

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**THE OFFICE OF THE OMBUDSMAN AS AN ADVOCATE OF ACCESS TO
ADMINISTRATIVE JUSTICE: LESSONS FOR KENYA**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF
THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)**

SUBMITTED BY:

JUDY ACHIENG KABILLAH

ADMISSION NUMBER: G62/75126/2014

SUPERVISOR: PROFESSOR MIGAI AKECH

DECLARATIONS

Student's Declaration

I declare that this thesis is my original work and has not been presented before for a degree in this or any other University.

Judy Achieng Kabillah

Date

Supervisor's Declaration

This thesis has been submitted for examination with my approval as University supervisor.

Prof. Migai Akech
University of Nairobi
School of Law

Date

DEDICATION

This thesis is dedicated to numerous Kenyans who continue to suffer from administrative injustices in the hands of public administration and who are unaware of the available avenues for seeking administrative justice. May administrative justice be accessible to all.

ACKNOWLEDGEMENTS

I wish to take this opportunity to thank the Almighty God for granting me good health and wisdom and for providing the resources to complete this study. I also wish to thank my parents who encouraged me throughout this study and whose prayers gave me the strength to soldier on. I further acknowledge the guidance and contribution by my supervisor, Prof. Migai Akech. You pushed me to attain higher levels of excellence in my writing. I also wish to appreciate my friends and colleagues, including Joseph Simekha, Mellyne Akinyi, Rachel Ndungu, Judith Nguru-Walla and James Okina whose assistance and contribution in this study was most invaluable. I finally wish to thank all the interviewees who sacrificed their time to take part in this research.

I am forever indebted.

LIST OF ABBREVIATIONS

ADR- Alternative Dispute Resolution

APRM- African Peer Review Mechanism

CAJ- Commission on Administrative Justice

CBD- Central Business District

CHRAJ- Commission on Human Rights and Administrative Justice

CID- Criminal Investigation Department

DPP- Directorate of Public Prosecution

EACC- Ethics and Anti-Corruption Commission

FIA- Financial Intelligence Authority

IGG- Inspector General of Government

IG- Inspectorate of Government

IPCRM- Intergrated Public Complaints Referral Mechanism

KNCHR- Kenya National Commission on Human Rights

KNHREC- Kenya National Human Rights and Equality Commission

NBS- Nile Broadcasting Services

NCIC- National Cohesion and Integration Commission

ODPP- Office of the Director of Public Prosecutions

OPP- Office of the Public Protector

PAC- Public Accounts Committee

RDE- Royal Danish Embassy

SFO- Serious Fraud Office

TI- Transparency International

LIST OF STATUTES

1. Anti-Corruption Act, 2009.
2. Constitution of Kenya, 2010.
3. Constitution of the Republic of Ghana, 1992.
4. Constitution of the Republic of South Africa, 1996.
5. Commission on Administrative Justice Act, No.23 of 2011.
6. Fair Administrative Action Act, 2015.
7. Inspectorate of Government Act, 2002.
8. Leadership Code of Conduct, 1992.
9. Leadership Code Act, 2002.
10. Ombudsman Act, Cap 400 of 1980.
11. Promotion of Access to Information Act, No. 2 of 2000.
12. Public Protector Act, No. 23 of 1994.
13. Public Service (Values and Principles) Act, No.1A of 2015.
14. Whistle-Blower Act 2006, Act 720.

LIST OF CITED CASES

1. *British Banker's Association v Financial Services Authority/ Financial Ombudsman Service* [2011] EWHC.
2. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).
3. *Ex Parte Bradley and Others v Secretary of State for Pensions* [2007] EWHC.
4. *Fose v Minister of Safety and Security*, 1997 3 SA 786 (CC).
5. *John Ken Lukyamuzi v Attorney General and Another*, Constitutional Appeal No. 2 of 2008.
6. *Marquez v Desierto*, G.R. No. 125882, June 27, 2001, 359 SCRA 772.
7. *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng. Judah Abekah* [2015].
8. *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin).

ABSTRACT

The Kenyan public service is riddled with incidences of lack of integrity, unreasonable delay in service provision, discourtesy, and incompetence among others which often expose the common *mwananchi* to administrative injustices. Most administrative complaints hardly ever get to court as they are largely considered non-justiciable. This leaves the citizenry without any recourse for administrative injustices suffered. This study identifies the Commission on Administrative Justice (hereinafter the *Commission*) as a viable avenue for seeking redress for administrative injustices. To this end, this study focuses on the *Commission* as an advocate of access to administrative justice. More specifically, the study looks at whether, since its inception, the *Commission* is promoting access to administrative justice.

This study seeks to establish whether the *Commission* is promoting access to administrative justice by interrogating three crucial aspects, to wit, whether it is accessible to the Kenyan public, whether it enjoys the support of and cooperation from government ministries, agencies and departments while carrying out its functions, and whether its jurisdiction and powers enable or hinder it from executing its mandate. In so doing, the researcher engages in collection of data from the field in a bid to find out the status quo in light of these aspects. The study goes further to carry out a comparative legal analysis of ombudsman institutions from three African countries in light of the aspects set out above. These are Ghana, South Africa and Uganda. This is done so as to highlight the positive steps taken so far by these institutions in promoting access to administrative justice and also to provide lessons going forward.

Some of the key findings of this study are that the *Commission* is largely inaccessible to the Kenyan public; it enjoys limited support and cooperation from government ministries,

agencies and departments while carrying out its functions and; suffers from restraints in its jurisdiction and powers in the course of executing its mandate. As regards accessibility, it is recommended that the *Commission* rethinks its awareness creation strategies so as to better reach its primary constituents and hence improve its accessibility. In light of support and cooperation, it is recommended that the *Commission* partners with civil society to make issues of administrative justice politically relevant to the National Assembly so that it gets the required support and cooperation. With respect to its jurisdiction and powers, it is recommended that the Commission on Administrative Justice Act be amended so as to elevate its decisions and recommendations to the level of court decisions and to have the same adopted by the courts as final and binding as is the case in Ghana. This will result in compliance by public bodies with the *Commission's* decisions and recommendations.

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CHAPTER ONE

INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE OF THE STUDY

1.0 Background to the study

The public service plays a vital role in the lives of the citizenry of a country. This is because it is charged with the task of ensuring that the citizenry access public services with ease. Ideally, public servants are required to ensure that there is responsive, prompt, effective, impartial and equitable provision of services, failure of which the public are likely to suffer administrative injustices.¹ In this regard, public institutions ought to be accountable to those they exist to serve in order to minimize or prevent incidences of administrative injustices. In the words of Merilee Grindle,

“...citizens of many developing countries would be much better off, if public life were conducted within public institutions that were fair, judicious, transparent, accountable, participatory, responsive, well-managed, and efficient.”²

Such a scenario would go a long way in guaranteeing equitable provision of public services though that is rarely the case. “The widespread lack of accountability in public administration in Kenya largely undermines provision of public services and economic development.”³

¹ See generally s 7, Public Service (Values and Principles) Act, No. 1A (2015), available at <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101064/121598/F-2001559592/KEN101064.pdf>>, accessed 31 May 2016.

² Merilee Grindle, *Good Governance: The Inflation of an Idea*, Harvard Kennedy School, Faculty Research Working Paper Series at 2, available at <<https://research.hks.harvard.edu/publications/getFile.aspx?Id=562>>, accessed 8 October 2015.

³ C. 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%20science/volume8n1/ajps008001006.pdf>>, accessed 27 May 2017.

Odhiambo-Mbai cites the ineffectiveness of watchdog institutions and a general lack of political will as key hindrances to the promotion of public service accountability in Kenya.⁴ This is a pertinent issue because lack of public service accountability results in grievances of an administrative nature. “Neither the democratic process nor the law is adequate enough to deal with the grievances of the citizen against his government or its agencies.”⁵ Edward Jolliffe argues that though traditional remedies of administrative injustices for the aggrieved citizen such as courts of law still exist, they are often impracticable or ineffective.⁶ This therefore calls for redress mechanisms that are better suited to deal with administrative grievances as and when they arise.

Innis Macleod argues that in a court of law, there is a likelihood of administrative law being administered in a way that occasions more injustice than justice and hence, the imbalance between the legitimate needs of the government and the rights of the individual should be reconciled.⁷ “The ombudsman concept is the most appealing approach to such difficulty.”⁸ The International Bar Association defines an Ombudsman as a high-level public official, who receives complaints from aggrieved persons against government agencies and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.⁹ John Hatchard and G.K. Rukwaro add that the critical role of the ombudsman is enhanced by the shortcomings of the ‘traditional’ organs of governmental accountability

⁴ *ibid* 134-5.

⁵ Edward B. Jolliffe, ‘The Inevitability of the Ombudsman’, (1966-1967) *Administrative Law Review*, 99, available at <http://heinonline.org/HOL/Page?handle=hein.journals/admin19&div=10&start_page=99&collection=journals&set_as_cursor=0&men_tab=srchresults#> accessed 9 October 2015.

⁶ *ibid* 100.

⁷ Innis G. Macleod, The Ombudsman, (November 1966-1967) Vol.19, Issue 1, *Administrative Law Review*, 93, available at <http://heinonline.org/HOL/Page?handle=hein.journals/admin19&div=9&start_page=93&collection=journals&set_as_cursor=0&men_tab=srchresults#>, accessed 20 September 2015.

⁸ *ibid*.

⁹ See Anand Satyanand ‘Growth of the ombudsman concept’ (1993) 3/1 *Journal of South Pacific Law*, available at <http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Satyanand1.htm>, accessed 12 June 2015.

including courts of law, parliament, tribunals, media and commissions of inquiry which are ideally meant to protect the citizen.¹⁰ “The ombudsman institution is best placed to ensure accountability in public administration due to its unique characteristics such as not being subject to formalities or legal restrictions for the handling of cases; being an organization that does not charge fee; and being independent of other state bodies.”¹¹ “The ombudsman ultimately contributes towards improved delivery of public services by striking at the root of maladministration such as injustice, delay, negligence, unreasonableness, discriminatory and unjust action, and oppressive behaviour on the part of the administration.”¹²

Kenya has had a brief history of institutions that were set up to deal with maladministration in the public service. In 1971, the Commission of Inquiry (Public Service Structure and Remuneration Commission), better known as the Ndegwa Commission, recommended that such an institution be established as a result of widespread maladministration in the public service though this did not materialize until 2007.¹³ In 2007, the Public Complaints Standing Committee (PCSC) was set up vide Gazette Notice Number 5826.¹⁴ The institution’s

¹⁰ See G.K Rukwaro, ‘Redress for Grievances: The Case for an Ombudsman in Kenya’, (1973) Vol 9, No.1, *East African Law Journal*, 44, available at http://heinonline.org/HOL/Page?handle=hein.journals/easfrilaj9&div=7&start_page=43&collection=journals&set_as_cursor=0&men_tab=srchresults, accessed 10 November 2015 and see generally John Hatchard, ‘Governmental Accountability, National Development and the Ombudsman: A Commonwealth Perspective’, (1991) Vol.6 *Denning Law Journal*, 53, available at <https://books.google.com/books?isbn=9041104984>, accessed 2 October 2015.

¹¹ Lorena Gonzalez Volio, ‘The Institution of the Ombudsman: The Latin American Experience’, (2003) *Revista IIDH*, Vol. 37, 220-221, available at <http://www.corteidh.or.cr/tablas/R08066-5.pdf>, accessed on 4th May 2017 as cited in Commission of Administrative Justice, *Annual Report to Parliament, 2012* at 19, available at <http://www.ombudsman.go.ke/wp-content/uploads/2016/04/CAJ-Annual-Report-2012.pdf>, accessed 10 October, 2016.

¹² Commission of Administrative Justice, *Annual Report, 2012* at 19, available at <http://www.ombudsman.go.ke/wp-content/uploads/2016/04/CAJ-Annual-Report-2012.pdf>, accessed 10 October, 2016.

¹³ *ibid* 3-4 and Commission on Administrative Justice, *Annual Report, 2014*, 2-3, available at <http://www.ombudsman.go.ke/resources-downloads/>, accessed 2 May 2016.

¹⁴ *ibid*.

performance was generally very poor and there were great concerns as regards its establishment and independence.¹⁵

In 2011 however, following the ushering of the new Constitution, the Commission on Administrative Justice (hereinafter referred to as '*the Commission*') was established under the Commission on Administrative Justice Act pursuant to Article 59(4) of the Constitution.¹⁶ The Kenyan Judiciary has a similar institution though the same is limited to curbing maladministration within the Judiciary.¹⁷ The Judiciary Ombudsperson is mandated to investigate the misconduct of judicial officers and staff.¹⁸ "*The Commission's* mandate is to enforce administrative justice in the public sector by addressing maladministration through effective complaints handling and alternative dispute resolution."¹⁹ In so doing, the *Commission* carries out among other functions, combating all forms of maladministration as well as promoting good governance and efficient service delivery in the public sector by enforcing the right to fair administrative action.

Since its inception, *the Commission* has endeavored to enforce the right to fair administrative action by acting as an avenue for redressing maladministration grievances primarily through the complaints-handling system.²⁰ Despite the *Commission's* potential in promoting access to administrative justice and effective governmental accountability, the

¹⁵ See (n 12).

¹⁶ Established under Article 59(4) of the Constitution of the Republic of Kenya and guided by Act No.23 of 2011.

¹⁷ The Judiciary, Office of the Ombudsperson, available at <<http://www.judiciary.go.ke/portal/page/office-of-the-ombudsperson>>, accessed 27 May 2017.

¹⁸ *ibid.*

¹⁹ See (n 12) 23.

²⁰ See generally Commission on Administrative Justice, *Annual Report, 2014* at vii, available at <<http://www.ombudsman.go.ke/resources-downloads/>>, accessed 2 May 2016.

"Maladministration is about the conduct of public officers and the practices, policies and procedures of public authorities, that results in an irregular and unauthorised use of public money, the substantial mismanagement of public resources, or the substantial mismanagement of official functions. It includes conduct that might be described as incompetent or negligent, but it is not criminal conduct"- Independent Commissioner Against Corruption, Office for Public Integrity, available at <<https://icac.sa.gov.au/content/what-maladministration>>, accessed 27 May 2017.

question still lingers on as to whether such a remedial institution is promoting access to administrative justice in an era of blatant and widespread maladministration including unreasonable delay, administrative injustice, discourtesy or misconduct, incompetence or ineptitude, misbehavior in public administration, improper or prejudicial conduct, manifest injustice, abuse of power, unlawful, oppressive, unfair treatment or unresponsive official conduct.²¹

The *Commission* exists to serve the Kenyan citizenry through promoting administrative justice. The citizenry can however only take advantage of its services if it is aware of its existence and can easily access its services. In this regard, the *Commission* must be accessible to all if it is to render its services. While inquiring into and investigating complaints on maladministration against public officials, the *Commission* must engage with government institutions and agencies so as to establish the truth. Be that as it may, the success of the *Commission's* inquiries and investigations is wholly dependent upon cooperation by state organs and public institutions. This implies that where there is no such cooperation, the *Commission's* ability to carry out its functions is limited. The *Commission* is an independent office which is vested with jurisdiction and powers to fight maladministration and ultimately promote access to administrative justice. Ideally, these powers ought to be wide enough or should be interpreted as widely as possible to enable the *Commission* to effectively execute its mandate.

