual pieces of legislations;¹¹¹ including specific provisions for the ombudsman.¹¹²

It is viewed as a progressive constitution however; there are others who fault it. Scholars have pronounced themselves on the subject and reiterate that there is no perfect constitution, world over.

Largely the constitution has embraced rules of international law as Kenyan law. It provides an extensive bill of rights, pronounced itself on integrity matters and sought to create institutions that are national in nature. Others have argued that by virtue of being constitutional institutions, the said institutions are not easy to dispense with as they are anchored in the constitution and that the process is rather rigorous.

The constitution has also made provision for alternative dispute resolution employing reconciliation, mediation, arbitration.¹¹³

3.3.2 Commission on Administrative Justice Act

The Act ¹¹⁴was enacted in 2011 and established an independent “Commission within the meaning of chapter fifteen of the Constitution,” known as the office of the ombudsman.¹¹⁵ It enjoys wide powers and functions as provided for in the Act; however,

¹¹¹ Articles 2(5) , 2(6), 10,35, 47, 59(4) of the Constitution of Kenya

¹¹² Article 59(4) of the Constitution of Kenya

¹¹³ Article 159(2)(c) of the Constitution of Kenya

¹¹⁴ Act No. 23 of 2011 was enacted in 2011, pursuant to Article 59(4) of the Constitution to restructure the Kenya National Human Rights and Equality Commission, establish the Commission, its powers and functions

¹¹⁵ Article 252 (1) (a) of the Constitution of Kenya 2010

there exists a limitation section.¹¹⁶ The CAJ Act makes minimal provision for offences and penalty.¹¹⁷

The ombudsman employs mediation, conciliation and negotiation in resolution of public complaints.

3.3.2.1 The scope of the Office of the Ombudsman in Kenya

The ombudsman has mandate over both national and county governments. The ombudsman may inquire into a matter or initiate an investigation following a complaint or take up a matter suo motu and issue a determination.

The powers and functions are derived from constitutional and legislative provisions.¹¹⁸ Its functions include advisory opinions, investigations, reporting to parliament amongst others.

The limitation clause has been subject of many cases against the ombudsman where the courts have consistently made pronouncements against the ombudsman.¹¹⁹ Intervention is required in this area, to smoothen the friction that has thus far been demonstrated in judgements against the ombudsman and ultimately to strengthen the position of the ombudsman as envisioned in the UNGA resolutions.

¹¹⁶ Section 30 of the Commission on Administrative Justice Act No. 23 of 2011

¹¹⁷ Section 52 Commission on Administrative Justice Act

¹¹⁸ Constitution of Kenya 2010 and the Commission on Administrative Justice Act 2011

¹¹⁹ Section 30 of the Commission on Administrative Justice Act provides that the Commission shall not have jurisdiction over ;a) proceedings or a decision of the Cabinet or a committee of the Cabinet; b) a criminal offence; c) a matter pending before any court or judicial tribunal; d) the commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions; e) the grant of honors or Awards by the President; f) relations between Kenya and foreign States; g) matter where there exists a right of appeal; h) matter under investigation by an person or commission established under the Constitution or any other written law.

Appointment of commissioners is a rigorous process that involves the appointment of a selection panel, which shall forward eight names; three for Chairperson and five for Commissioners to the president. The president thereafter forwards three names to parliament for either approval or rejection.

The ability of the ombudsman to conduct investigations has been marred by a myriad of court orders highlighting the tension between the ombudsman and the judiciary. The courts have failed to uphold as mandatory, the decisions of the ombudsman and have instead offered refuge to applicants seeking orders against the ombudsman.

3.3.3 Access to Information Act¹²⁰

The Act¹²¹ is pursuant to Article 35 of the Constitution and has conferred oversight powers to the ombudsman.

The Act provides a framework within which information may be obtained from both public and private institutions, outlines information that is limited, provides for proactive disclosure, mode of access of the information and cost thereof and right of review both to the Ombudsman and to the High Court.¹²² It is hailed as a significant milestone towards the enforcement of the operations of the Ombudsman in Kenya as it confers more powers to it. Following the enactment of this Act, there have been several cases for access to information more particularly in instances where public offices have neglected to avail the information and or sought to wrongfully apply the limitation clause. In the case of

¹²⁰ Act No. 31 of 2016

¹²¹ Access to information Act Number 31 of 2016

¹²² Section 20 of the Access to Information Act gives the Commission powers of enforcement and oversight.

Katiba Institute versus President's Delivery Unit & 3 others,¹²³ Mwita J. upheld the petition and emphasized the need to appreciate as a nation that the right to access information as not an inferior right. That it is integral to the democracy conceptualized by the Constitution, and it encourages public participation and ensures that public power delegated to leaders is not abused.

3.3.4 Contempt of Court Act¹²⁴

The main object of the Act is to emphasize that court orders are not issued in vain and must be complied with. Judicial authority must be protected to enhance confidence in the administration of justice. The Act therefore makes provision for limits and powers of courts in punishing for contempt of court.¹²⁵

Similarly, the ombudsman as a quasi-judicial authority, issues determinations that must be complied with. Of interest, is the Judah Abeka¹²⁶ case where the court was categorical that government agencies are under no statutory duty to comply. The contention herein is that failure to comply, must invite sanctions against the public officer. The first step perhaps is to ensure that the decisions of the ombudsman are peremptory as demonstrated in the South Africa jurisdiction.

3.3.5 The Penal Code¹²⁷

The Act makes provision for offences and punishment under criminal law. It does not expressly outlaw unfair administrative action, but prohibits abuse of office.¹²⁸

¹²³ [2017] eKLR

¹²⁴ Act No. 46 of 2016

¹²⁵ Ibid see preamble. Sections 5 and 6 of the Contempt of Court Act provide for jurisdiction of superior and subordinate courts to punish for contempt.

¹²⁶ [2015] eKLR <http://kenyalaw.org/caselaw/cases/view/106164/> accessed 20 June 2018

¹²⁷ Cap 63 Laws of Kenya (Revised 2014)

It is noteworthy that the enabling Act ¹²⁹ has made minimal mention of offences committed in the course of carrying out its functions. The punishment provided, may also not act as a deterrent.¹³⁰

3.3.6 The Fair Administrative Action Act¹³¹

The Act makes provision for operationalisation of fair administrative action while embodying principles of natural justice. It obliges public and private entities to adhere to these principles when taking administrative action and addressing administrative injustice. It is a demonstration that this right must be jealously guarded and may not be abrogated haphazardly.

3.4 Institutional Framework

3.4.1 International Institutional Framework

3.4.1.1 The International Ombudsman Institute (IOI)¹³²

The IOI came into force in 1978 to develop , enhance the concept of the Ombudsman. It brings together more than 190 independent Ombudsmen from more than 90 countries worldwide. Key objectives of the IOI are independence, objectivity and fairness, as foundations and pillars of the Ombudsman Office and encouraging the exchange of information on regional and international levels.¹³³

¹²⁸ The Act provides for the offence of abuse of office and classifies it as a felony to which upon conviction, one is liable to a fine not exceeding one million or a term not exceeding 10 years or both.

¹²⁹ Commission on Administrative Justice Act 2011

¹³⁰ Section 52 Commission on Administrative Justice Act 2011

¹³¹ Act No. 4 of 2015 enacted pursuant to Article 47 of the Constitution of Kenya

¹³² International Ombudsman Institute < <http://www.theioi.org/the-i-o-i>> accessed on 6 May 2018.

¹³³ International Ombudsman Institute < <http://www.theioi.org/the-i-o-i>> accessed 7 May 2018

The IOI in promoting participation and decentralization has facilitated the establishment of many different models of Ombudsman offices globally and demonstrated the evolving nature of the ombudsman from the original Scandinavian roots.

In many jurisdictions, the Ombudsman operates at both the national and regional level and in other jurisdictions; it has gained recognition and acceptability within the private sector offering independent redress to consumers.

The role of the Ombudsman has been recognized by international organizations including the United Nations, having passed several resolutions¹³⁴ for protection of human rights. It has subsequent to passing resolutions, endeavoured to monitor the status of implementation by member states and report back. The Council of Europe has also passed resolutions¹³⁵ strengthening the functions and powers of the Ombudsman in Europe.

3.4.1.2 International Ombudsman Institute (IOI) By laws (2012)¹³⁶

The IOI byelaws were developed to make provision for the operation and institutionalization of the Ombudsman Institutions. The byelaws emphasize independence, objectiveness in complaints handling, redress of maladministration¹³⁷ to enhance provision of services and to address systemic failures.¹³⁸

¹³⁴ See (n 89)

¹³⁵ The European Parliament passed on 6 September 2001 adopted the European Code of Good Administrative Behaviour.

¹³⁶ International Ombudsman Institute (IOI) Bylaws (2012), adopted by the General Assembly in Wellington, New Zealand on 13 November 2012, available at <<http://www.theioi.org/downloads>> accessed on 6 May 2018.

¹³⁷ Ibid see the preamble.

¹³⁸ The International Ombudsman Institute (IOI) Byelaws, Article 2 provides inter alia that the purpose of the IOI, whose activities are of a non-profit making nature, is to strengthen the protection of human rights and fundamental freedoms, adherence to the rule of law, effective democracy, administrative justice and

3.4.2 Regional Institutional Framework

3.4.2.1 African Ombudsman and Mediators Association (AOMA)¹³⁹

AOMA was founded to advance growth of the Ombudsman institution in Africa.¹⁴⁰ Its activities are coordinated by African Ombudsman Research Centre (AORC) as a liaison, whose core functions are training, research and information sharing.¹⁴¹

Towards this end, AOMA is a critical institution in the operation of ombudsman institutions in Africa.

3.4.2.2 “African Ombudsman and Mediators Association” (AOMA)

Standards

AOMA , with support from African Union and through the African Ombudsman Research Centre, have formulated various policy frameworks that guide the principles for the establishment and operationalisation of Ombudsman institutions in Africa.¹⁴²

AOMA Standards set parameters for the institution and operations of the ombudsman in different jurisdictions in Africa by way of constitution or legislature.¹⁴³ The draft advocates for independence and impartiality of the ombudsman, mandate over cases of

procedural fairness in public organizations by promoting the concept and institution of ombudsman and encouraging its development throughout the world.

¹³⁹ African Ombudsman and Mediators Association available at <<http://aoma.ukzn.ac.za/Home.aspx>> accessed on 7 May 2018.

¹⁴⁰ Ibid AOMA mission statement; available at <<http://aoma.ukzn.ac.za/about-us/vision-mission.aspx>> accessed on 7 May 2018.

¹⁴¹ African Ombudsman Research Centre; available at <<http://aoma.ukzn.ac.za/Aorc/AboutAORC.aspx>> accessed on 7 May 2018.

¹⁴² African Ombudsman Research Center; ‘A Comparative Analysis of Legal Systems Governing Ombudsman Offices in Africa,’ 2014; available at <http://aoma.ukzn.ac.za/Libraries/MISCEL_ENGLISH/AORC_Comp_AnalysisftRep ar14_Final_2.sflb.ashx> accessed on 3 May 2018.

¹⁴³The AOMA draft available at <http://aoma.ukzn.ac.za/Libraries/MISCEL_ENGLISH/AORC_Comp_AnalysisftRep ar14Final_2.sflb.ashx> at page 129 accessed 4 May 2018.

maladministration, powers to investigate, make determinations and publish findings, mandate over the government actions and clear jurisdiction.¹⁴⁴

3.6 Conclusion

This chapter has discussed the legal and institutional framework both locally and internationally establishing the institution of the ombudsman and the extent to which the legal framework protects human rights and the general applicability in Kenya¹⁴⁵.