It is to this end that this study seeks to examine whether *the Commission* is promoting access to administrative justice in Kenya. The study seeks to establish this by determining *the Commission's* accessibility to the public, cooperation of government institutions and agencies with it in carrying out its functions and achieving its mandate as well as the reach of its jurisdiction and powers in the discharge of its mandate.

²¹ Macleod (n 7).

1.1 Statement of the Problem

The *Commission* is mandated to promote administrative justice and to protect the citizenry from the excesses of public administration.²² In this regard, the *Commission's* relationship with the public is paramount as it exists to serve them and should, as a matter of priority, be accessible to all. In the same vein, cooperation with and support for the *Commission* by government institutions and agencies, is crucial as this may either hinder it from or enable it in the provision of services to the people. Further, the scope of the *Commission's* jurisdiction and powers greatly contributes toward its ability to discharge its mandate effectively. These factors combined are indicative of whether the *Commission* is promoting access to administrative justice or not. To this end, the problem that this study seeks to address is whether the *Commission* is promoting access to administrative justice in Kenya. The study seeks to establish this by determining the *Commission's* accessibility to the public, the cooperation of government institutions and agencies with it in carrying out its functions and the reach of its jurisdiction and powers in the discharge of its mandate.

1.2 Scope of the Study

The study was limited to the Commission on Administrative Justice as an ombudsman institution and not the Judiciary Ombudsperson. It was further limited to the Commission on Administrative Justice as well as ombudsmen institutions in Ghana, Uganda and South Africa in relation to their accessibility, cooperation by government institutions and agencies with them in the execution of their mandates and the reach of their jurisdiction and powers in the discharge of their functions. The institutions were selected due to their success stories either as regards accessibility, cooperation of government institutions and agencies or the extent of their

²² See generally Commission on Administrative Justice Act, No. 23 of 2011.

jurisdiction and powers. The Ghanaian Ombudsman was selected due to its hybrid nature and tripartite mandate. It fuses a human rights institution, the ombudsman and an anti-corruption agency in a single institution. The South African Ombudsman was selected due to its expanded jurisdiction and accessibility to the public. The Ugandan Ombudsman was selected due to its extensive and strong powers including powers to enforce accountability from state organs. The features pointed out positively impact access to administrative justice in the said countries.

1.3 Justification of the Study

The ombudsman institution is a relatively new phenomenon in Africa and Kenya in particular. In Kenya, the *Commission* is one of its kind and plays a key and unique role in upholding and promoting access to administrative justice. The public are the end users of the *Commission's* services and therefore lack of or limited access to the institution is highly likely to occasion administrative injustice. Nonetheless, since its inception, it is unclear whether the *Commission* is impacting the administrative justice landscape and whether it is offering access to administrative justice. Currently, there is a paucity of literature as regards its performance, so far, in promoting access to administrative justice. This study offers lessons from selected ombudsman institutions in Africa that are promoting access to administrative justice due to their unique characteristics and *modus operandi*.

1.4 Objectives of the Research

1.4.1 Overall Objective

The overall objective of this study is to establish whether the Commission on Administrative Justice is promoting access to administrative justice in Kenya. To this end, the study will focus on three specific problem areas that may act as potential hindrances to the

Commission in promoting access to administrative justice. These are accessibility of the *Commission*, cooperation of government ministries and agencies with it and the reach of the *Commission's* jurisdiction and powers.

1.4.2 Specific Objectives

The specific research objectives are:

1. To assess whether the *Commission* is accessible to the Kenyan public.
2. To investigate whether government institutions and agencies cooperate with and support the *Commission* in the execution of its mandate.
3. To examine if the jurisdiction and powers of the *Commission* act as a limitation in the discharge of its functions.
4. To assess how the Ghanaian, South African and Ugandan ombudsman institutions are performing in light of their accessibility to the public, cooperation of government institutions and agencies with them and the reach of their jurisdiction and powers in comparison to the *Commission*.

1.5 Research Questions

The questions that the research seeks to answer are:

1. Is the *Commission* accessible to the public?
2. Do government institutions and agencies cooperate with and support the *Commission* in the discharge of its mandate?
3. Does the jurisdiction and powers of the *Commission* act as a limitation or hindrance in the discharge of its functions?

4. How are the Ghanaian, South African and Ugandan ombudsman institutions performing in light of their accessibility to the public, cooperation of government institutions and agencies with them and the reach of their jurisdiction and powers in comparison to the *Commission*?

1.6 Hypothesis

The hypothesis in this study is that non-cooperation by government institutions and agencies with the *Commission* in the carrying out of its functions coupled with limited accessibility and restraints in its jurisdiction and powers while discharging its mandate have a drawback effect on the promotion of access to administrative justice by the *Commission*.

1.7 Literature Review

The *Commission's* ability to promote access to administrative justice may be hindered or enabled by its accessibility, cooperation with and support from government agencies and institutions with it, as well as the scope of its jurisdiction and powers. The following section of the thesis discusses the same.

1.7.1 Accessibility of the Commission on Administrative Justice

Laura Pettigrew in her work 'Foundations of Ombudsman Law' characterizes the essential and universally recognized features of ombudsmanship to include among others accessibility.²³ Syed Bokhari contends that despite the key characteristic of accessibility, ombudsman offices are frequently noted for their inaccessibility leading to under-utilization of

²³Laura Pettigrew, Ombudsman Ontario 'Foundations of Ombudsman Law', available at <http://www.ombudsmanforum.ca/en/?p=571>, accessed 5 April 2015.

the institution especially by the least advantaged in society.²⁴ Pettigrew holds that an ombudsman's effectiveness largely depends on whether the complainants are aware of the existence of the office and can physically access it.²⁵ In this regard, she opines that public outreach and community education are essential.²⁶

Hatchard posits that a key feature of the office of the ombudsman is the ease with which complaints can be lodged.²⁷ He argues that ease of access to the ombudsman should essentially make the office extremely attractive to the public and where this is not the case, disappointment with or apathy to the institution might arise.²⁸ Other essential elements of accessibility include the flexibility and formalities of the processes involved in complaints handling, for instance, ombudsmen, in theory employ inquisitorial techniques rather than the adversarial approach taken by courts which make the institution easy to use.²⁹

Article 48 of the Constitution secures the right to access to justice which by implication includes administrative justice. The Article further provides that the State shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice.³⁰ This provision is not unique to the *Commission* but is general in its application in the sense that it includes courts of law as well as other redress mechanisms. Neither the Commission on Administrative Justice Act (hereinafter referred to as '*the Act*')³¹ nor the Constitution expressly provide for accessibility of the *Commission* though the same can be

²⁴ Syed Bokhari, *Ombudsman: An Introduction*, at 20, available at <www.policy.hu/bokhari/Ombudsman_An%20Introduction.doc>, accessed 9 October 2015.

²⁵ *ibid.*

²⁶ See (n 22).

²⁷ John Hatchard, 'Governmental Accountability, National Development and the Ombudsman: A Commonwealth Perspective', (1991) 53 *Denning Law Journal* 61, available at <<http://ubplj.org/index.php/dlj/article/view/203>>, accessed 2 October 2015.

²⁸ *ibid* 62.

²⁹ Macleod (n 7).

³⁰ Constitution of Kenya, 2010, Article 48.

³¹ See (n 20).

inferred from Article 47. The fact that accessibility of the *Commission* is expressly provided for neither by statute nor the Constitution raises the question whether this hinders it from achieving real accessibility. This study investigated whether the *Commission* is accessible to the public.

Other jurisdictions have nonetheless gone ahead to expressly provide for accessibility of the ombudsman. The South African Constitution for instance specifically requires that the Public Protector must be accessible to all persons and communities.³² Malunga opines that this provision enables the Public Protector to achieve real accessibility to all those with grievances of an administrative kind.³³ He asserts that accessibility does not only refer to the ability to lodge complaints with the ombudsman, but instead relates to real access of the services of such office including investigating, rectifying and redressing any complaints of maladministration occasioned by government institutions.³⁴ Malunga bemoans the size, function and location of the organs of state over which ombudsmen must exercise their mandate and states that their limited centralized locations prevent them from effectively administering administrative justice.³⁵ Malunga's arguments accord with the situation currently obtaining in Kenya as regards the number of counties as well as government institutions and agencies that the *Commission* has to extend its services to hence calling its accessibility into question.

Hatchard argues that legitimacy of the office of the ombudsman can only be established if members of the public and government officials are aware of the operations of the office.³⁶ In

³² Constitution of the Republic of South Africa, 1996, s 182(4).

³³ Kevin Malunga, Deputy Public Protector, A Paper for Address: *Twenty Years of South African Constitutionalism, "An assessment of the role and challenges of the Office of the Public Protector in asserting South Africa's transformative constitutionalism"* (November 2014) 28, available at <<http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Malunga.pdf>>, accessed 7 September 2015.

³⁴ *ibid.*

³⁵ See (n 20).

³⁶ Bokhari (n 24) 63.

this regard, he argues that annual reports are a potentially useful source of publicity.³⁷ On the other hand, Bokhari argues that the ombudsman function is generally not well understood as a result of limited documentation and information about their work as well as confusion and uncertainty about their role.³⁸ He adds that the annual reports submitted by most ombudsmen are considered an inadequate instrument for influencing administrative procedures and practice, informing mass media and educating the public.³⁹ Bokhari's views accord with those of Dr. Otiende Amollo as expressed in his article "Insights in Enforcing Ombudsman Decisions-The Case of Kenya." He argues that the annual reports undergo insufficient scrutiny by Parliament and may hence be unsuitable for informing mass media.⁴⁰ In this regard, public awareness including advertising campaigns, sensitization programs and media coverage of reports is vital. This study looked at how well informed the Kenyan populace was about the *Commission* and the work it does.

The Productivity Commission of Australia Report outlines four major areas that it identified in which ombudsmen promote access to administrative justice in relation to accessibility.⁴¹ Only three are of concern to this study. *Firstly*, ombudsmen should help overcome power imbalances by informing the disadvantaged and lowly in society of avenues of redress where they suffer administrative injustices. Through civic education to promote awareness of the office as well as the awareness of rights and fundamental freedoms, the ombudsman's office is likely to record a higher reporting rate, in terms of complaints, at the

³⁷ *ibid.*

³⁸ Bokhari (n 24) 56.

³⁹ Bokhari (n 24) 21.

⁴⁰ Otiende Amollo, *Insights in Enforcing Ombudsman Decisions-The Case of Kenya*, A Presentation made at the Second Regional Colloquium of African Ombudsman Institutions on the Theme 'Securing the Ombudsman as an Instrument of Governance in Africa' held at the Safari Park Hotel, Nairobi, 20 February 2015, 6.

⁴¹ See generally Productivity Commission of Australia Report, 2014, available at http://www.anzoa.com.au/assets/anzoa-submission_productivity-commission_access-to-justice-inquiry_draft-report_may2014.pdf >, accessed 9 April 2015.

instance of infringement of rights rather than later when the cases of infringement have multiplied. This is an essential aspect of accessibility. According to the *Commission's* 2014 Annual Report, there is increased reportage of administrative injustice on local media specifically radio stations, increased awareness on issues relating to administrative justice amongst Kenyan radio journalists and correspondents, and increased accessibility and visibility of the *Commission* at the grassroots level.⁴² The Report is however silent on whether such increase is directly attributed to increased physical access to the *Commission* or to increased awareness by the public on it. The study sought to establish this.

Secondly, the office of the ombudsman must be easy to use and physically located in areas convenient for the people to access. John Hatchard cites lack of accessibility to the offices of ombudsmen as a key problem.⁴³ He states that in countries where communications are difficult, there is a danger that only those living close to the office or with adequate transportation are able to use it.⁴⁴ This may lead to an urban bias in the number of complaints received and handled. Hatchard's arguments raise the question of whether the *Commission's* offices are located in areas convenient for the public to access. The *Commission* has only five offices located in five counties.

Thirdly, on ease of use, it is noted that ombudsmen actively pursue the resolution of disputes rather than leaving the primary control of the case to the parties whose advantage is to remove the need for professional advocates or representatives.⁴⁵ This greatly contributes to ease of use. In addition, the complainant is provided with easy options to lodge their complaints.

⁴² See (n 20) 81, available at <<http://www.ombudsman.go.ke/resources-downloads/>>, accessed 2 May 2016.

⁴³ Hatchard (n 27) 58.

⁴⁴ *ibid.*

⁴⁵ Pettigrew (n 23).

Pettigrew posits that an ombudsman who follows fair and consistent procedures for the investigation and resolution of complaints, who makes realistic recommendations and works with the organization or entity subject to review to improve services, is much more likely to win the trust and respect of the public and ultimately achieve positive results. This, she states, is the essence of accessibility.⁴⁶

Accessibility of the ombudsman is very crucial since certain administrative complaints such as discourtesy, rudeness and inordinate delays in service provision, which are important to the public, hardly ever reach the courts and are in essence considered as non-justiciable. This necessitates accessibility of the ombudsman so as to ensure that such complaints do not go unresolved. This study looked at the various aspects of accessibility raised by the authors above including physical location, ease of use, flexibility of procedures and processes, as well as visibility in establishing whether the *Commission* is accessible to the public and if this in turn has a bearing on its ability to promote access to administrative justice.

1.7.2 Cooperation of State Organs and Public Institutions with the Commission on

Administrative Justice in the discharge of its mandate

Kevin Malunga argues that whereas the ombudsman institution is at times considered as a hostile entity by government institutions, a strong working relationship between the ombudsman and such institutions can inspire voluntary cooperation with the office as well as compliance with its recommendations.⁴⁷ Rudolph Harold states that an ombudsman can help eliminate corruption, maladministration, injustice and inefficiency with the full support of government and public

⁴⁶ *ibid.*

⁴⁷ Malunga (n 33) 19.

administration.⁴⁸ Hatchard further posits that a high degree of cooperation by public servants and government agencies is essential to the success of the ombudsman institution.⁴⁹ Malunga alludes to lack of cooperation by state organs and government institutions as the greatest hindrance to the achievement of an ombudsman's mandate.⁵⁰ He further contends that:

“Failure to extend assistance and delays in the supply of information could significantly constrain and protract the Public Protector's investigative powers and capacity, since access to information and genuine, timely cooperation are decisive and central to the success of the Public Protector's investigations, reports and remedial action.”⁵¹

The relationship between an ombudsman and state institutions is crucial as it either facilitates or hinders the nature of relations between the ombudsman and the people.⁵² Malunga argues that the Public Protector will only achieve its purpose if there is a willingness and readiness on the part of administrative agencies to cooperate with the Public Protector in the investigation and resolution of complaints, and to comply with its findings and remedial action.⁵³ This position is further exemplified by the experience of the defunct Swazi Ombudsman when he lamented thus:

⁴⁸ See generally 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=advanced&typea=text&tabfrom=&other_cols=yes&submit=Go, accessed 5 December 2015.

⁴⁹ Hatchard (n 27) 70.

⁵⁰ Malunga (n 33) 26.

⁵¹ *ibid.*

⁵² The Office of the Public Protector in the Republic of South Africa: A Discussion of Key Issues in International Perspective, July 2000 by National Democratic Institute for International Affairs at 28, available at https://www.ndi.org/files/970_sa_keyissues.pdf, accessed on 17th April 2016.

⁵³ Malunga (n 33) 26.