There is therefore adequate institutional and legislative framework in place. The institutional framework emphasises on the modus operandi that is proposed and ideal. Whether the same is implemented in all jurisdictions as indicated is debatable. It is therefore fair to conclude that constitutionalism and principles of good governance are critical to the ombudsman.

¹⁴⁴ Ibid see preamble.

¹⁴⁵ Recognized under Articles 2(5) & (6) of the Constitution of Kenya 2010

CHAPTER FOUR: OTHER JURISDICTIONS AND TRENDS IN CASE LAW

4.0 Introduction

This chapter reviews cases and the trends in case law in Kenya and other jurisdictions. It examines the practice of the Public Protector in South Africa, Public Complaint Commission in Nigeria and the Ombudsmen for Justice in Sweden, to draw inspirations.

Sweden was chosen because it is the first known jurisdiction to have the institution of the ombudsman and other jurisdictions have evolved from the initial efforts in 1809 in Sweden.

Nigeria was chosen because it a populous state in Africa , the world bank estimates the population to be 190.9 million , and the researchers was keen to understand the operations in a large and populous African state.

South Africa was chosen because of the documented efforts of the Advocate Thulisile Madonsela who was the South Africa Public Protector from 2009 to 2016 during whose tenure, the South Africa Public Protector undertook investigations in relation to a sitting president.

4.1 Case Law

This section explores relevant case law in light of the elements of the mandate of the Ombudsman, its power to investigate and compliance with its determination, implementation of its recommendations, jurisdiction and cooperation of state agencies with the ombudsman .These elements are explored with a view to ultimately determine whether the ombudsman is effective in the resolution of public complaints in Kenya as envisioned in the Constitution.

4.1.1 Republic versus Kenya Vision 2030 Delivery Board & 2 others Ex-parte Judah Abekah¹⁴⁶

The court took the position that public bodies are not obligated to execute the reports, findings and recommendations of the ombudsman. Following the decision, the ombudsman sought for stay orders.¹⁴⁷

The court declined to grant the orders on the grounds that the ombudsman has no power to compel institutions to adhere to its recommendations and neither can a court of law. Justice Weldon Korir remarked that there is no legislative obligation on public bodies to enforce the recommendations of the ombudsman since such non-compliance can only be reported to the National Assembly by the ombudsman.¹⁴⁸

There is a pending appeal from this decision; however, it has brought forth the element of reporting of the ombudsman to parliament, independence and what that portends to its effectiveness.

4.1.2 Republic versus Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees¹⁴⁹

NSSF Board of Trustees contention was that ombudsman acted in breach of the statutory provisions¹⁵⁰ and that it had no jurisdiction on a matter that was already under

¹⁴⁶ [2015] eKLR < <http://kenyalaw.org/caselaw/cases/view/106164/> > accessed 20 June 2018.

¹⁴⁷ Ibid

¹⁴⁸ The Constitution of Kenya 2010, Articles 59(2)(h) & (i) and 252 and the Commission on Administrative Justice Act No. 23 of 2011, sections 8, 26, 27, 28 and 29.

¹⁴⁹ [2015] eKLR, available at <<http://kenyalaw.org/caselaw/cases/view/111737/>> accessed 26 June 2018.

¹⁵⁰ Section 30(h) of the Commission on Administrative Justice Act which limits the commission from investigating any matter for the time being under investigation by any other person or Commission established under the Constitution

investigation by the “Ethics and Anti-Corruption Commission” (EACC) and two committees of parliament.

This case was dismissed due to insufficient evidence; however, the court observed that multiplicity of investigations was not as grave as malpractices in the public service, which was the case herein.

As such, the court while applying the rule enunciated by the Supreme Court in the case of “Samuel Kamau Macharia & another” versus “Kenya Commercial Bank Limited & 2 others,”¹⁵¹ emphasized a need for the courts, tribunals, state corporations, government agencies and commissions to operate within their jurisdictional fields as established.

This decision highlights statutory bottlenecks and limitation,¹⁵² on grounds that the matter was under investigation by EACC and National Assembly.

4.1.3 Republic versus Commission on Administrative Justice & another Ex Parte Samson Kegengo Ongeru¹⁵³

The substantive issue before the court was a question of fair hearing where the applicants contention was that he was not accorded a hearing prior to publishing of the report¹⁵⁴ that related to a case in Court, therefore illegal, *sub judice* and contrary to section 30 (c) of the CAJ Act.¹⁵⁵

This application was upheld and an order of certiorari issued quashing the whole of the investigation report of the Ombudsman on the grounds that it had no jurisdiction to

¹⁵¹ [2012] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/82994> > accessed 26 June 2018.

¹⁵² As articulated under section 30 of the Commission on Administrative Justice Act.

¹⁵³ [2015] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/111733> > accessed 26 June 2018.

¹⁵⁴ Contrary to the procedural safeguards in Sections 36, 37 and 39 of the Commission on Administrative Justice Act and Article 47 of the Constitution

¹⁵⁵ See generally the Commission on Administrative Justice Act, No. 23 of 2011.

entertain the matter in question; and could therefore not accord the applicant a fair hearing.

Significantly, the court found that the procedure was an illegality as the ombudsman was limited in its mandate by its own legislature and therefore had no jurisdiction over it.

Importantly, this decision further buttresses the research hypothesis that the ombudsman continues to face challenges in so far as fulfilling the constitutional mandate is concerned because of the shortfalls in legislative and institutional framework.

4.1.4 Republic versus Commission on Administrative Justice & 2 others Ex parte Michael Kamau Mubea¹⁵⁶

The issue for determination herein was the scope of the powers conferred upon the Ombudsman. The Ombudsman purported to investigate the Applicant's Remuneration, a matter within the purview of the Salaries and Remuneration Commission (SRC). The applicant's case was that in conducting the said investigations, the Respondent usurped the powers of the SRC.¹⁵⁷

The court issued an order of prohibition, on grounds that the ombudsman had no jurisdiction to embark on the investigation during the pendency of similar investigations by the SRC and particularly in light of the issues complained of with regard to approval by SRC of the applicant's remuneration.

¹⁵⁶ [2017] eKLR available at <<http://kenyalaw.org/caselaw/cases/view/134851/>> accessed 27 June 2018

¹⁵⁷ As set out in Article 230(4) of the Constitution of Kenya, 2010, and particularly since, at the time of conducting the purported investigations, the SRC was actively considering the issue in question and therefore by virtue of Section 30(h) of the Commission on Administrative Justice Act, 2011 the Ombudsman was debarred from investigating the matter.

Consistent with the decision in the “Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees”¹⁵⁸ (supra), limitation, jurisdiction and powers of the Ombudsman were emphasised, in which case the courts have consistently failed to appreciate the investigative role of the ombudsman and leaned on the limitation.

4.1.5 Commission on Administrative Justice versus John Ndirangu Kariuki & Independent Electoral and Boundaries Commission¹⁵⁹

The ombudsman sought declaratory orders on the abdication of constitutional duty by a state organ, Independent Electoral and Boundaries Commission (IEBC) and addressing improper conduct. Onguto J. observed that, like all independent commissions guided by Chapter 15 of the Constitution, IEBC was under a duty to promote Constitutionalism in dispensing its constitutional mandate.

This case highlights the proactive function of the office of the Ombudsman in the promotion of constitutionalism.¹⁶⁰

The trends in case law have brought to fore notable challenges faced by the Ombudsman in discharging its constitutional mandate. They include lack coercive powers of enforcement, coupled with statutory bottlenecks that limit its jurisdiction. It cannot therefore exercise powers outside its jurisdiction and that the advisory opinions are

¹⁵⁸ [2015] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/111737>> accessed 26 June 2018

¹⁵⁹ [2016] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/133845/>> accessed 27 June 2018

¹⁶⁰ The Constitution of Kenya 2010, Article 249(1) & 59, and the Commission on Administrative Justice Act No. 23 of 2011, Section 8.

merely persuasive and depend on the willingness and moral persuasion of the respondent to act on the advice.

4.2 Lessons from Court

4.2.1 Tension between the new role of the ombudsman as quasi-judicial organ and the traditional role of the judiciary

Notably, as demonstrated in the cases reviewed herein, the commission lacks coercive powers, coupled with statutory bottlenecks to enforce its recommendations. Aggrieved persons and or institutions have found solace in the courts by way of various court orders prohibiting action by the ombudsman, orders quashing decisions of the Ombudsman, orders confirming lack of jurisdiction on the part of the ombudsman. In the Judah Abekah case,¹⁶¹ Justice Weldon Korir affirmed that the ombudsman has no coercive powers of enforcement. This decision is a demonstration of tension between the role of the ombudsman as quasi-judicial organ with the traditional role of the judiciary in resolution of public complaints.¹⁶² The outcome of the appeal in the case would be interesting to say the least.

Non-cooperation by public institutions is mostly in the form of non-conformity with the recommendations of the ombudsman, non-responsiveness to inquiries on complaints lodged, and failure to honour summonses issued by the Commission.¹⁶³ The Commission in its annual report observes that the limited or lack of cooperation by government institutions is exhibited by the impunity that is the key impediment to redress. Continued

¹⁶¹ [2015] eKLR < <http://kenyalaw.org/caselaw/cases/view/106164/> >accessed 20 June 2018

¹⁶² Commission on Administrative Justice, Annual Report, 2015, 56 – 60, <<http://www.ombudsman.go.ke/>> accessed 3 August 2018> accessed 3 August 2018.

¹⁶³ See generally Commission on Administrative Justice, Annual Report, 2014 at vii, <<http://www.ombudsman.go.ke/resources-downloads/>> accessed 3 August 2018>accessed 3 August 2018

court cases challenging the ombudsman and the affirmation by the courts have not been of help to the ombudsman in its mandate.¹⁶⁴

In its reports the ombudsman decries the lack of cooperation or limited support by government institutions and agencies, courts of law in instances of non-compliance by public institutions with the ombudsman's decisions, seeking of favourable opinions by public entities led by the office of the Attorney General as against the ombudsman's recommendations, lack of general understanding by public officers on the constitutional mandate of the ombudsman and its nature as well as appreciation of the new constitutional dispensation.¹⁶⁵

The Act makes provision for remedial action.¹⁶⁶ To this end, the Act requires the entities to report on implementation of those recommendations.¹⁶⁷

In the event of failure to comply, such non-compliance shall be reported to the national assembly.¹⁶⁸ Ultimately, the enforcing instrument is therefore a political one and dramatically depends on moral suasion as opposed to using coercive powers of enforcement.¹⁶⁹ Otiende Amollo nonetheless contends that moral suasion is ineffective especially in Africa because most countries are still faced with the challenge of impunity.¹⁷⁰ Public administrators no longer deem it morally inappropriate to fail to

¹⁶⁴ Ibid

¹⁶⁵ Commission on Administrative Justice, Annual Report,(2014),
<<http://www.ombudsman.go.ke/resources-downloads/>> accessed 3 August 2018>accessed 3 August 2018

¹⁶⁶ Section 42(3) of the Commission on Administrative Justice Act

¹⁶⁷ Ibid

¹⁶⁸ Section 42(4) of the Commission on Administrative Justice Act

¹⁶⁹ Commission on Administrative Justice , Securing the Ombudsman as an Instrument of Governance in Africa (2015)

¹⁷⁰ibid

implement the recommendations of the ombudsman.¹⁷¹ This then makes voluntary cooperation by public administrators with the Commission essential to achieving its constitutional mandate. Amollo contends that this culture has to change if the ombudsman is to make an impact on the resolution of public complaints.¹⁷²

In the same breath, Rudolph observes that support and cooperation of government agencies, institutions and officials are essential to the success of an ombudsman institution.¹⁷³

In a bid to curb non-cooperation, the ombudsman has come up with various mechanisms, including, a citation register where “unresponsive and malfeasance public institutions and officers are blacklisted.”¹⁷⁴ However, this is not enough as public institutions continue to disregard the ombudsman's authority and mandate.