“Some officers have already exhibited a tendency to regard the ombudsman and members of staff with hostility, resentment and suspicion. The officials in question have openly spoken against the office and some of them have already denounced its existence and advocated for its abolition.”⁵⁴

The above authors’ arguments tend to support the notion that cooperation by government agencies and institutions with the office of the ombudsman is key and go to the very heart of promoting access to administrative justice. They also further the argument that such an institution, regardless of the country it is in, cannot exist in isolation and requires the support of the relevant agencies.

In the words of Hatchard, ombudsmen lack judicial powers and can only make recommendations upon conclusion of investigations due to limited enforcement powers.⁵⁵ This makes cooperation by government ministries, agencies and departments very vital. Be that as it may, most offending bodies fail or refuse to implement their recommendations despite the fact that compliance with recommendations is one of the hallmarks of cooperation.

Hatchard contends that the real solution to the problem of non-cooperation probably lies in the attitude of the executive.⁵⁶ He adds that support for the office will greatly enhance its image and status.⁵⁷ Hatchard argues that the non-binding nature of ombudsmen’s recommendations coupled with the over-centralization of power in government institutions encourages disregard for ombudsman’s recommendations or decisions.⁵⁸ In Kenya, cooperation by public servants and government agencies with the *Commission* mainly relates to investigations, responsiveness and implementation of recommendations. Whereas Hatchard

⁵⁴ Kingdom of Swaziland *Ombudsman Annual Report*, 1985, 13 as cited in Hatchard (n 27).

⁵⁵ Hatchard (n 27) 71.

⁵⁶ Hatchard (n 27) 72.

⁵⁷ *ibid.*

⁵⁸ Hatchard (n 27) 72.

discusses non-cooperation from the perspective of non-compliance with the recommendations of the ombudsman, this study in addition looks at the level of responsiveness by government agencies to the *Commission* while carrying out its work as well as the support they extend in investigations as components of cooperation.

In Kenya, the remedial action available to the *Commission* under *the Act* is well provided for in Section 42 (3) and (4) respectively. The sections require the entities in respect of which investigations have been carried out and reports and recommendations issued to submit a report to the *Commission* within a specified period on the steps taken to implement those recommendations. Furthermore, when such an organization fails or refuses to implement the recommendations, the *Commission* may prepare and submit to the National Assembly a report detailing such failure or refusal to implement its recommendations whereby the National Assembly is required to take appropriate action.⁵⁹ It seems that the ultimate enforcing instrument is therefore a political one and greatly depends on moral suasion as opposed to using coercive powers of enforcement.⁶⁰ This then makes cooperation and support by public administrators towards the *Commission* essential to its mandate.

Dr. Amollo argues that refusal to comply with the decisions of the ombudsman warrants the use of coercive powers of enforcement, which the *Commission* lacks, since public administrators no longer deem it morally inappropriate to fail to implement the recommendations of the ombudsman.⁶¹ He comments thus regarding the limited nature of the *Commission's* powers as regards enforcement of its recommendations:

⁵⁹ See (n 22) s 42(3) and (4).

⁶⁰ Amollo (n 40) 4.

Moral suasion refers to the reliance on the moral authority of the findings and recommendations as opposed to using coercive powers of enforcement.

⁶¹ *ibid.*

“While moralisation has worked in developed countries, it is worth noting that it cannot be effective in a number of jurisdictions, especially in Africa. This is especially so considering the political, economic and cultural environment in which ombudsman institutions operate in Africa. A number of countries are still faced with the challenge of impunity. In some cases where the ombudsman makes recommendations, the relevant bodies ask for ‘court orders’ for implementation.”⁶²

From the above sentiments, it would appear that not much cooperation and support is extended by public administrators towards the ombudsman institution hence acting as a hindrance to its mandate.

As regards support and cooperation extended by the courts towards the *Commission*, Dr. Amollo asserts that in *Republic v Kenya Vision 2030 Delivery Board and another Ex-parte Eng. Judah Abekah*, the Court failed to appreciate the need for interdependence typified in the modern legal jurisprudence where the Courts enforce the decision of the ombudsman where it has acted within the scope of its powers.⁶³ Failure or refusal to implement recommendations emanating from such processes makes the ombudsman exercise in itself vain. The rationale behind the ombudsman scheme is that it should provide an alternative dispute settlement and lift pressure from the ordinary court system. Ideally, the ombudsman should not have to seek the court’s intervention so as to secure compliance with its recommendations. Instead, the relevant bodies should feel obliged to cooperate with the *Commission* and give the necessary support.

⁶² Amollo (n 40) 5.

⁶³ [2015] eKLR, available at <<http://kenyalaw.org/caselaw/cases/view/106164/>>, accessed 21 November 2015.

From the above, it would appear that there is limited cooperation by public servants and government agencies with the *Commission* and this study seeks to find out whether such cooperation has any effect on the *Commission's* promotion of access to administrative justice.

1.7.3 Jurisdiction and Powers of the Commission in the discharge of its mandate

At the initial stages of its evolution, the ombudsman's key concern was the quality of public administration.⁶⁴ The Classical or Swedish ombudsman had his powers bestowed upon him by parliament on whose behalf it acted to support its parliamentary oversight over the executive.⁶⁵ To this end, its jurisdiction and powers were strictly limited to administrative injustices and the institution could only make recommendations where it found administrative injustices.⁶⁶ To this extent, its role can be said to have been purely reactive in nature. The Swedish ombudsman model has however evolved over time to what is currently known as the 'new' ombudsman.⁶⁷

According to Linda Reif, one of the most outstanding features of the new ombudsman is the expansion of the functions of the ombudsman beyond the traditional mandate of addressing maladministration to include aspects such as protection of human rights, anti-corruption, enforcement of leadership and ethical codes, environmental protection and access to information.⁶⁸ Reif's work is useful in bringing out the new and expanded mandate of the ombudsman. This study furthers her arguments by looking into the *Commission's* jurisdiction and powers in relation to its mandate and what it means in terms of promoting access to administrative justice.

⁶⁴ Bokhari (n 24) 14.

⁶⁵ Amollo (n 40) 3.

⁶⁶ *ibid.*

⁶⁷ Amollo (n 40).

⁶⁸ Linda C. Reif, (2004), *The Ombudsman, Good Governance, and the International Human Rights System*, Leiden: Martinus Nijhoff Publishers, 218-19.

The expansion of jurisdiction and powers of the ombudsman, especially in Africa, has been necessitated by the unique political, cultural and economic contexts within which African ombudsmen operate.⁶⁹ Reif justifies the expansion of jurisdiction and powers as follows:

“Most post-independence states in Africa were military regimes or one-party states...a number of African states continue to suffer from recurrent civil conflict...as a result...African ombudsmen did not duplicate the classical ombudsman model, and adapted the concept to fit the political, legal, economic and social peculiarities of Africa.”⁷⁰

In Kenya, the jurisdiction and powers of the *Commission* are set out in *the Act*.⁷¹ They include among other powers guarding against maladministration and administrative injustice, adjudication, offering advisory opinions and recommendations, facilitating mediation, conciliation and negotiation, issuance of summons, requiring disclosure of relevant information, and compelling production of relevant documents. Notably, the *Commission* cannot investigate the proceedings or decisions of the Cabinet or its committees nor can it look into a matter pending before any court or judicial tribunal.⁷² On paper, it would appear that the *Commission* has extensive powers. This study sought to examine whether such powers are sufficient, whether the *Commission* exercises the same and the effect of such powers on promoting access to administrative justice.

Dr. Otiende Amollo laments that despite the expansion in jurisdiction and powers of the new ombudsman, its defining characteristics have not changed especially as regards parliamentary

⁶⁹ *ibid.*

⁷⁰ Reif (n 68).

⁷¹ See (n 22), s 29-31.

⁷² See (22), s 30(a) and (c).

reporting, judicial enforcement and implementation of recommendations.⁷³ The *Commission's* power to take appropriate remedial action is provided by the Constitution and *the Act*.⁷⁴ According to Dr. Amollo, this power goes beyond the conventional jurisdiction of the ombudsman, as known worldwide.⁷⁵ He adds that the power implies that the *Commission* can offer tangible remedies after carrying out inquiries or investigations.⁷⁶ The remedies include offering recommendations for compensation, specific performance, restitution and apologies.⁷⁷ In emphasizing the crucial nature of such remedial powers, Dr. Amollo contends that:

“Such decisions are binding and must be complied with....in case any party is aggrieved by the decisions, the only recourse is to challenge them in Court and not refuse to comply.”⁷⁸

This is however not the situation currently obtaining in Kenya as was seen in the *Judah Abekah case*. In the said case, Justice Korir held that the *Commission* cannot compel a state agency to implement its recommendations and neither can a court of law. He added that government agencies have no statutory duty to implement the recommendations of the *Commission* since failure or refusal to implement such recommendations can only be reported to the National Assembly by the *Commission*. In other words, the *Commission* lacks coercive powers over the government institutions it investigates.⁷⁹ The decision was rendered despite the fact that Article 59(2) (j) of the Constitution and Section 8(c) of *the Act* require the *Commission* to ‘take remedial action’ on complaints investigated. In Dr. Amollo’s view, such action cannot

⁷³ Amollo (n 40).

⁷⁴ Constitution of Kenya, 2010, Article 59 (2) (j) and (n 22) s 8(c)

⁷⁵ Otiende Amollo, ‘*Constitutional Commissions Under the Constitution of Kenya 2010: The Case of the Commission on Administrative Justice*’, A Lecture Delivered at the School of Law, University of Nairobi on 23 March 2015, 12.

⁷⁶ *ibid.*

⁷⁷ Amollo (n 75).

⁷⁸ *Ibid.*

⁷⁹ *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng. Judah Abekah* [2015] eKLR, available at <<http://kenyalaw.org/caselaw/cases/view/106164/>>, accessed 21 November 2015.

be merely recommendatory or declaratory.⁸⁰ The same issue was also raised in *R (Equitable Members Action Group) v. HM Treasury*⁸¹ whereby the question at stake was whether the recommendations of the ombudsman are binding on government officials or institutions. It was held that as a matter of principle, the ombudsman can enter a finding of maladministration and make recommendations thereof but the government is under no statutory obligation to implement the same.⁸²

The experience in Scandinavia and many other developed countries is somewhat different in that the recommendations and decisions of the ombudsman are implemented as a matter of course.⁸³ Modern legal jurisprudence on the enforceability of the decisions of an ombudsman is reflected in a number of decisions from developed countries where it has generally been held that the decisions of the ombudsman are legally enforceable by courts of law, where an ombudsman has acted within its statutory mandate to fulfill the scope of its powers.⁸⁴ In *Ex Parte Bradley and Others v Secretary of State for Pensions*⁸⁵ for instance, the High Court decided, among other issues, that the findings of fact made by the ombudsman were binding on a government minister unless and until they could objectively be shown to be flawed or irrational or where there was genuinely fresh evidence.⁸⁶

⁸⁰ Dr. Otiende Amollo, Former Chairperson of the Commission on Administrative Justice, *Enhancing Access to Justice: The Role of the Commission on Administrative Justice in Kenya's Constitutional Dispensation*, 18.

⁸¹ [2009] EWHC 2495 (Admin).

⁸² Case and Comment, 'The Government Versus the Ombudsman: What Role for Judicial Review?' (March 2010) 69(1), *Cambridge Law Journal*, 1, available at <<https://www.cambridge.org/core/journals/cambridge-law-journal/article/government-versus-the-ombudsman-what-role-for-judicial-review/2DC1204D5AF248134026D63609A7FA63>>, accessed 27 May 2017.

⁸³ Amollo (n 40) 2.

⁸⁴ *ibid.*

⁸⁵ [2007] EWHC 242, available at <<http://www.bailii.org/ew/cases/EWHC/Admin/2007/242.html>>, accessed 25 April, 2015.

⁸⁶ *ibid.*

In the same breadth, in *British Banker's Association v Financial Services Authority/Financial Ombudsman Service*⁸⁷, the High Court dismissed the British Banker's Association's application for judicial review and upheld the decisions of the Financial Services Authority and the Financial Ombudsman Service as they were considered rational.⁸⁸ The above decisions are relevant to this study as they demonstrate how situations of non-compliance by government ministries, agencies and departments with the recommendations of the ombudsman have been dealt with in other jurisdictions where the reasons for such refusal are not justified. The *Commission* nonetheless continues to grapple with the challenge of such refusal.

The South African Constitution also expressly mandates the Public Protector to take appropriate remedial action.⁸⁹ In Commonwealth countries such as Kenya, the essence of the ombudsman's powers lie in investigation of complaints and where necessary to make recommendations on the appropriate remedial action.⁹⁰ Nevertheless, according to Syed Bokhari, the office is generally powerless to change or reverse decisions.⁹¹ In support of this assertion, Dr. Amollo laments thus:

“The ombudsman in Africa continuously finds itself in a contradictory situation where it is expected to be the people's defender or watchman against bad administration while at the same time bestowed with ‘soft’ power to ensure compliance with its recommendations and decisions. Considered from this perspective, the ombudsman in Africa must have more than

⁸⁷ [2011] EWHC 999, available at <<http://www.bailii.org/ew/cases/EWHC/Admin/2011/999.html>>, accessed 25 April, 2015.

⁸⁸ *ibid.*

⁸⁹ Constitution of the Republic of South Africa, No. 108 of 1996, s 182(c), available at <<https://www.ru.ac.za/media/rhodesuniversity/content/humanresources/documents/employmentequity/Constitution%20of%20the%20Republic%20of%20South%20Africa%201.pdf>>, accessed 22 May 2017.

⁹⁰ Bokhari (n 24) 13.

⁹¹ Bokhari (n 24) 21.

mere recommendatory powers for it to be effective. It would be preposterous to expect the ombudsman to deliver on its mandate and gain the trust of the public while it has been rendered ineffective or allowed to become a constitutional or statutory eunuch or toothless bulldog.”⁹²

Dr. Amollo and Bokhari’s works emphasize on the complex nature of and challenges associated with the ombudsman’s power to make recommendations and their enforcement thereof. Their key argument is that ombudsmen lack powers of enforcement. This study will look at the *Commission* and the difficulties it faces, if any, in enforcing its decisions.

Hatchard states that in a number of jurisdictions, the ombudsman is required to report to parliament periodically.⁹³ In Kenya, the *Commission* is required to report to both Parliament and the President on the progress of its work and bi-annually on complaints investigated and remedial action taken.⁹⁴ Further, the *Commission* is required to submit a report to the National Assembly in the event that a public authority fails to comply with its recommendations.⁹⁵ Dr. Amollo however argues that such parliamentary oversight is over the ombudsman as an institution and not over its decisions or recommendations.⁹⁶ Several difficulties emerge from such oversight.

Politicization of ombudsmen’s decisions renders their implementation close to impossible, especially when contentious issues have been investigated and recommendations

⁹² Amollo (n 40) 2.

⁹³ John Hatchard at al. *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective*, (2004) Cambridge University Press, London, 225.

⁹⁴ Constitution of Kenya, 2010, Article 59(2)(j) and (n 22) s 8(c).

⁹⁵ See (n 22) s 42(4).

⁹⁶ Amollo (n 40) 6.

made.⁹⁷ Additionally, the ombudsman reports annually to parliament making it difficult for pertinent issues to be dealt with immediately as and when they arise.⁹⁸ Further, inadequate time is set aside for considering ombudsmen's reports due to pressing parliamentary business.⁹⁹ All these deficiencies make a case for the *Commission* to be granted coercive powers of enforcement. This study seeks to look at whether the *Commission* has adequate powers of enforcement and whether such powers facilitate or hinder promotion of access to administrative justice.

Simeon Marcelo in his article 'Challenges to the Coercive Investigative and Administrative Powers of the Office of the Ombudsman' argues that to aid in the performance of the ombudsman's obligations, the Constitution and legislature should grant such office broad disciplinary powers.¹⁰⁰ The Philippine Ombudsman Act provides for the powers, functions and duties of the ombudsman including powers to examine and have access to bank accounts and records as well as powers to punish for contempt.¹⁰¹ Despite such provisions, the Philippine courts have since refused to acknowledge such powers and have made adverse decisions that have clipped the powers of the ombudsman.¹⁰² In *Marquez v. Desierto*¹⁰³, the Supreme Court barred access to bank accounts and records at the investigation stage claiming that the Office of the Ombudsman would just be engaged in 'fishing' for evidence.¹⁰⁴ In the words of the Philippine Ombudsman,

⁹⁷ *ibid.*

⁹⁸ See (n 96).

⁹⁹ *ibid.*

¹⁰⁰ Simeon Marcelo, 'Philippines Ombudsman, Challenges to the Coercive Investigative and Administrative Powers of the Office of the Ombudsman', (2003-4) Vol.78, *Philippines Law Journal*, 611, available at <http://koha.nlp.gov.ph/cgi-bin/koha/opac-search.pl?op=do_search&marclist=bibliosubject.subject&and_or=and&operator=contains&value=Ombudsman%20--%20Philippines>, accessed on 1 June 2017.

¹⁰¹ Republic Act No. 6770, also known as Ombudsman Act of 1989, Article 15(8) & (9).

¹⁰² See generally the Supreme Court's decision in *Marquez v Desierto*, G.R. No. 125882, June 27, 2001, 359 SCRA 772 (2001)

¹⁰³ *ibid.*

¹⁰⁴ See (n 101).

graft investigations conducted by his office have since met a blank wall or dead end with banks citing confidentiality.¹⁰⁵ Marcelo's work is crucial in demonstrating the challenges faced by ombudsmen in carrying out their work especially during investigations and where the court does not accord them the necessary support.

Literature on cooperation of state organs and public agencies with ombudsmen institutions indicates that there is limited cooperation. This study seeks to find out if the same is the case in Kenya and how this affects the *Commission* in terms of promoting access to administrative justice.

1.8 Research Methodology

The researcher employed a comparative method of legal analysis in order to prove or disprove the hypothesis. According to Kai Schadbach, a comparative legal analysis aids in the 'attainment of knowledge of another system in order to enhance the understanding of one's own system'.¹⁰⁶ He contends that a comparative legal analysis entails among other processes 'comparing national legal institutions as an avenue to new insights about one's own legal system'.¹⁰⁷ In this regard, ombudsmen institutions from Ghana, South Africa and Uganda were studied in comparison to the *Commission*. The comparative legal analysis offered lessons and best practices that may be borrowed with a view to promoting access to administrative justice in Kenya.

¹⁰⁵ Marcelo (n 100) 615.

¹⁰⁶ Kai Schadbach, 'Benefits of Comparative Law: A Continental European View', (1998) Vol. 16, Issue No.2, *Boston University International Law Journal*, 335, available at <<http://heinonline.org/HOL/LuceneSearch?terms=schadbach+the+benefits+of+comparative+law%3A+a+continenta+l+european+view&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&all=true>>, accessed 22 June 2016.

¹⁰⁷ *ibid* 333.

The researcher relied on both primary and secondary sources of data. Secondary data was mainly gathered through review of relevant documents. The secondary sources of data included national constitutions, international treaties and conventions, Acts of Parliament, text books, theses, scholarly journals and articles, reports, and newspaper articles. There was also an extensive use of internet sources to access electronic books and journals. The data obtained from the secondary sources was supplemented with primary data. More specifically, the primary data filled in the gaps that existed in the literature reviewed.

Primary data was collected through interviews and questionnaires. The interviews included both face to face as well as telephone interviews with the selected respondents. An interview guide comprising questions that were relevant to the research objectives, research questions and hypotheses were prepared in this regard. The advantage of using this instrument was that it gave the researcher an in depth understanding of the research issues. The interview guide was pretested to improve on its reliability.

In addition to the interview guide, the researcher also designed a questionnaire that was meant for respondents who were unable to spare time for either a face to face or telephone interview. Some of the questionnaires were physically distributed by the researcher while others were distributed via email.

The researcher relied on non-probability sampling technique. When collecting primary data, the researcher applied both purposive and convenient sampling. Purposive sampling was used to select respondents who were believed to have knowledge of the issues that were under study.¹⁰⁸ Convenient sampling targeted respondents who had not necessarily engaged with the

¹⁰⁸ See O M Mugenda and A G Mugenda *Research Methods*, Acts Press, 1999 Revised 2003, 51.

Commission but who were available to the researcher for the study. Such respondents included Commissioners as well as the *Commission's* staff. This technique was adopted because the information required could only be obtained from certain respondents. The interviews were limited to respondents from Nairobi, Eldoret, Kisumu and Mombasa. This is because the *Commission* has offices in these areas.¹⁰⁹ The researcher targeted 50 respondents.¹¹⁰ The researcher was also of the view that the number selected was adequate to enable them to reach a point of saturation.¹¹¹ The identified respondents included Commissioners and staff from the *Commission*, as well as members of the public. The purpose for this was to gauge the awareness of the public on the *Commission* and its mandate and functions. For purposes of confidentiality, pseudonyms were applied in place of the actual names of the respondents in the analysis and presentation of the data.

The researcher collected a mix of qualitative and quantitative data. Out of the 50 respondents selected for the study, only 43 responded either by filling in questionnaires or availing themselves for interviews. 18 members of the public were reached through face to face interviews while 25 respondents filled in questionnaires. The respondents were given a span of three weeks to answer the questionnaires after which the same were collected both physically and via email. The data collected was then analyzed.

The qualitative data collected both from the interviews and the questionnaires was analyzed through reviewing all the data collected and then applying a thematic analysis. This

¹⁰⁹ At the time of conducting the study, the *Commission* only had Eldoret, Kisumu and Mombasa as branch offices. It currently however has a branch office in Isiolo.

¹¹⁰ It is argued that a sample size of 30 subjects is adequate for the identification of consistent patterns in a study. See generally D K Kombo and D L A Tromp *Proposal and Thesis Writing: An Introduction* (2006) 84.

¹¹¹ T Nigatu, 'Qualitative Data Analysis', March 2009, 11, available at <<http://www.macs.hw.ac.uk/~yjc32/project/student-notes/writing-advice/how%20to%20evaluate%20a%20software%20system/2002-qualitative-data-analysis.pdf>>, accessed 15 May 2017.

entailed grouping the data reviewed into emerging themes and patterns and further assigning sub-topics to related themes. In order to provide quantifiable and easy to understand information, the researcher further engaged in quantitative analysis of the quantitative data collected. This was done through tabulating the data and further constructing them into frequency and percentage distributions. Percentages were then used to represent the quantitative data analyzed.

1.9 Limitations of the Study

The researcher was faced with two limitations. Firstly, some of the respondents who were targeted for the study were unable to avail themselves for interviews due to busy work schedules. Secondly, the researcher observed that there were incidences of subjectivity and bias from respondents who comprised of the *Commission's* staff as a result of their engagements with it. Such subjectivity and bias greatly influenced the responses given by the *Commission's* staff.

1.10 Chapter Breakdown

The study has five chapters.

1.10.1 Chapter One- Introduction: A General Overview and Outline of the Study

This chapter introduces the study as a whole by giving a background to the study. Thereafter, the problem statement, research objectives, research questions, hypothesis, literature review, justification of the study, the anticipated limitations as well as the scope of the study are set out. Finally, the methodology is discussed and chapter breakdown given.

1.10.2 Chapter Two - Access to Administrative Justice: A Conceptualization

The chapter identifies the concept of access to administrative justice as forming the core of this study. In this regard, a conceptual analysis of the concept of access to administrative

justice is carried out. The chapter then concludes with a discussion on the specific elements of the concept of access to administrative justice.

1.10.3 Chapter Three - The Commission on Administrative Justice and Access to

Administrative Justice: Assessing the Status Quo

This chapter assesses the prevailing situation in Kenya as concerns the *Commission* and whether it is promoting access to administrative justice. To this end, accessibility; cooperation of state organs and public institutions with the *Commission* in the carrying out of its functions as well as the jurisdiction and powers of the *Commission* in the discharge of its mandate form the basis of the discussion. Concluding remarks are then made.

1.10.4 Chapter Four - Ghana, South Africa and Uganda: A Comparative Review of

Ombudsman Institutions

This chapter compares the Ghanaian, South African and Ugandan Ombudsman to Kenya in light of accessibility; cooperation of state organs and public institutions with the ombudsman institution in the carrying out of its functions; and jurisdiction and powers of the ombudsman in the discharge of its mandate. In so doing, the strengths and weaknesses of these institutions are highlighted. The chapter culminates with concluding remarks.

1.10.5 Chapter Five - Conclusions and Recommendations

This chapter provides a brief summary and conclusion of the study as a whole. It then provides recommendations on the way forward.

CHAPTER 2

ACCESS TO ADMINISTRATIVE JUSTICE: A CONCEPTUALIZATION

2.1 Introduction

This chapter gives a conceptual analysis of access to administrative justice. In so doing, the concept of access to administrative justice is discussed with a view to understanding its meaning and content within the context of this study. It then culminates with a discussion on the elements of access to administrative justice.

2.2 Access to Administrative Justice Conceptualized

“Administrative law, on the one hand, regulates the exercise of power by requiring that administrative action should meet certain requirements of legality, reasonableness and procedural fairness while on the other hand, also provides remedies when these principles and procedures of administrative law are not adhered to.”¹¹² Furthermore, administrative law is applied across the desks of public servants as they exercise the discretion necessary to translate public policy into individual situations.¹¹³ Public administrators therefore concern themselves with administrative action and decision making. As custodians of governmental authority, they ought to exercise such authority in accordance with administrative law and with the wellbeing of individuals in mind. Failure to do so warrants seeking of redress by aggrieved parties. Essentially, effective public administration must be weighed against the extent of respect for administrative law rights of individuals. It is only then that administrative justice can be said to

¹¹² See Professor Migai Akech, *Administrative Law and Governance in East Africa in Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions*, 43, available at <http://aoma.ukzn.ac.za/Libraries/External_reports/Kenya_Draft_Report_of_the_Regional_Colloquium_of_African_Ombudsmen.sflb.ashx>, accessed 5 July 2015.

¹¹³ Stephen Owen, ‘The Expanding Role of the Ombudsman in the Administrative State’, (1990), Vol. 40 *University of Toronto Law Journal*, 671.

exist. In this regard, administrative justice therefore entails effective public administration and the extent of respect for the administrative law rights of individuals.

Administrative justice as a philosophy posits that in administrative decision-making the rights and interests of individuals should be properly safeguarded and balanced against the overall public good.¹¹⁴ Robin Creyke and John McMillan postulate that it applies only to administrative action within government and that it overlaps with the legal concept of justiciability.¹¹⁵ Dr. Otiende Amollo argues that administrative justice is a principle of administrative law that relates to public administration, which is the overall system by which decisions are made and action taken by public institutions.¹¹⁶ Mathew Groves propounds that administrative justice can be conceived through the practical approach.¹¹⁷ The practical approach was advanced by the Kerr Committee¹¹⁸ and consists of two views. The first view is that administrative justice focuses on balancing distributive justice of public administration against individual interests.¹¹⁹ The second view holds that administrative justice focuses on delivering a form of justice to individuals and to the wider society, who are affected by administrative processes.¹²⁰ This study concerns itself with both views.

¹¹⁴ Robin Creyke and John McMillan, *Administrative Justice-the Core and the Fringe*, Papers presented at the 1999 National Administrative Law Forum, 3-4, available at <<http://www.aial.org.au/Publications/webdocuments/Procedures/AdministrativeJustice.pdf>>, accessed 5 July 2015.

¹¹⁵ *ibid* 3.

¹¹⁶ Otiende Amollo, 'Constitutional Commissions Under the Constitution of Kenya 2010: The Case of the Commission on Administrative Justice', A Lecture Delivered at the School of Law, University of Nairobi 23 March 2015, 8.

¹¹⁷ Mathew Groves, 'Administrative Justice in Australian Administrative Law', at 18, Australian Institute of Administrative Law Forum No.6, available at <<http://www.austlii.edu.au/au/journals/AIAdminLawF/2011/8.pdf>>, accessed 25 September 2015.

¹¹⁸ Established in Australia on 29th October 1968 and also known as the Commonwealth Administrative Review Committee.

¹¹⁹ See Robin Creyke, 'Administrative Justice- Towards Integrity in Government' (2007) 31 *Melbourne University Law Review*, 705 & 708.

¹²⁰ *ibid*.

Michael Adler conceptualizes administrative justice through the ‘top-bottom’ approach.¹²¹ According to Adler, the top-bottom conception of administrative justice is targeted at the redress mechanisms employed once an individual has been aggrieved by the action or inaction of a government body or institution.¹²² Robert Thomas comments thus on the ‘top-bottom’ conception of administrative justice:

...a top-down perspective...focuses on the external accountability mechanisms by which individuals dissatisfied with initial administrative decisions may challenge them. From this perspective, the role of the courts and judicial review in particular often take centre stage as the principal means of articulating general standards of legality that apply across the disparate range of individual administrative processes.

According to the Law Commission in England and Wales, administrative justice has four pillars, to wit, internal mechanisms for redress, such as formal complaint procedures; external, non-court, avenues of redress, such as public inquiries and tribunals; public sector ombudsman; and remedies available in public and private law by way of a court action.¹²³ All these mechanisms can be used in ensuring accountable use of power by the public service and avoiding administrative injustices occasioned to the citizenry.

¹²¹ See generally Michael Adler, ‘Fairness in Context’, (2006) *Journal of Law and Society*, Vol. 33, No.4 December 2006 as cited in ‘An Appraisal of Administrative Justice and Good Governance in Nigeria’, (2013) Vol. 6, No. 2. *Journal of Politics and Law*, 218.

¹²² *ibid.*

¹²³ The Law Commission, ‘*Administrative Redress: Public Bodies and the Citizen*’, Law Commission Consultation Paper No. 187, 3, available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp187_Administrative_Redress_Consultation.pdf>, accessed 18 May 2017.

Galligan conceives administrative justice from the perspective of the mechanisms for redress of administrative injustices in the general adjudicatory system.¹²⁴ He concludes that it relates to ‘the justice that inheres in administrative decision making’ or the application of ‘justice ideas’ to the actions of government authorities and other bodies exercising governmental powers.¹²⁵ It includes the systems, such as the various ombudsmen, tribunals, and courts, which enable people to challenge decisions made by public administrators.¹²⁶ The Nuffield Foundation makes an attempt in defining the concept of administrative justice as thus:

“...Administrative justice has as its core the administrative decisions by public authorities that affect individual citizens and the mechanisms available for the provision of redress. These latter include ombudsmen, tribunals, complaints handlers, internal review and other forms of early dispute resolution.”¹²⁷

The Bristol Center for Administrative Justice further defines the scope of administrative justice as a system that involves a complex web of institutions and processes including the ombudsman, judicial review, tribunals, inquiries, and other acceptable complaint procedures.¹²⁸ From the above, it is apparent that administrative justice may manifest itself in two forms. Firstly, it can manifest through administrative decision making and actions of public authorities.