It is in this regard that Parliament's action in such instances is crucial to the legitimacy of the ombudsman. Parliament plays an oversight role over the commission,¹⁷⁵ and it is critical for it to act on the cases of non-compliance as reported to it.

Similarly, cooperation from the judiciary is critical in the implementation of the ombudsman's findings and recommendations since at the moment, it is mainly through

¹⁷¹ Otiende Amollo, *Enhancing Access to Justice: The Role of the Commission on Administrative Justice in Kenya's Constitutional Dispensation*

¹⁷² Ibid.

¹⁷³ Harold Rudolph, “*The Ombudsman and South Africa*,” (February 1983) Vol. 100 No.1, South African Law Journal, 98, available at <<http://heinonline.org/HOL/LuceneSearch?terms=Harold+Rudolph%2C+The+Ombudsman+and+South+Africa&collection=journals&searchtype>>accessed 4 August 2018.

¹⁷⁴ Regulation 20(c) Commission on Administrative Justice Regulations 2013

¹⁷⁵ See (n 168)

the courts that the decisions of the Ombudsman can be satisfactorily enforced otherwise this lack of support technically renders the ombudsman ‘toothless.’¹⁷⁶

4.2.2 The jurisdiction and powers of the ombudsman acting as a limitation in the discharge of its mandate

The jurisdiction, powers, and functions the ombudsman is set out in the Act,¹⁷⁷ with a mandate over cases of maladministration, administrative injustice and abuse of power. For purposes of limitation, the ombudsman cannot, however, investigate the proceedings or decisions of the cabinet, matters active in court or judicial tribunal.¹⁷⁸ This was the position of the court in Samson Kegengo Ongeri case¹⁷⁹ where the court essentially affirmed that, the Commission lacked jurisdiction to conduct the said investigations since its operative Act does not empower it.

Ombudsman, according to its statutory and constitutional mandate, may also render advisory opinions,¹⁸⁰ which are however merely persuasive since it would depend on the government’s willingness to act as advised.¹⁸¹

The Act¹⁸² further mandates the ombudsman to ‘take appropriate remedial action’ on complaints investigated. In that regard, Amollo asserts that “the power” for remedial action is construed that ombudsman can provide concrete remedies after carrying out

¹⁷⁶ Ibid

¹⁷⁷ Article 59(2) (j) of the Constitution of Kenya and sections 29 to 31 Commission on Administrative Justice Act 2011

¹⁷⁸ Section 30 (a) and (c) Commission on Administrative Justice Act 2011

¹⁷⁹ See (n 138)

¹⁸⁰ Section 8(h) Commission on Administrative Justice Act

¹⁸¹ Otiende Amollo, *Ombudsman, Courts and the Common Law*, A presentation made at the Regional Colloquium of African Ombudsman held in Nairobi at the Kenya School of Monetary Studies, 19-20 September 2013, 7

¹⁸² Section 8 (c) of the Commission on Administrative Justice Act

inquiries or investigations.¹⁸³ The remedies include offering recommendations for compensation, specific performance, restitution, and apologies.¹⁸⁴ In emphasizing the crucial nature of such remedial powers, it is argued that, such decisions are binding, and must be adhered to. The decision can be challenged in a court of law by persons aggrieved.¹⁸⁵

Odhiambo Mbai contends that a very low percentage of public administration in Africa would implement a decision merely because recommendations have been made by a body that lacks the power to enforce the same.¹⁸⁶ In respect therefore, the ombudsman needs the Court's backing in ensuring compliance with its recommendations.

4.3 The practice in other Jurisdictions

In examining other jurisdictions, the study has reviewed the Public Protector in South Africa, Public Complaint Commission in Nigeria and the Ombudsmen for Justice in Sweden, to draw from their experiences.

The classical ombudsman model has however evolved into what is presently referred to as the 'new' ombudsman.¹⁸⁷ However, despite the expansion in jurisdiction and powers of

¹⁸³ Amollo (n 169) 4.

¹⁸⁴ Ibid

¹⁸⁵ Amollo (n 169) 3.

¹⁸⁶ Odhiambo Mbai, *"Public Service Accountability and Governance in Kenya Since Independence,"* (2003) Vol. 8 No.1, African Journal of Political Science 143, available at <<http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/political%20scienc/volume8n1/ajps008001006.pdf>>, accessed 27 July 2018

¹⁸⁷ Ibid

the new ombudsman, its defining characteristics have not changed especially as regards political reporting, judicial enforcement and implementation of recommendations.¹⁸⁸

4.3.1 Public Protector South Africa

The Public Protector enjoys wide powers as provided for in the Constitution.¹⁸⁹ Additional powers vested in the Public Protector are for investigations, reporting, and publication of findings, as well as entering premises for purposes of investigations.¹⁹⁰ The office exists to strengthen democracy, monitor adherence or otherwise to the rule of law, give populace a voice as well as provide remedies for populace who have suffered administrative injustices.¹⁹¹ Notably, the most outstanding characteristic of the Office of the Public Protector includes;

4.3.1.1 Accessibility

The Public Protector has over the years witnessed massive growth, accessibility, and created awareness. In this regard, there has been recorded consistency in number of

¹⁸⁸ Amollo (n 165)

¹⁸⁹ Constitution of the Republic of South Africa, No. 108 of 1996, section 182; available at <<http://www.saflii.org/cgibin/disp.pl>> accessed 29 July 2018. Powers to investigate the conduct of government, government departments, government agencies, government officials and bodies performing public functions that is alleged or suspected to be improper; to report such conduct and to take appropriate remedial action

¹⁹⁰ The Public Protector Act 23 of 1994, Section 6(4) (a) available at <<http://www.saflii.org/cgibin/disp.pl>> accessed 29 July 2018.