¹²⁴ See generally Galligan, D. J. (1986). *Discretionary Powers: A Legal Study of Official Discretion*. Oxford: Clarendon Press and Adler, M. (2006a). Fairness in Context. (2006) *Journal of Law and Society*, 33(4), 615-638, available at <<http://dx.doi.org/10.1111/j.1467-6478.2006.00373.x>>, accessed 18 May 2017.

¹²⁵ *ibid.*

¹²⁶ Joliffe (n 5) 8.

¹²⁷ Nuffield Foundation, para 3 as cited in T Buck, R Kirkham and B Thompson *The Ombudsman Enterprise and Administrative Justice* (Ashgate, Farnham Publishing, 2011) 54.

¹²⁸ “Standing Conference on the Resolution of Citizens’ Grievances”, a consultation paper published by the Bristol Centre for the Study of Administrative Justice, as cited in Robin Creyke & John McMillan (Eds.), *Administrative Justice: the Core and the Fringe*, Paper presented by Ron Mcleod at the 1999 National Administrative Law Forum, 58, available at

<<https://www.google.com/search?q=constitution+2010&oq=constitution+2010&aqs=chrome..69i57.5168j0j8&sourceid=chrome&ie=UTF-8#q=Administrative+Justice:+the+Core+and+the+Fringe>>, accessed 18 May 2017.

Secondly, it can manifest through the decisions and actions of institutions that act as redress mechanisms to those adversely affected by the decisions of public authorities. This study focuses on the latter.

Professor McMillan asserts that ombudsman offices are especially interested in protecting administrative law rights.¹²⁹ Edward Joliffe while acknowledging that traditional remedies of the aggrieved citizen still exist and should not be abandoned, argues that such remedies are often impracticable or ineffective altogether.¹³⁰ This implies that legal mechanisms such as courts of law may be an inadequate avenue for the individual who has suffered an administrative injustice. Professor McMillan argues that the ombudsman institution has developed as a result of the shortcomings of legislative and judicial methods in offering remedies in the wake of adverse public administration.¹³¹ It is to this end that the ombudsman has been identified as a mechanism of governmental accountability that can serve as an avenue for fair administrative action.

Dr. Amollo contends that the ombudsman is directly anchored in the larger area of administrative justice and plays an important role in ensuring accountability in public administration.¹³² ‘An ombudsman institution derives legitimacy from the fact that a fair remedy to an administrative injustice may not always be available at law.’¹³³ This, Owen argues, is fundamental to the creation of an ombudsman institution as an alternative to the formal justice

¹²⁹ See generally Professor McMillan, Commonwealth Ombudsman, *The Role of the Ombudsman in Protecting Human Rights*, Conference on ‘Legislatures and the Protection of Human Rights’, University of Melbourne, Faculty of Law, 21 July 2006, available at <http://www.ombudsman.gov.au/_data/assets/pdf_file/0016/31093/21-July-2006-The-role-of-the-Ombudsman-in-protecting-human-rights.pdf>, accessed 18 May 2017.

¹³⁰ Joliffe (n 5) 100.

¹³¹ See (n 20).

¹³² Amollo (n 75).

¹³³ Stephen Owen, *The Ombudsman: Essential Elements and Common Challenges*, in Linda C. Reif (ed) *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (1999) Martinus Nijhoff Publishers, 62.

system.¹³⁴ The significance of the ombudsman is derived from the need to provide citizens with an independent institution within the democratic framework which enjoys public confidence and to which the public can have easy access for redress of their grievances.¹³⁵ Macleod opines that the ombudsman institution seems to be the most interesting and appealing approach to the problem of reconciling government interests and individuals' rights while offering redress for administrative injustices.¹³⁶ "Preference for the ombudsman institution has been attributed to advantages such as accessibility, inquisitorial system, flexibility, inclusiveness, responsiveness, cost effectiveness, the duration of resolution of disputes and the type of remedy offered."¹³⁷

As regards remedies, Thulisile Madonsela contends that in resolving maladministration complaints, most aggrieved parties just want an apology from government, a proper explanation of what transpired, or an undertaking that injustice will not occur again, remedies that may not be available at law.¹³⁸ In that regard, the ombudsman is an ideal model since such are the remedies it offers. In view of an appropriate remedy, *Kriegler J in Fose v. Minister of Safety and Security*, stated that appropriate relief means that which is "specifically fitted or suitable."¹³⁹ It would appear, from the reasons stated above, that the ombudsman institution is best placed to deal with administrative injustices due to its centrality in accessing administrative justice.

In support of the above assertions, Innis Macleod argues that in a court of law, there is a likelihood of administrative law being administered in a way that occasions more injustice than

¹³⁴ *ibid.*

¹³⁵ Kenneth Marede, EGH, Former Speaker of the Kenya National Assembly at the Official Launch of the Strategic Framework of the Commission on Administrative Justice held at the Inter-Continental Hotel on 21st February 2013, 2-3, available at <<http://www.ombudsman.go.ke/2013/02/21/2241/>>, accessed 19 October 2015.

¹³⁶ Macleod (n 7) 93.

¹³⁷ Amollo (n 80) 15.

¹³⁸ TN Madonsela, 'The Role of the Public Protector in Protecting Human Rights and Deepening Democracy', (2012) 23 Vol. 4 Stellenbosch Law Review 13, available at <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/stelblr23&div=5&id=&page=>>>, accessed 18 May 2017.

¹³⁹ 1997 3 SA 786 (CC), para 97

justice and hence, the imbalance between the legitimate needs of the government and the rights of the individual should be reconciled.¹⁴⁰ In view of that, he contends that the ombudsman concept is the most appealing approach to such difficulty.¹⁴¹ John Hatchard and G.K. Rukwaro add that the critical role of the ombudsman is enhanced by the shortcomings of the ‘traditional’ organs of governmental accountability including courts of law, parliament, tribunals, media and commissions of inquiry which are ideally meant to protect the citizen.¹⁴²

The inception and evolution of the institution of the ombudsman in the larger part of the African continent, Kenya included, is as a result of the need not only to ensure accountability and transparency within the government and its ancillaries but also to bring about sanity in public administration. Prior to the establishment of ombudsman offices in most African countries, a lacuna existed in terms of mechanisms for redress available to individuals aggrieved by the actions or inactions of public administrators. The ombudsman’s role can be said to be balanced as he acts not only for the oppressed citizen but also defends government institutions and officials against unfounded, malicious and unfair attacks.¹⁴³ It is for these reasons that this study focuses on the office of the ombudsman as a key redress mechanism of administrative injustices.

Administrative justice is understood and presented differently by various authors and scholars but the common thread among all the conceptions is the element of a balanced interaction between public administration and individuals and the redress mechanisms put in place in cases of breach. The various conceptions of administrative justice are nevertheless silent

¹⁴⁰ Macleod (n 7).

¹⁴¹ *ibid.*

¹⁴² Rukwaro (n 10) 44.

¹⁴³ Hatchard (n 27) 216.

when it comes to the issue of the approachability and usability of these redress or external accountability mechanisms.

The term 'access' has a bearing on the concept of administrative justice as the concept seems 'incomplete' where the issue of usability and approachability of accountability mechanisms of governmental power such as the ombudsman remains unaddressed. According to the Longman Dictionary of Contemporary English, access is defined as the right to enter a place or use something.¹⁴⁴ Administrative justice cannot be said to exist if those aggrieved by administrative decisions and actions have no means or opportunity of approaching and using the relevant redress mechanisms.

Ideally, administrative justice redress mechanisms such as the ombudsman institutions are meant to ensure that aggrieved individuals have an avenue for seeking redress for administrative injustices. This is however only possible where such remedies or formal mechanisms for redress are available and aggrieved individuals have the opportunity of 'accessing' the same. Access of redress mechanisms is a crucial yet often overlooked aspect of administrative justice and may often thought to be synonymous with 'availability'. Whereas a remedy should first and foremost be available, an aggrieved party should in addition be able to approach and use the remedy with ease. The availability alone of a remedy is therefore not sufficient.

From the foregoing, the concept of access to administrative justice primarily concerns itself with the interaction between effective public administration and individuals' right to fair administrative action as well as the approachability and usability of redress mechanisms in

¹⁴⁴ Longman Dictionary of Contemporary English, New Edition, Pearson Longman Publishers, 2009.

instances of administrative injustices. The latter part of this conception is what gives administrative justice true meaning. Whereas the actions and decisions of public administrators must be weighed against individuals' right to fair administrative action, redress mechanisms should be both available and usable. Macleod asserts that the biggest problem encountered in the realm of administrative law is how to reconcile the legitimate needs of government and the rights of the individual.¹⁴⁵ However, various conceptions of administrative justice are silent on how these redress mechanisms can be approached and utilized. The concept can only have true meaning when the redress mechanisms can be approached and utilized by those most in need. In this regard Lorne Sossin remarks that until recently, texts on administrative law rarely discussed issues of 'access' to administrative justice.¹⁴⁶ He acknowledges that whereas 'access to justice' is considerably characterized by the natural justice ideal of one having their "day in court", it is unclear what access to justice means to vulnerable people who come before administrative justice institutions or offices in pursuit of administrative justice.¹⁴⁷

In this study, the concept of access to administrative justice is looked at in terms of three essential elements namely: the approachability of the ombudsman institution; the jurisdiction and powers of the ombudsman as well as the engagements of the ombudsman with state organs and public authorities in the discharge of its functions. These elements combined help in determining whether administrative justice is accessible or not. This study, for the reasons enumerated above, focuses on the ombudsman institution as a key redress mechanism for administrative injustices despite the fact that numerous other redress mechanisms exist. The elements of access to administrative justice are further examined below.

¹⁴⁵ Macleod (n 7).

¹⁴⁶ Lorne Sossin, *Access to Administrative Justice and Other Worries*, 1, available at <https://www.law.utoronto.ca/documents/.../adminjustice08_Sossin.pdf>, accessed 16 October 2015.

¹⁴⁷ *ibid.*

2.3 Elements of the Concept of Access to Administrative Justice

As earlier discussed, access to administrative justice not only entails the approachability of the ombudsman institution but also includes the cooperation of state organs and public authorities with the ombudsman in the discharge of its functions as well as the jurisdiction and powers of the ombudsman in executing its mandate. These elements are significant for a number of reasons.

Firstly, the mandate of the ombudsman is mostly thought of in terms of jurisdiction, powers and statutory purposes. The element of accessibility is least considered if at all. Accessibility primarily concerns itself with the relationship between the ombudsman and the people as the office exists to serve the people. Despite this, Sossin argues that rarely is the mandate of the ombudsman thought of to include key concerns such as where the ombudsman institution is located, how complaints can be lodged, how much fee is charged, how well known the institution is, how ‘user friendly’ it is among other concerns which are paramount to the proper functioning of the ombudsman institution. These concerns are normally left to the ombudsman institution to dictate despite the fact that they go to the core of usability of the institution and ensure real accessibility. In Sossin’s view, such concerns are what are of most relevance to those affected by administrative decisions.¹⁴⁸ He adds that whereas the governing statute of an ombudsman institution typically will set out its jurisdiction and powers, it will often

¹⁴⁸ Sossin (n 146) 3.

be left to the institution itself to decide what face it will present to the public.¹⁴⁹ In that regard, accessibility is a critical determinant of access to administrative justice.

Secondly, the jurisdiction, powers and statutory purposes of the ombudsman institution are predetermined by statute and essentially influence the reach of its authority.¹⁵⁰ The very first ombudsman institution was established in Sweden and the ombudsman's province was limited to maladministration and he could only make recommendations in light of administrative injustices.¹⁵¹ The classical ombudsman model has however evolved over time to what is currently known as the 'new' ombudsman.¹⁵² "Despite the expansion in jurisdiction and powers of the new ombudsman, its defining characteristics have not changed especially as regards parliamentary reporting, judicial enforcement and implementation of recommendations."¹⁵³

The ombudsman institution lacks enforcement powers and is therefore unable to secure compliance with its recommendations. The ombudsman can seek the intervention of courts of law to secure compliance with its recommendations, however, such intervention amounts to dilution of its functions. As regards parliamentary reporting, it is only done periodically, implying that pertinent issues may not be attended to as and when they arise. All these issues render the institution 'toothless' and unable to promote access to administrative justice. Ideally, expanded jurisdiction and powers can lead to greater access to administrative justice as the office of the ombudsman can then act as a one-stop shop for administrative injustices.

¹⁴⁹ *ibid.*

¹⁵⁰ Sossin (n 148).

¹⁵¹ Amollo (n 40) 3.

¹⁵² *ibid.*

¹⁵³ Amollo (n 40) 5.

Thirdly, John Hatchard posits that a high degree of cooperation by public servants and government agencies is essential to the success of an ombudsman institution.¹⁵⁴ This is because complaints can only be effectively handled where the necessary support and cooperation is accorded to the institution. Cooperation by public servants and government agencies with the ombudsman is with regards to investigations, responsiveness and implementation or enforcement of its recommendations. Where cooperation is lacking, the ombudsman cannot effectively carry out his mandate. It can therefore be said that access to administrative justice is heavily dependent on the level of cooperation of public authorities with the office of the ombudsman in the discharge of its mandate. The ombudsman can only act as the public defender if the state organs and public authorities it engages with extend the required support.

Access to administrative justice hence exists where the ordinary citizen can freely approach and utilize the services of an ombudsman; where state organs fully cooperate with and support the ombudsman institution in the discharge of its mandate especially as regards implementation of recommendations and where the powers and functions of the ombudsman institution are expanded to enable it to effectively discharge its mandate. An ombudsman can only promote access to administrative justice when all these elements are present.

¹⁵⁴ Hatchard (n 27) 70.

CHAPTER 3

THE COMMISSION ON ADMINISTRATIVE JUSTICE AND ACCESS TO ADMINISTRATIVE JUSTICE: ASSESSING THE STATUS QUO

3.1 Introduction

This chapter assesses the situation currently obtaining in Kenya regarding the Commission on Administrative Justice based on the elements of access to administrative justice to wit, accessibility of the *Commission*, the extent of cooperation of government institutions and agencies with it, as well as the reach of the *Commission's* jurisdiction and powers in the execution of its mandate. The analysis is carried out with a view to ultimately determining whether the *Commission*, considering the elements set out above, is promoting access to administrative justice.

The chapter starts off with a brief discussion on the relevance of the ombudsman institution to the concept of access to administrative justice. It then goes on to discuss the constitutionalisation of access to administrative justice in Kenya. The chapter then proceeds to carry out an analysis on the *Commission* based on the elements mentioned above. The analysis is drawn both from literature as well as from data collected from the fieldwork undertaken in this study.

3.2 The Place of the Ombudsman in the Access to Administrative Justice Discourse

Access to administrative justice concerns itself with the interaction between effective public administration and individuals' right to fair administrative action as well as the usability of redress mechanisms in instances of maladministration. This implies that whereas care must be

taken to balance the needs of government and rights of the citizen, a remedy must exist and be accessible where the citizen is aggrieved by the actions or inactions of a public administrator. Professor Benon Basheka contends that “the public service is a central pillar of any government as it regulates, administers, executes, mediates, invests and delivers the construction, operations, maintenance and servicing of service delivery infrastructure, and ensures that the public service machinery is oriented to diligently serve the citizens.”¹⁵⁵

Due to the central nature of the public service, it should therefore be accountable to the citizenry. According to John Hatchard, governmental accountability calls for states to implement effective mechanisms for such accountability.¹⁵⁶ To this end, the ombudsman has been identified as a mechanism of governmental accountability that can serve as an avenue for fair administrative action. “The significance of the ombudsman is derived from the need to provide citizens with an independent institution within the democratic framework which enjoys public confidence and to which the public can have easy access for redress of their grievances.”¹⁵⁷ Malunga envisages that such an institution will bridge the rift between the bureaucracy and the citizens.¹⁵⁸

¹⁵⁵ Benon Basheka, *Public Service Processes in the Public Eye, at 4*, available at <<http://www.cscuganda.go.ug/publications/publiceye.pdf>>, accessed 8 October 2015.

¹⁵⁶ Hatchard (n 27) 61.

¹⁵⁷ Marende (n 135) 2-3.

¹⁵⁸ Malunga (n 33) 25.

The Ombudsman of Trinidad and Tobago contends thus:

“The office of the ombudsman...serves to assist the disadvantaged, the underprivileged, the poor, the weak and the frightened, who do not understand the ways of public bureaucracy. It has proved to be a useful adjunct to the courts and other tribunals in stemming human rights and other abuses.”¹⁵⁹

Innis Macleod argues that the ombudsman institution seems to be the most interesting and appealing approach to the problem of reconciling government interests and individuals' rights while offering redress for administrative injustices.¹⁶⁰ As regards the ombudsman institution, Edward Jolliffe argues that ‘it is critical that a door always remains open to the citizen who complains, rightly or wrongly, that he has been unfairly, improperly or illegally dealt with by constituted authority.’¹⁶¹ In view of the above discussion, the ombudsman is a vital part of the access to administrative justice discourse.

3.3 Constitutionalisation of the Concept of Access to Administrative Justice in Kenya

The mechanisms available for redress of administrative injustices in Kenya have more often than not been ineffective or inadequate which has necessitated the introduction of new mechanisms. In view of this, Macleod contends that, ‘administrative law may infringe on the rights of the individual and such law may be applied in such a way as to occasion more injustice than justice.’¹⁶² Moreover, a remedy may not always be available rendering access to administrative justice impracticable.¹⁶³ Redress or accountability mechanisms are crucial in guarding against administrative injustices and in promoting the right to fair administrative action.

¹⁵⁹ Hatchard (n 27) 75.

¹⁶⁰ Macleod (n 7) 93.

¹⁶¹ Jolliffe (n 5) 103.

¹⁶² Macleod (n 7).

¹⁶³ *ibid.*

This implies that the redress mechanisms provide an avenue through which aggrieved parties can channel their grievances.

According to Jolliffe, ‘there can be no right without a remedy and an ineffective remedy is no remedy at all.’¹⁶⁴ Access to administrative justice can only be said to exist where there is an effective remedy to cure administrative injustices. In this regard, access to administrative justice must first and foremost have a constitutional basis and further, a legal framework establishing the relevant remedies must be in existence.

The Constitution of Kenya and *the Act* operationalize the right to administrative justice in Kenya.¹⁶⁵ John Gichuhi opines that constitutionalisation of administrative justice is aimed at promoting mechanisms which are intended to protect individuals from excessive power.¹⁶⁶ The office of the ombudsman is one such mechanism. The Constitution provides for the right to fair administrative action which entails the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.¹⁶⁷ The same is also provided for by the Fair Administrative Action Act.¹⁶⁸ The right to fair administrative action is effected by Article 48 of the Constitution which sets out the right to access to justice, which includes access to administrative justice. Pursuant to this Article, the State is mandated to ensure access to justice for all persons as is reasonably possible.

In the Kenyan context, it can therefore be deduced that the concept of access to administrative justice, though not expressly provided for, is implied in the Constitution. Without

¹⁶⁴ Jolliffe (n 5) 99.

¹⁶⁵ Constitution of Kenya, 2010 and (n 22).

¹⁶⁶ John Gichuhi, *Constitutionalisation of Administrative Justice in Kenya*, available at <http://www.academia.edu/7052956/John_Gichuhi_Constitutionalisation_of_Administrative_Justice_in_Kenya_2014> accessed 25 September 2015.

¹⁶⁷ Constitution of Kenya, Article 47.

¹⁶⁸ s 4 (1), Act No.4 of 2015.

redress mechanisms to enforce the right to fair administrative action, access to administrative justice remains an elusive mirage. It can be said that the State has made an attempt in making administrative justice accessible through the establishment of the Commission on Administrative Justice in November 2011.¹⁶⁹ The *Commission* fully operationalizes the right to access to administrative justice.¹⁷⁰ It presents an opportunity to the public to seek redress for administrative injustices.

The *Commission* is an integral part of the institutional framework of the administrative justice landscape in Kenya and its uniqueness lies in its mandate and *modus operandi*. It is mandated to combat all forms of maladministration, promote good governance and efficient service delivery in the public sector by enforcing the right to fair administrative action.¹⁷¹ Since its inception, the *Commission* has endeavored to enforce the right to fair administrative action by acting as an avenue for redressing administrative injustices. Despite the constitutionalisation of access to administrative justice and the establishment of the *Commission*, the institution continues to face hurdles that may act as hindrances to promoting access to administrative justice. In the Kenyan context, access to administrative justice embodies accessibility of the *Commission*; cooperation of government agencies and institutions with it; and the reach of its jurisdiction and powers. These elements form the core of this study and the same are discussed herein.

¹⁶⁹ See (n 12).

¹⁷⁰ Constitution of Kenya, 2010, Art.47 as read with Art.48.

¹⁷¹ Commission on Administrative Justice, *Office of the Ombudsman*, available at <<http://www.ombudsman.go.ke>>, accessed 3 October 2014.

3.4 The Commission on Administrative Justice against the backdrop of the Elements of Access to Administrative Justice

3.4.1 Accessibility of the Commission

Accessibility is an essential and universally recognized feature of ombudsmanship.¹⁷² Persons aggrieved by the decisions of public administrators must be aware of the existence of the ombudsman's office and should be able to physically access it.¹⁷³ In this regard, Laura Pettigrew opines that public outreach and community education are essential.¹⁷⁴ Further, Hatchard opines that awareness of the institution of the ombudsman is central to its existence because it is only through such awareness that the office can be utilized.¹⁷⁵ He goes on to argue that legitimacy of the office of the ombudsman can only be established if members of the public and government officials are aware of the operations of the office.¹⁷⁶

In that regard, the *Commission* uses various platforms to create awareness including legal clinics, county visits, county barazas, agricultural shows, public fora as well as social and traditional media.¹⁷⁷ The *Commission* has also established Ombudsman Committees whose membership largely entails opinion leaders in various informal settlements.¹⁷⁸ The *Commission* trains the opinion leaders and empowers them to bring to its attention to complaints on administrative injustices. The opinion leaders also act as ambassadors against maladministration.

¹⁷² Pettigrew (n 23).

¹⁷³ *ibid.*

¹⁷⁴ Pettigrew (n 23).

¹⁷⁵ Hatchard (n 27) 63.

¹⁷⁶ Hatchard (n 27) 61.

¹⁷⁷ Commission on Administrative Justice, *Annual Report*, 2015, 56-60, available at <<http://www.ombudsman.go.ke/resources-downloads/>>, accessed 2 July 2016.

¹⁷⁸ *ibid.* 60.

“The challenge with these Committees however is that the members seek to be paid for their services yet the *Commission* suffers from budgetary constraints.”¹⁷⁹

Despite these numerous awareness raising platforms, there are still low levels of public awareness about the *Commission*. Out of the respondents reached, only 33 per cent (14 out of 43 members of the public) knew about the *Commission* while 67 per cent (30 out of 43 members of the public) were totally unaware of the same. Most of the respondents who were aware of the *Commission's* existence learnt of the same either through a friend, the *Commission's* website, television, radio or social media including Tweeter and Facebook. With regards to the *Commission's* mandate, none of the respondents who knew about the *Commission* were clear of the same though most of them generally related the *Commission's* mandate to seeking of justice on behalf of the public. These awareness levels are inspite of the fact that in 2015 and 2016, the *Commission* carried out widespread awareness programmes on television stations such as KBC, Citizen TV and KTN and mainstream as well as local radio stations such as KBC, Baliti FM and Athiani FM.¹⁸⁰

Social media seems to be the most used platform and has made the *Commission* relatively more accessible to the public though the *Commission's* primary constituents, who happen to be the lowly in society, are still unable to effectively engage with the *Commission* on such platforms. This is because the nature of communications on these platforms tends to be ‘elitist’ therefore excluding a certain section of the society from engaging with the *Commission*. This assertion is further supported by the following remarks made by Eliud during an interview:

¹⁷⁹ Interview with Eliud in Nairobi, Kenya (1st July 2016).

¹⁸⁰ See (n 177).

“Our approach to awareness creation tends to be elitist. Even when we publicise the *Commission*, our messages tend to be ‘elitist’ hence leading to lack of awareness about us amongst those we exist to serve and who need us the most; the feeble and downtrodden in society.”¹⁸¹

Limited awareness of the *Commission* is also partly blamed on the large number of Commissions in Kenya leading to widespread confusion and uncertainty about their various roles and mandates.¹⁸² Eliud commented thus on the issue:

“Concerning information about us, we are not doing well. Due to the proliferation of commissions following the new constitutional dispensation, people are not very clear about what we do. People often confuse us with non-governmental organizations mainly due to our oversight role. There are so many commissions and people generally struggle to understand what we do due to the newness of our *Commission*. Further, due to this confusion, we sometimes receive complaints that do not fall within our mandate. Sustained civic education on the mandates of the various commissions is hence very necessary.”¹⁸³

Awareness creation among public officers is also crucial as knowledge of the *Commission* by public institutions directly affects how these institutions engage with the *Commission*.¹⁸⁴ To this

¹⁸¹ See (n 179).

¹⁸² See generally, Constitution of Kenya, 2010, Article 248 of the on the various Commissions.

¹⁸³ See (n 179).

¹⁸⁴ Interview with Nguku in Nairobi, Kenya (19th July 2016).

end, the *Commission* has intensified its training of government institutions and agencies on effective complaints handling.¹⁸⁵

In a bid to increase awareness among the disadvantaged in society including the physically challenged, the *Commission* has gone a step further to translate some of its Information, Education and Communication (IEC) materials for instance brochures into Braille.¹⁸⁶ The brochures have further been circulated to various institutions of the visually impaired to increase awareness.¹⁸⁷ Recruitment is yet another area where the *Commission* makes a deliberate attempt at reaching out to disadvantaged persons.¹⁸⁸ This is for instance done through the *Commission* recruiting personnel from marginalized communities for purposes of easier and more meaningful engagements with the people at the grassroots level.¹⁸⁹ This is however not very common due to budgetary constraints and is generally done on a case by case basis.¹⁹⁰ Despite these efforts, a lot still needs to be done to reach out to this group of constituents for instance through making the *Commission* offices disability friendly as well as having personnel who are conversant in sign language.¹⁹¹

92 per cent (40 out of 43 members of the public) of the respondents argued that the *Commission* is not doing enough to make itself known to the public while 8 per cent (3 out of 43 members of the public) stated that the *Commission* is trying the best it can under the circumstances to make itself known to the public. Further, 63 per cent (29 out of 43 members of the public) of the respondents stated that they were unaware of any sensitization or awareness

¹⁸⁵ See generally (n 12) 46, (n 20) 68-74, available at <<http://www.ombudsman.go.ke/resources-downloads/>>, accessed 19 May 2017 and (n 177) 40-46.

¹⁸⁶ See (n 177) x.

¹⁸⁷ *ibid.*

¹⁸⁸ Interview with Terry in Nairobi, Kenya (5th July 2016).

¹⁸⁹ *ibid.*

¹⁹⁰ See (n 188).

¹⁹¹ See (n 179).

raising activities by the *Commission* while 37 per cent (16 out of 43 members of the public) admitted that they had seen adverts on television and some had even listened to talk shows on radio about the *Commission*. Joy from the justice sector had the following to say about this state of affairs:

“I am in the justice sector yet the last I heard about the *Commission* was in 2011 when its Chairperson was being appointed. The *Commission* should be a household name especially to those in the justice sector.”¹⁹²

In the spirit of devolution, the *Commission* is required to decentralize its services countrywide for ease of access. To this end, physical accessibility is key. The *Commission*, in its 2012 Annual Report, pointed out that inability by the members of the public to access its services may result to waning of public confidence in the *Commission*.¹⁹³ Since inception, the *Commission* has established three branch offices in Eldoret, Kisumu and Mombasa in addition to its Head Office in Nairobi.¹⁹⁴ Apart from the regional offices, the *Commission*'s presence is also extended to Help Desks at various Huduma Centres countrywide including Kisii, Nakuru, Kakamega, Nyeri, Kajiado, Mombasa, Nairobi, Embu, Eldoret, and Kisumu.¹⁹⁵ These efforts notwithstanding, the *Commission*'s presence is still very limited posing a great challenge to its accessibility.

Whereas 44 per cent (19 out of 43 members of the public) of the respondents in this study knew where the *Commission*'s offices are located, 56 per cent (24 out of 43 members of the public) of the respondents did not. Further, out of those who knew where the *Commission*'s

¹⁹² Interview with Joy held in Machakos, Kenya (13th July 2016).

¹⁹³ See (n 12).

¹⁹⁴ See (n 177) 78.

¹⁹⁵ See (n 177) 84.

offices are located, 90 per cent (39 out of 43 members of the public) of the respondents were only aware of the head office in Nairobi and had no idea that the *Commission* has branch offices in other parts of the country. Those aware of the Nairobi office stated that it was not conveniently located as its current location in Westlands is mostly associated with the affluent. Omollo asserted that the Westlands office excludes ‘*mwananchi wa kawaida*’.¹⁹⁶ When asked whether the *Commission* is accessible to the public, Ken stated the following:

“Accessibility is a real challenge. Our Nairobi office is intimidating and its location is not ideal. Most complainants in Nairobi come from areas like Kibera or Eastlands and they sometimes have to walk from town to our offices in Westlands as they may not have means of transport. The regional offices are also not conveniently located as they are situated within the town centres. This prevents needy persons from reaching us.”¹⁹⁷

Waweru was however of the view that the current location of the *Commission*’s Head Office is in fact ideal as the office is far away from government institutions and agencies and this introduces the aspect of confidentiality.¹⁹⁸ As a result, aggrieved parties do not have to fear being victimized by public officers due to being seen visiting the *Commission* most likely to lodge complaints against such officers as the office is in a secluded area.¹⁹⁹

Lodging of complaints introduces yet another aspect of accessibility. Hatchard argues that ease in lodging complaints with an ombudsman is essential.²⁰⁰ This is because it is only through lodging of complaints that a person’s grievances can be heard and dealt with. According

¹⁹⁶ Swahili translation for ‘the ordinary man’. Questionnaire filled by Omollo in Nairobi, Kenya (9th July 2016).

¹⁹⁷ Interview with Ken in Nairobi, Kenya (5th July 2016).

¹⁹⁸ Interview with Waweru in Nairobi, Kenya (5th July 2016).

¹⁹⁹ *ibid.*

²⁰⁰ Hatchard (n 27).

to *the Act*, a complaint can be made orally or in writing by the aggrieved party or by someone else on his behalf at no cost.²⁰¹ The *Commission* provides various modes through which complaints can be made including by post, personal visits, email, website, telephone and through their Help Desks at various Huduma Centres.²⁰² Despite the availability of numerous modes of lodging complaints, very few people are able to take advantage of these modes as they are altogether unaware either of the presence of the *Commission* or the location of its offices.