¹⁹¹ Kevin Malunga , “An assessment of the role and challenges of the Office of the Public Protector in asserting South Africa’s transformative constitutionalism”(November 2014), <<http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Malunga.pdf>> accessed 27 July 2018.

complaints lodged, which has been directly attributed to increased publicity, awareness, and growing public confidence.¹⁹²

4.3.1.2 Cooperation of government institutions and agencies with the Public Protector in the discharge of its mandate

This cooperation is provided for under the Constitution,¹⁹³ which expressly requires state organs to extend support and cooperate with the Public Protector, through legislative and other means in the discharge of its functions.¹⁹⁴ On the face of it, this provision makes it mandatory for government institutions and agencies to cooperate with the Public Protector while carrying out its functions and such cooperation is not dependent on the discretion of a public administrator. In comparison, however, the Kenyan government institutions and agencies are not obliged to extend their support and cooperation to the ombudsman and are construed as being discretionary rather than mandatory.

Gary Pienaar, while highlighting the importance of cooperation between the Public Protector and government institutions and agencies, posits that the Public Protector has a comprehensive mandate and a widened scope of control over executive power hence a broadened sphere of investigation.¹⁹⁵ Such broadened mandate necessitates full

¹⁹² Ibid.

¹⁹³ Section 181 (3) of the South African Constitution

¹⁹⁴ See (n 185) section 182(4)

¹⁹⁵ Gary Pienaar, 'The Role of The Ombudsman in Fighting Corruption,' 9th International Anti-Corruption Conference, 10-15 October 1999, Durban, South Africa <http://9iacc.org.s3-website.eu-central-1.amazonaws.com/papers/day3/ws3/dnld/d3ws3_gpienaar.pdf> 29 July 2018

cooperation from the relevant agencies as well as concerned parties or else the Public Protector runs the risk of being frustrated.

4.3.1.3 Assessment of Performance of the Public Protector

South Africa

This is demonstrated by Court rulings in favour of the Public Protector of South Africa. North Gauteng “High Court Minister of Home Affairs” versus the “Public Protector” SA,¹⁹⁶ the applicants sought orders to quash the final report of the Public Protector into alleged conduct of its employees. The application was dismissed and the court noted that it was regrettable, that the applicants chose to litigate since the constitution¹⁹⁷ was clear that assistance must be accorded to chapter 9 institutions like the public protector by way of legislation or otherwise.¹⁹⁸

In “Economic Freedom Fighters” versus “Speaker of the National Assembly and Others.”¹⁹⁹ The Court pronounced itself and stated that the decision of the Public Prosecutor against President Zuma was compulsory and his failure to comply was inconsistent with the Constitution.²⁰⁰ The decisions have been termed as being peremptory and not optional.

The South African landmark cases have demonstrated empowerment of chapter 9 institutions to which the Public Protector belongs, as anchored in the Constitution. The Courts have pronounced themselves with a view to upholding the reports, decisions of the

¹⁹⁶ High Court South Africa Case Number 76554/2013 < <http://www.pprotect.org/?q=content/landmark-judgments>> accessed 30 July 2018

¹⁹⁷ Section 181 of the Constitution of South Africa

¹⁹⁸ Ibid

¹⁹⁹ Section 181 of the Constitution of South Africa

²⁰⁰ Inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is therefore invalid.

Public Protector as binding and emphasised failure to comply amounts to a violation of the Constitution.

4.3.2 The Nigerian Public Complaint Commission

“Nigeria Public Complaint Commission” was established pursuant to the “Nigeria Public Complaints Commission” Act Cap 377 to receive complaints, take up investigations on its own initiative, monitor, and address administrative injustice.²⁰¹

4.3.2.1 Structural Operational Analysis of the Nigeria Public Complaints Commission

The Public Complaints Commission is structured in line with the Federal System of Government in Nigeria. Accordingly, it has its National Headquarters, with five area offices in each State of the federation. The devolved offices facilitate easy and quick access to services.

The Act has created offences ranging from failure to appear before the Commission to issuance of false information and penalties thereto. In the event of a guilty verdict, one is liable to a fine of Nigerian Naira 500 or sentence for six (6) months or to both.²⁰²

The Commission exercises broad powers through its commissioners whose number is unknown as it is a matter determined by the National Assembly and not specified in legislation. ²⁰³

²⁰¹ Public Complaints Commission The Nigerian Ombudsman <<http://www.pcc.gov.ng/index.php/about> > accessed 29 July 2018

²⁰² Section 8 Nigeria Public Complaints’ Commission Act

²⁰³ Public Complaints Commission Act <http://www.pcc.gov.ng/index.php/about/pcc-act> > accessed 30 August 2018

The Act, like the Kenyan Act provides for limitation²⁰⁴ in exercise of its jurisdiction. It cannot therefore address issues relating to key public institutions including the National Assembly, presidency, council of state, Nigeria armed forces and Nigeria police.²⁰⁵

4.3.2.2 Achievement Assessment

Ogunna argues that the Nigerian Public Complaints Commission is the bastion of justice, the defender and social watchdog of the oppressed and a powerful check against administrative power extremism.²⁰⁶

Assessment is undertaken with due regard to the complaints received vis a vis those resolved. Noteworthy, it is observed that the public complaints commission has made some achievements since its establishment. This view is supported by the statistics for example in the year 1995; the commission received 10,013 cases throughout the federation, of which 3,644 cases were satisfactorily resolved.²⁰⁷ The shortcoming herein is that the website is not interactive and informative. It does not provide for the reports of the Public Complaints Commission.

4.3.2.3 Synthesis of the Discourse

The findings demonstrate an institution that is not independent since it is a government institution and the National Assembly has a role to play in determination of the number of Commissioners, which is unclear leaving room for manipulation and vested interest.