The *Commission* not only carries out investigations based on complaints received but also on its own initiative. “A natural development in complaint resolution has been the inclusion of system-wide investigations which focus on addressing the system as opposed to individual complaints.”²⁰³ Systemic investigations represent an efficient form of dispute resolution as it addresses all instances of wrong treatment in one investigation.²⁰⁴ The rationale behind systemic or an ‘own motion’ investigation is to comprehensively look at the scale of the problem presented, the likely causes and possible remedial action, either specifically in an individual case or generally by a review to legislation or administrative policies or procedures.

The *Commission’s* power to carry out ‘own motion’ investigations is secured under Article 252 (a) of the Constitution which provides that *each commission...may conduct investigations on its own initiative or on a complaint made by a member of public.*²⁰⁵ Nonetheless, owing to the resource-intensive nature of such process, the *Commission* is unable to carry out a significant number of ‘own motion’ investigations as may be required mostly due to

²⁰¹ See (n 22) s 32 and 33.

²⁰² See (n 177) 23.

²⁰³ Malunga (n 33) 24.

²⁰⁴ *ibid.*

²⁰⁵ Constitution of Kenya, 2010.

resource constraints.²⁰⁶ The *Commission* for instance carried out only one systemic investigation in 2015 on the issuance of vital documents such as birth and death certificates, passports, identity cards and passes by relevant offices.²⁰⁷

In a bid to effectively deal with complaints, the *Commission* also uses the Intergrated Public Complaints Referral Mechanism (IPCRM) to refer complaints to the relevant bodies where complaints received do not fall within its mandate. “The IPCRM is a referral system comprising of institutions including the *Commission*, the Ethics and Anti-Corruption Commission (EACC), the Kenya National Commission on Human Rights (KNCHR), the National Anti-Corruption Campaign Steering Committee, the National Cohesion and Integration Commission (NCIC) and Transparency International (TI-Kenya Chapter) which facilitates expeditious referral of complaints to member institutions.”²⁰⁸

The *Commission*, through the IPCRM mechanism as well as the own-motion investigations model has made an attempt in making itself more reachable to those seeking its services and through these modes has been able to resolve more complaints. These gains are however reversed by the fact that there are generally low levels of awareness among the public about the *Commission* and its mandate hence hampering its accessibility.

Limited funding continues to hamper the *Commission's* accessibility in the sense that it cannot effectively reach out to the public through carrying out sustained awareness campaigns or establishing additional offices to the already existing ones.²⁰⁹ Inadequate staffing is also another hurdle that the *Commission* continues to grapple with. According to its 2015 Annual Report,

²⁰⁶ Malunga (n 33) 25.

²⁰⁷ See (n 177) viii.

²⁰⁸ See (n 177) 78.

²⁰⁹ See generally (n 12, 177, 20).

“whereas the approved staff establishment is 336, the *Commission* has only 70 members of staff occasioning a great strain on effective service delivery to the public and hinders decentralization of the ombudsman services.”²¹⁰

3.4.2 Cooperation of government institutions and agencies with the Commission

The support and cooperation of government agencies, institutions and officials is cited as essential to the success of any ombudsman institution.²¹¹ In stressing the crucial nature of cooperation, Malunga contends that “failure to extend assistance and delays in the supply of information could significantly constrain and protract the ombudsman’s investigative powers and capacity, since access to information and genuine, timely cooperation are decisive and central to the success of the ombudsman’s investigations, reports and remedial action.”²¹²

Despite the *Commission* being a constitutional office, there is minimal good will from public institutions to support and cooperate with the same.²¹³ Non-cooperation by public institutions is largely in form of non-compliance with the recommendations of the *Commission*, non-responsiveness to inquiries on complaints lodged, and failure to honor summonses issued by the *Commission*.²¹⁴ According to the *Commission*, limited or lack of cooperation by government institutions can summed up as follows:

“Impunity remains the biggest obstacle to the quick resolution of complaints. Whereas the *Commission* strives to inquire and resolve complaints without undue delays, the attitude by public officers continues to affect the resolution rate. Equally, a number of public officers have challenged the *Commission’s* findings and recommendations in court

²¹⁰ See (n 177) 83.

²¹¹ Rudolph (48) 98.

²¹² Malunga (n 33) 26.

²¹³ See (n 177) 86.

²¹⁴ See (n 20) 61.

which burdens the *Commission* financially and elongates the time taken to conclude the complaints.”²¹⁵

Limited or lack of cooperation and support by government institutions and agencies was attributed to a number of reasons by various respondents. These included impunity and political resistance, an insufficient legal framework that limits the *Commission’s* powers, lack of support by courts of law in instances of non-compliance by public institutions with the *Commission’s* decisions, seeking of favorable opinions by public entities from the Office of the Attorney General as against the *Commission’s* recommendations, lack of a general understanding by public officers on the nature and mandate of the *Commission*, and a lack of appreciation of the new constitutional dispensation especially as regards challenging the Executive. It was also acknowledged that the approach adopted by the *Commission* when dealing with malfeasant public officers also mattered as some approaches for instance publicizing wrongdoing by a public institution instead of settling the matter quietly tends to discourage rather than encourage cooperation and results in the *Commission* being largely perceived as a ‘hostile’ entity.²¹⁶

Political leadership of government also has a huge bearing on the level of cooperation by government institutions and agencies.²¹⁷ In this regard, some respondents opined that some of those in government leadership do not recognize the *Commission* as they consider themselves to be above reproach. In support of this assertion, Eliud made the following comparison:

“During the Kibaki/Raila regime, most oversight institutions, the *Commission* included, received relatively more cooperation from government institutions and seemed to work more effectively. The current government has however made it difficult for these

²¹⁵ See (n 20).

²¹⁶ See (n 179).

²¹⁷ *ibid.*

oversight institutions to operate such that some have opted to ‘go to bed’ with the government, and those that continue to insist on doing their work are threatened with disbandment and are starved of funds.’²¹⁸

The Act provides for remedial action available to the *Commission*.²¹⁹ To this end, *the Act* requires the entities in respect of which investigations have been carried out and reports and recommendations issued to submit a Report to the *Commission* within a specified period on the steps taken to implement those recommendations.²²⁰ Furthermore, when such an organization fails or refuses to implement the recommendations, the *Commission* may prepare and submit to the National Assembly a report detailing such failure or refusal to implement its recommendations whereby the National Assembly is required to take appropriate action.²²¹ It seems that the ultimate enforcing instrument is therefore a political one and greatly depends on moralisation as opposed to using coercive powers of enforcement.²²² Dr. Otiende Amollo nonetheless contends that “moralisation is ineffective especially in Africa because most countries are still faced with the challenge of impunity.”²²³ “Public administrators no longer deem it morally inappropriate to fail to implement the recommendations of the ombudsman.”²²⁴ This then makes deliberate cooperation by public administrators with the *Commission* essential to achieving its mandate.

The study however revealed that in instances where non-compliance with the recommendations of the *Commission* have been brought to the attention of Parliament through

²¹⁸ See (n 179).

²¹⁹ s 42(3) & (4).

²²⁰ *ibid*.

²²¹ See (n 22).

²²² Amollo (n 40) 4.

²²³ *ibid* 5.

²²⁴ Amollo (n 80) 18.

the relevant reports, little or no action is taken. According to Annette, the most Parliament can do is to refer the matter to the Office of the Director of Public Prosecutions or on their own volition, pursue the matter in Court.²²⁵ In the words of Eric:

“Kenya has come from a past where accountability on the part of public institutions and officers was rarely demanded if at all as it was never part of our culture yet our core mandate as the *Commission* is to play an oversight role over such institutions and agencies. This attitude must change if the *Commission* is to make any impact in the administrative justice arena.”²²⁶

Due to such an attitude, there is a general lack of regard for the work the *Commission* does and the *Commission's* recommendations are not accorded the seriousness they deserve by government institutions and are treated as mere declarations.

Limited political will is not only experienced from the political leadership of government, but also from Parliament. According to G. K Rukwaro, “Parliamentary oversight is weakened by the vagaries of politics.”²²⁷ Arthur Maloney contends that parliamentarians are somewhat similar to ombudsmen in that they receive annual reports from the ombudsman and are required to take action against bureaucrats who refuse to comply with the ombudsman’s recommendations.²²⁸ He goes on to argue that “the simple process of filing an Annual Report with the Assembly is not especially effective as it is merely tabled and may not be debated, discussed or voted upon.”²²⁹

²²⁵ Interview with Annette in Nairobi, Kenya (5th July 2016).

²²⁶ Interview with Eric in Nairobi, Kenya (5th July 2016).

²²⁷ Rukwaro (n 10) 48.

²²⁸ Arthur Maloney, ‘The Ombudsman Idea’, (1979) *British Columbia Law Review*, 387 of 400, available at <http://heinonline.org/HOL/Page?handle=hein.journals/ubclr13&div=22&start_page=380&collection=journals&set_as_cursor=0&men_tab=srchresults>, accessed 26 September 2015.

²²⁹ *ibid.*

This causes a strain on the ombudsman whose hands are tied as he cannot enforce his own decisions.

In Kenya, Parliament views the *Commission* as an unnecessary burden to the workings of government and for that reason rarely extends its support and cooperation. “Lack of Parliamentary scrutiny of our Annual or Special Reports subject to Section 42 of *the Act* affects our work in the sense that we do not benefit from parliamentary oversight and are therefore unable to tell whether we are on the right track or not. We really need Parliament’s support in this regard.”²³⁰ “As it were only the Senate scrutinizes our Reports through debates though the quality of debates is another issue altogether.”²³¹

The *Commission* has since resorted to the courts for enforcement of their decisions and recommendations due to numerous instances of non-compliance but the response has been nothing short of disheartening. This was seen in the *Judah Abekah case* whereby Justice Weldon Korir essentially affirmed that the *Commission* has no coercive powers of enforcement.²³² In voicing his disappointment towards the Court’s verdict in the *Judah Abekah case*, Benson stated that “the *Commission* is in dire need of support from the Judiciary since at the moment, it is mainly through the courts that the decisions of the *Commission* can be satisfactorily enforced.”²³³ He added that “this lack of support makes us toothless.”²³⁴ In view of the above decision, Dr. Amollo argued that “the Court failed to appreciate the need for interdependence typified in the modern legal jurisprudence where the Court enforces the decision of the ombudsman where it

²³⁰ Interview with James in Nairobi, Kenya (5th July 2016).

²³¹ *Supra* n 25.

²³² *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng. Judah Abekah* [2015] Eklr, available at <<http://kenyalaw.org/caselaw/cases/view/106164/>>, accessed 21 November 2015.

²³³ See (n 179).

²³⁴ *ibid.*

has acted within the scope of its powers.”²³⁵ He further added that the *Commission’s* powers should be far-reaching and that its decisions cannot be merely recommendatory or declaratory in light of its remedial powers.²³⁶

In a bid to curb non-cooperation the *Commission* has come up with various mechanisms. For instance it has come up with a Citation Register “in which unresponsive and malfeasant public institutions and officers are blacklisted.”²³⁷ This is however not enough as public institutions continue to disregard the *Commission’s* authority and mandate. It is in this regard that Parliament’s action in such instances is crucial to the legitimacy of the *Commission*. Parliament plays an oversight role over the *Commission* as an institution.²³⁸ Parliament taking action on not only reports of non-compliance with the *Commission’s* recommendations but also with Annual or Special Reports is therefore essential. Parliamentary oversight over the ombudsman institution in most African countries including Kenya is generally very weak due to the formation of most parliaments; most members of parliament come from the ruling party and may therefore be reluctant to act against errant public officers who are part of the political leadership of government.

3.4.3 Jurisdiction and Powers of the Commission

The Classical ombudsman model has gradually evolved over time into the ‘new’ ombudsman model.²³⁹ In the African context, such evolution is as a result of the unique political, cultural and economic contexts within which African ombudsmen operate.”²⁴⁰ Most African

²³⁵ Amollo (n 80).

²³⁶ *ibid.*

²³⁷ See generally (n 20) 61-65 and (n 177) 36-37.

²³⁸ Amollo (n 40) 97.

²³⁹ Bokhari (n 24) 21.

²⁴⁰ Reif (n 68) 218-19.

countries opted to craft out their own unique ombudsmen institutions after independence in light of their prevailing circumstances.”²⁴¹ Despite the expansion, some defining characteristics have not changed. These are parliamentary reporting, judicial enforcement and implementation of recommendations.”²⁴²

The jurisdiction, powers and functions of the *Commission* are set out in the Constitution and *the Act*.²⁴³ They include among other powers, guarding against maladministration and administrative injustice, adjudication, offering advisory opinions and recommendations, facilitating mediation, conciliation and negotiation, issuance of summons, requiring disclosure of relevant information, and compelling production of relevant documents. The *Commission* cannot however investigate the proceedings or decisions of the Cabinet or its committees nor can it look into a matter pending before any court or judicial tribunal.²⁴⁴ In line with its mandate, the *Commission* also issues advisory opinions on matters of public administration, including review of legislation, codes of conduct, processes and procedures.²⁴⁵ “Advisory opinions are however merely persuasive since it would depend on the government’s willingness to act as advised.”²⁴⁶

Article 59(2) (j) of the Constitution and Section 8(c) of *the Act* further mandate the *Commission* to ‘take appropriate remedial action’ on complaints investigated. Dr. Amollo asserts that “the power ‘to take appropriate remedial action’ implies that the *Commission* can offer tangible remedies after carrying out inquiries or investigations.”²⁴⁷ The remedies include offering

²⁴¹ *ibid.*

²⁴² Amollo (n 80).

²⁴³ See generally Article 59(2) (h-k) and s 29-31.

²⁴⁴ s 30(a) and (c).

²⁴⁵ s 8(h) of *the Act*.

²⁴⁶ 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.

²⁴⁷ Amollo (n 40) 8-9.

recommendations for compensation, specific performance, restitution and apologies.²⁴⁸ In emphasizing the crucial nature of such remedial powers, Dr. Amollo posits that:

“Such decisions are binding and must be complied with....in case any party is aggrieved by the decisions, the only recourse is to challenge them in Court and not refuse to comply.”²⁴⁹

The *Commission* has seemingly wide powers but it is argued by some members and staff of the *Commission* that their powers have since inception suffered major drawbacks specifically in the areas of enforcement of its decisions and compelling the enforcement of their summons.²⁵⁰ In addition, the *Commission* lacks prosecutorial powers and has to rely on the Office of the Director of Public Prosecutions to prosecute on its behalf where a public officer has been found liable of some wrongdoing that constitutes a criminal offence.²⁵¹ On the limited nature of the *Commission's* powers of enforcement, Patrick commented thus:

“The ruling on the *Judah Abekah case* has clawed back on some of the gains that we have made as a *Commission*. It has set a bad precedent that gives the impression that our decisions are mere recommendations that are to be complied with only at will. We have however since appealed against the decision and are awaiting a verdict.”

As far as the jurisdiction and powers of the ombudsman are concerned, “the relationship between the ombudsman and the Court is of mutual benefit and the two are meant to complement as opposed to compete with each other.”²⁵² “A very low percentage of public administration in

²⁴⁸ *ibid.*

²⁴⁹ Amollo (n 40).

²⁵⁰ See (n 179).