²⁰⁴ Section 6 Nigeria Public Complaints' Commission Act

²⁰⁵ *ibid*

²⁰⁶ Alloy Ogunna, *Public Administration in Nigeria ; Theory and Practice*, Owerri Great Versatile Publishers ltd (1999)

²⁰⁷ *ibid*

The offences and penalties as stated in the Act are limited; in particular, the penalty of Nigerian Naira 500 or imprisonment to a term of six months may not achieve one of the key goals of punishment and act as a deterrent.

A similar scenario is demonstrated in the limitation clause, which as demonstrated in Kenya has become the greatest impediment to the mandate of the Public Complaints Commission.

In light of the foregoing, there may be need for legislative amendments to reaffirm the mandate of the Public Complaints Commission and align it to the Institutional frameworks discussed in chapter three of this study.

4.3.3 Ombudsmen for Justice in Sweden

The ombudsman in Sweden includes four key areas; the “Chancellor of Justice, the Ombudsman for children, the Equality Ombudsman and the Swedish Consumer Ombudsman, the latter being the relevant authority for the purpose of a study on Collective Redress.”²⁰⁸

4.3.3.1 Functions of the Ombudsman

The principal mandate of Sweden Ombudsman is to receive, investigate and redress citizen complaints on the mal-administration by state agencies or their functionaries. In this regard, Professor Larry Hill²⁰⁹ has described the primary functions of ombudsman

²⁰⁸ British Institute on International and Comparative Law. ‘ Ombudsman System in Sweden’ < <https://www.collectivereess.org/collective-reess/alternative-ombudsman-sweden> > accessed 3 August 2018

²⁰⁹ Gary Pienaar, *The Role of The Ombudsman in Fighting Corruption,* 9th International Anti-Corruption Conference, 10-15 October 1999, Durban, South Africa<http://9iacc.org.s3-website.eu-central-1.amazonaws.com/papers/day3/ws3/dnld/d3ws3_gpienaar.pdf> 29 July 2018

institution as to address maladministration reduce bureaucracy, as well as introduce administrative reform.²¹⁰

4.3.3.2 Critical Observations on Ombudsman Scheme in Sweden

The major issues that stand out like in many other jurisdictions is that the recommendations of the Ombudsman are non-binding, the ombudsman's mandate is limited in certain areas such as members of parliament, government, members of county or municipal councils and that private persons / entities are outside mandate .

4.4 Comparative Lessons

In a comparative analysis of the Ombudsman, it should be acknowledged that they have achieved different levels of success while operating under unique contexts and circumstances.

The Public Protector South Africa is hailed as being most functional. It is easily accessible, has a vibrant, interactive and informative website. It enjoys Constitutional protection as a chapter 9 institution. The public protector has enjoyed landmark rulings where the courts have emphasised the constitutional protection and upheld that compliance with its decision is mandatory.

The Nigeria Public Complaints Commission is considered as a defender of justice and social watchdog of the oppressed. The Commission, which is part of the government, affords the government feedback.²¹¹The issue arising therefore is the ability to objectively check on the government while being part of the government rather than independent; the

²¹⁰ ibid

²¹¹ Ibid

open nature of number of commissioners that is left for determination by the national assembly, and may be prone to abuse.

In Sweden, the mandate is over public entities. The issue of limitation has also been demonstrated in this jurisdiction with its decisions not being legally binding. For an institution as old as this, it is expected that to have evolved over the years. However, there is demonstrated lack of change from the initial concept of 1809.

From the foregoing, the study notes that the ombudsman's powers lie mainly in the recommendation/ determination and adherence thereof, which leads to a concern that the Ombudsman lacks 'teeth.' The Ombudsman in Africa is a 21st Century phenomenon, and therefore its operations and benefits are yet to be fully appreciated. In Kenya particularly, the Ombudsman continues to face challenges from all quarters including the Executive, Judiciary and Legislature. The executive is critical in the appointment of the Commissioners, Legislature passes applicable laws and approval of budgets and the judiciary has demonstrated its role repeatedly in the various cases to which the Ombudsman has been party to.

However, based on landmark ruling from of South Africa,²¹² the situation has changed, a demonstration that the Ombudsman has gained recognition for the critical role-played. Inter-agency cooperation is also commendable in South Africa as opposed to Kenya and this has enabled the South African Public Protector to carry out its functions effectively in an enabling environment.

²¹² Economic Freedom Fighters v Speaker of the National Assembly and Others; [2016] ZACC 11

4.5 Conclusion

In conclusion, the study notes that the South African Public Protector, Nigerian Public Complainants Commission, and Sweden OJ are indeed promoting access to administrative justice despite numerous challenges they face. The Nigerian Public Complaints Commission is considered as part of government, perhaps translating into effectiveness or lack of thereof.

There is need for the Ombudsman in Kenya to be ably empowered as demonstrated in the South Africa Public Protector; more particularly to have its decisions/ determinations considered as mandatory and not optional in terms of compliance to enhance the discharge of its mandate and to do away with bottlenecks demonstrated in the limitation section.

CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The research has interrogated the ombudsman and public complaints in Kenya. Importantly, the research raises a multilevel argument for more transparency, effectiveness, and accountability in the work of public administration. This comes against the backdrop that seven years since its inception, despite numerous efforts including legislative framework, the ombudsman still faces numerous challenges in its operations.

Towards this end, the study has reviewed the operations of the Ombudsman since its inception as a Constitutional Commission.²¹³

In view thereof, this chapter summarises the findings and presents the conclusions and recommendations of this study.

5.1 Findings

This study has established that, “good governance, the rule of law and constitutionalism” are critical to the ombudsman and outlines the findings as follows;

5.1.1 Friction between traditional and new forms of dispute resolution

Case law has demonstrated friction between the Ombudsman and the Judiciary, the new against the traditional. The decisions in the Kenyan Courts have failed to empower the work of the Ombudsman. Instead, the courts have pronounced themselves that the Ombudsman cannot exercise power that it does not have, that the Act intended for

²¹³ Established under Article 59 (4) and Chapter fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

parliament to be the next stop on enforcement, and over emphasis on the shortcomings laying bare the legislative shortcomings of the CAJ Act.

This study reveals that despite statutory provisions, the ombudsman lacks enforcement powers and is therefore unable to secure compliance with its recommendations. The ombudsman has sought the intervention of courts of law to ensure compliance with its recommendations, which has not been forthcoming.

A breakthrough has however, been established in the South African Jurisprudence more particularly that the decision by the South African Public Protector is mandatory and not optional, constitutional protection of the public protector and mandatory cooperation.

5.1.2 Limitation in jurisdiction

Limitation under the CAJ Act²¹⁴ is a significant impediment to the operations of the commission. The Courts have severally relied on the limitation to issue orders to parties seeking protection from the investigations and determinations by the ombudsman. The courts have highlighted the issue of usurping powers of other bodies in the Mubea case, where the issue at hand fell within the mandate of SRC who were seized of the matter.

5.1.3 Lack of cooperation

The first instance is demonstrated by the trends in courts in failing to encourage a culture of cooperation amongst institutions. The decision in Judah Abeka case is critical herein in particular, that public bodies are not duty-bound by legislation to enforce the decisions of the ombudsman.

²¹⁴ As captured under Section 30 of the Commission on Administrative Justice Act

Limited cooperation has a significant bearing on the Ombudsman's jurisdiction and powers because failure to cooperate renders the ombudsman incapable of effectiveness and ultimately breeds impunity.

5.1.4 Legislative shortfalls

Section 30 of the Act²¹⁵ has been identified as promoting court decisions against the ombudsman and allowing applicants to exploit it through judicial decisions and orders.

Lack of cooperation can also be considered as a legislative shortfall to the extent that other jurisdictions have anchored cooperation in the Constitution, such as South Africa.

5.1.5 Importance of relationship between parliament and ombudsman

The Act provides that the ombudsman shall render reports to the National Assembly; failure to implement decisions may also be reported to the National Assembly for appropriate action and that at any given time, the ombudsman may be required to submit a report.²¹⁶

The study reveals that the relationship between parliament and the Commission is a very crucial one owing to the nature of their engagements. The National Assembly plays an oversight role over the ombudsman, as it receives reports for debate and appropriate action and participates in recruitment of the commissioners by either accepting or rejecting the names submitted to it.

²¹⁵ Commission on Administrative Justice Act 2011

²¹⁶ Sections 8(c) , 32 (2)(b), 42(4) and 53(3) of the Commission on Administrative Justice Act

5.2 Conclusion

The Act²¹⁷ generally gives the Commission extensive powers, which are then curtailed. This has been demonstrated in case law including Republic versus “Commission on Administrative Justice & another Ex Parte Samson Kegengo Ongeru,”²¹⁸ where the court essentially confirmed that the Ombudsman was stifled by statutory bottlenecks, which unless removed or settled, the Ombudsman would not embark on such investigation.

Non-compliance has been exhibited in the case of “Republic versus Kenya Vision 2030 Delivery Board & 2 others Ex-parte Judah Abekah,”²¹⁹ where Justice Weldon Korir held that public bodies cannot be compelled to implement the reports, findings of the Ombudsman. This decision demonstrates that the ombudsman lacks coercive powers over the government institutions it investigates.

Failure or refusal to implement recommendations emanating from such processes makes the Ombudsman exercise itself vain. Ironically, the rationale behind the Ombudsman is that it should provide an alternative dispute settlement and ease pressure from the ordinary court system.

The study concludes that the role of the ombudsman as a quasi-judicial organ in resolution of public complaints has not been understood within the Kenyan public service, as such it’s not well appreciated leading to the general perception that the ombudsman is indeed a mere state agency with no coercive powers.

²¹⁷ Commission on Administrative Justice Act 2011

²¹⁸ [2015] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/111733> > accessed 26 June 2018

²¹⁹ [2015] eKLR < <http://kenyalaw.org/caselaw/cases/view/106164/> > accessed 20 June 2018.

5.3 Recommendations

5.3.1 Immediate

The ombudsman to foster relations with the National Assembly to enhance compliance of its decisions.

In South Africa, the “Constitutional Court” held that Public Protector's recommendations were indeed binding and compliance with such decisions are peremptory and cannot be disregarded or complied with at will.²²⁰ In light of the said decision, it is recommended that the Kenyan Courts adopt such emerging jurisprudence, albeit as persuasive authority on the binding character of the ombudsman’s findings and support the Commission in enforcing its decisions. It is only through such support that the ombudsman may be effective in the discharge of its constitutional mandate.

This study recommends that the ombudsman should have adequate budgetary allocation by the National Assembly, borrowing from the South African Constitutional Court, where it held that, “within the context of breathing life into the Public Protector's remedial powers, the ombudsman must have the resources and capacities necessary to effectively execute its mandate so that it can indeed strengthen our constitutional democracy.”²²¹ Appreciably, in light of the international best practices, it is recommended that Parliament should approve adequate funds to the Commission to enable it to execute its constitutional mandate effectively.

²²⁰ Economic Freedom Fighters v Speaker of the National Assembly and Others; [2016] ZACC 11

²²¹ *ibid*

5.3.2 Short term

Enhance cooperation amongst government agencies, first through legislation and thereafter given effect by way of court decisions.

In view of the foregoing, there is need for the laws to be coherently and exhaustively structured to eliminate any ambiguity and limitations on the jurisdiction and powers of the ombudsman. For cooperation between institutions to be mandatory and for the general protection of such institutions as is the case in South Africa Public Protector and related institutions under chapter 9.

5.3.3 Medium term

Amendment of the CAJ Act to elevate the Ombudsman to a comparable level to that of the South African Public Protector. The amendments shall include a review of the limitation clause, jurisdiction, finality in decisions of the Ombudsman and general protection of such institutions as is the case for chapter 9 institutions in South Africa.

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