²⁵¹ Interview with Mark in Nairobi, Kenya (5th July 2016).

²⁵² Amollo (n 246).

Africa would implement a decision merely because recommendations have been made by a body that lacks the powers to enforce the same.”²⁵³ It is for this reason that the *Commission* needs the Court’s backing in ensuring compliance with its recommendations. Recent jurisprudence from the Kenyan courts nonetheless shows that the *Commission* does not enjoy the support of the Judiciary and Executive as well.

The lack of recognition from both the Judiciary and Executive of the *Commission’s* jurisdiction and powers especially those of enforcement seem to emanate from a limited interpretation of the law by these two arms of government. Such a limited interpretation undermines the jurisdiction and powers of the *Commission* and renders them powerless in the fight against maladministration. Such a minimalist approach fails to take into account the spirit as opposed to the letter of the law with regards to the *Commission* and the role the Constitution intended the institution to play. Due to the political history of the African continent and the fact that governments often lord over the very people they should serve and protect, laws such as those granting the *Commission* power to take appropriate remedial action should be interpreted as widely as possible in the best interest of the citizen who is defenseless against excesses of government.

The lack of the *Commission’s* powers of enforcement was made official by Justice Korir’s judgment in the *Judah Abekah case*.²⁵⁴ Whereas the Learned Judge acknowledged that “the *Commission* should be given the leeway to discharge its mandate”, he argued that the *Commission* “cannot exercise powers they do not have and that their decisions cannot be

²⁵³ Ibid 3.

²⁵⁴ See (n 79).

conferred the status not bestowed on them by the Constitution or statute.”²⁵⁵ Justice Korir’s interrogation and subsequent interpretation of the Constitution and *the Act* was essentially that the *Commission* has no coercive powers of enforcement and therefore their decisions are not binding. He added that the most the *Commission* could do in instances of non-compliance was to “submit a report to the National Assembly detailing such failure” and wait for appropriate action to be taken.²⁵⁶

Justice Korir further held that “the *Commission* cannot compel a state agency to implement its recommendations and neither can a court of law.” He added that government agencies have no statutory duty to implement the recommendations of the *Commission* since failure or refusal to implement such recommendations can only be reported to the National Assembly by the *Commission*.²⁵⁷ In other words, the *Commission* lacks coercive powers over the government institutions it investigates.²⁵⁸

In affirming that granting the *Commission* powers of enforcement would be equivalent to usurping judicial powers, Justice Korir commented thus:

“I do not think that Parliament wanted the *Commission’s* findings and recommendations to have the force of court judgments. I doubt whether the *Commission* having been given investigative powers could also be given powers akin to those of the Judiciary. Elevating the *Commission’s* reports to the level of court judgments would mean that the

²⁵⁵ See (n 79) 11.

²⁵⁶ See (n 79) 15.

²⁵⁷ *ibid.*

²⁵⁸ See generally (n 79).

Commission would act as a prosecutor, a judge and executor at the same time. It would end up steamrolling over state organs, public offices and organizations.”²⁵⁹

The above decision can be seen as a reversal of the gains contemplated by the Constitution when establishing the *Commission* since the institution is mandated to investigate complaints of unfair or unresponsive official conduct, abuse of power and unfair treatment among other complaints. However, failure or refusal to comply with recommendations emanating from such processes renders the exercise in itself vain. Chaloka Beyani has criticized this decision in light of comparative developments in the law and the transformative effect of the Kenyan Constitution.²⁶⁰ He asserts that in the said case, the Court lost sight of the transformative effect of the Constitution and the role of the *Commission* as envisaged in the Constitution and the respective *Act* establishing it.²⁶¹ He expounds on this position in light of Article 47 of the Constitution that provides for the right to fair administrative action.²⁶² In his opinion, the *Commission* is enabled under the transformative posture of the Constitution to ‘take remedial action’ which relates directly to fair administrative action and the roles specified under Article 59 (2) (h) (i) and (k).²⁶³

The above developments notwithstanding, all is not lost as the *Commission* has devised other means of ensuring compliance with its recommendations. Some of the interventions include employing performance contracting which entails the *Commission* issuing annual

²⁵⁹ See (n 256).

²⁶⁰ See generally Chaloka Beyani, *High Court ignored Constitution on the powers and duties of the Ombudsman*, posted on 25 March 2015, available at <<http://mobile.nation.co.ke/blogs/-High-Court-Constitution-Ombudsman-Beyani/-/1949942/2665506/-/format/xhtml/-/buah4u/-/index.html>>, accessed 9 November 2015.

²⁶¹ *ibid.*

²⁶² Beyani (n 260).

²⁶³ *ibid.*

certificates to public institutions based on their activeness in resolution of complaints, citing of unresponsive and malfeasant public officers in a Citation Register which is similar to a ‘Black Book’, naming and shaming of unresponsive and malfeasant public officers and use of alternative dispute resolution mechanisms.²⁶⁴ Public officers cited in the Citation Register are publicized in the *Commission’s* Annual Reports.²⁶⁵ As regards performance contracting, the *Commission* assists public bodies to set up complaints-handling systems in their institutions and as a result “compliance has shot up by 90%.”²⁶⁶

The *Commission* is also empowered subject to Article 252(1) (d) and Section 8(f) of *the Act* to incorporate ADR mechanisms in complaint resolution. This mechanism is most suitable where it is crucial that the cordial relationships between disputants are maintained. In view of this, the *Commission* has used ADR in a number of complaints and hopes to resolve even more complaints through the same mechanism.²⁶⁷

²⁶⁴ Amollo (n 246) 12.

²⁶⁵ See (n 177) 36-37.

²⁶⁶ See (n 179).

²⁶⁷ See (n 177) 69.

CHAPTER 4

GHANA, SOUTH AFRICA AND UGANDA VERSUS KENYA: A COMPARATIVE REVIEW OF OMBUDSMAN INSTITUTIONS

4.1 Introduction

This chapter carries out a comparative legal analysis of three African ombudsman institutions to wit, the Commission on Human Rights and Administrative Justice in Ghana, the Public Protector in South Africa and the Inspector-General of Government in Uganda in comparison to the *Commission*. These three institutions are discussed in light of the elements of access to administrative justice which are accessibility to the public, cooperation of government institutions and agencies with the institutions in the carrying out of their functions and the reach of their jurisdiction and powers in the discharge of their mandates. These elements are explored with a view to ultimately determining whether these institutions are promoting access to administrative justice.

The Ghanaian Ombudsman is selected due to its hybrid nature and tripartite mandate. It fuses a human rights institution, the Ombudsman and an Anti-Corruption Agency. The South African institution is selected due to its generally expanded jurisdiction and accessibility to the public. The Ugandan Ombudsman institution is selected due to its extensive and strong powers including powers to enforce accountability from state organs. These factors combined positively impact access to administrative justice in the said countries hence a comparative study of the three institutions.

Whereas distinctive characteristics may emerge among the institutions, these do not necessarily mirror their sufficiency or shortcomings as against one another since the institutions

were established for varying reasons and under different circumstances. Instead, the comparison is intended to share the successes and achievements of the selected ombudsman institutions and to provide some lessons going forward. The chapter culminates with a discussion on the comparative lessons learnt from the three institutions.

4.2 The Ghanaian Commission on Human Rights and Administrative Justice

The Commission on Human Rights and Administrative Justice (hereinafter referred to as the CHRAJ) was established in October 1993 subject to Chapter 18 of the Constitution of Ghana.²⁶⁸ The CHRAJ combines three institutions in one, to wit, the ombudsman, a human rights institution and an anti-corruption agency.²⁶⁹ In addition to these three functions, it plays the additional role of Ethics Office for the public service.²⁷⁰ In the words of Crook and Asante, the Commission's principal mandate can be summarized as follows:

“...to investigate a broad range of human rights violations and abuses of power and maladministration by government agencies, which infringe on citizens' rights as guaranteed by the Constitution. This includes violations of the rights of women and children, unfair treatment of citizens by public agencies, corruption of public officials, and unequal recruitment practices.”²⁷¹

The ombudsman arm of the CHRAJ is based on the classical ombudsman model which implies that the institution's role is purely recommendatory and limited to administrative

²⁶⁸ Constitution of the Republic of Ghana, 1992, available at <<http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh014en.pdf>>, accessed 22 May 2017.

²⁶⁹ See generally ibid Article 218 and s 7 of the Commission on Human Rights and Administrative Justice Act, No. 456 of 1993, available at <http://www.chrajghana.com/?page_id=23>, accessed 22 May 2017.

²⁷⁰ Stephen Sondem, *National Human Rights Institutions- The Ghanaian Experience*, 245, available at <http://studiorum.org.mk/evrodijalog/16/pdf/Evrodijalog_br_16_7_S-Sondem_ENG.pdf>, accessed 12 October 2015.

²⁷¹ Richard C. Crook and Kojo P. Asante, *The State, 'Hybrid Institutions' and the Provision of More Accessible Justice in Africa: the Case of Ghana's Commission on Human Rights and Administrative Justice*, 3, available at <<http://harvardhrj.com/2014/11/the-state-hybrid-institutions-and-the-provision-of-more-accessible-justice-in-africa-the-case-of-ghanas-commission-on-human-rights-and-administrative-justice/>>, accessed 23 November 2015.

justice.²⁷² The CHRAJ took over the role of the ombudsman following the repeal of the Ombudsman Act of 1980.²⁷³ The Commission's anti-corruption agency investigates abuse of power and all instances of alleged or suspected corruption and the misappropriation of public monies by officials.²⁷⁴

The Constitution of Ghana affirms administrative justice, human rights, accountability and probity as core national principles.²⁷⁵ To that end, a correlation does exist between the institution's tripartite mandates.²⁷⁶ The common thread that runs through the CHRAJ's tripartite mandate can be condensed as thus:

“To the extent that maladministration in public service, including corruption, can erode the enjoyment of basic needs such as socio-economic rights, there is a causal relationship between the three mandates of the CHRAJ.”²⁷⁷

4.2.1 Accessibility of the CHRAJ

Anna Bossman states that the CHRAJ “pursues administrative justice in a manner that is confidential, informal and flexible and which provides people with an opportunity to complain about maladministration by public officials.”²⁷⁸ This contributes greatly to its popularity and preference among the public. The CHRAJ prides itself in offering alternative dispute resolution

²⁷² See generally Dr. Mukoro Akpomuvire, *The Ombudsman Phenomenon in African States Public Services*, available at <<http://unpan1.un.org/intradoc/groups/public/documents/AAPAM/UNPAN029881.pdf>> accessed 22 May 2017.

²⁷³ s 18 Act No. 400.

²⁷⁴ See (n 269).

²⁷⁵ The preamble to the Constitution of Ghana solemnly declares and affirms the commitment to “...*freedom, justice, probity and accountability, the protection and preservation of fundamental human rights and freedoms...*”

²⁷⁶ Sondem (n 270) 244.

²⁷⁷ Cook & Asante (n 271) 248.

²⁷⁸ Anna Bossman, Ag Commissioner of the CHRAJ, *The Anti-Corruption Mandate of the Commission on Human Rights and Administrative Justice*, Presentation made at the United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights in Warsaw, 8-9 November 2006 at 3, available at <<http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Bossman.pdf>>, accessed 12 October 2015.

services at the grassroots level countrywide as well as carrying out public education on the work it does.²⁷⁹ “It thrives as a national institution which capitalizes on the informality of procedures.”²⁸⁰ To that end, it is an excellent model which offers informal justice, including administrative justice, which is both accessible and impartial.²⁸¹

The services of the CHRAJ are characterized as free, empowering, user-friendly and accessible to all.²⁸² The Commission on Human Rights and Administrative Justice Act (hereinafter referred to as the *CHRAJ Act*) stipulates that the institution should establish branches in each Region and District of Ghana.²⁸³ In this regard, the CHRAJ’s headquarters are based in Accra while there is a regional office in each of Ghana’s ten regional capitals though not in all the district capitals.²⁸⁴ There is however no such legal provision for the Kenyan *Commission* and such physical accessibility is dependent on its discretion. For the CHRAJ, such provision not only leads to enhanced physical accessibility but greatly facilitates access to administrative justice.

The CHRAJ has about 110 District Offices in Ghana’s 170 Districts hence enhancing accessibility to the office.²⁸⁵ This was prompted by Emile Short’s realization that most Ghanaians live in rural areas and that decentralization is the only way to ensure that those most

²⁷⁹ Cook & Asante (n 271) 4.

²⁸⁰ Richard Crook, *The State and Accessible Justice in Africa: Is Ghana Unique?* Policy Brief No.3, November, 2011 at 1, available at <<http://www.institutions-africa.org/filestream/20111115-appp-policy-brief-3-the-state-and-accessible-justice-in-africa-is-ghana-unique-richard-crook-nov-2011>>, accessed 15 October 2015.

²⁸¹ *ibid* 4.

²⁸² Commission on Human Rights and Administrative Justice (CHRAJ) Ghana, available at <http://www.chrajghana.com/?page_id=47>, accessed 5 July 2016.

²⁸³ The Commission on Human Rights and Administrative Justice Act, No. 456 of 1993, s 10, available at <http://www.chrajghana.com/?page_id=23>, accessed 22 May 2017.

²⁸⁴ E. Gyimah-Boadi, Kojo P. Asante *et al*, *Achieving successful governance in Africa: the case of Ghana’s Commission on Human Rights and Administrative Justice*, Rethinking Development in an Age of Scarcity and Uncertainty, New Values, Voices and Alliances for Increase Resilience, 19-22 September 2011, University of York, 7, available at <<http://eadi.org/gc2011/brobbey-784.pdf>>, accessed 21 August 2016.

²⁸⁵ Crook (n 280) 8.

in need can lodge complaints to the CHRAJ with ease.²⁸⁶ Most of the Commission's primary constituents also live in rural areas and such a legal provision would go a long way in ensuring that aggrieved persons can access the Commission with ease.

In the words of Stephen Sondem, "the sustained public education policy of the CHRAJ has created awareness and increased rights consciousness in the public."²⁸⁷ He further adds that, "its Alternative Dispute Resolution (ADR) mechanisms and the cost-free nature of its services has attracted many people and as a result increased public confidence."²⁸⁸ In the Kenyan case, the *Commission* also conducts awareness creation activities but the same seem to be few and far between and are not sustained. The end result is that scores of Kenyans remain unaware of the *Commission* and the noble work it is doing.

As regards its human rights protection function, the CHRAJ has the duty of safeguarding fundamental rights and freedoms as enshrined in the Constitution.²⁸⁹ According to Bossman, the CHRAJ carries out this function "through promotion of public education which focuses on examining social and customary practices in the society, which are considered as dehumanizing and a violation to human rights."²⁹⁰ Through this, it increases awareness on human rights issues among the public and encourages lodging of complaints with the institution where human rights violations have been suffered by an individual. The *Commission* however does not deal with

²⁸⁶ Deepa Iyer, *Earning a Reputation for Independence: Ghana's Commission on Human Rights and Administrative Justice, 1993-2003* at 5, available at <<https://successfulsocieties.princeton.edu/publications/earning-reputation-independence-ghanas-commission-human-rights-and-administrative>>, accessed 7 April 2016.

²⁸⁷ Sondem (n 270) 253.

²⁸⁸ *ibid.*

²⁸⁹ See (n 268) Articles 218(a), (c), (f) and Chapter 5 and (n 283) s 7(1), (a), (c) and (g).

²⁹⁰ Bossman (278) 2.

human rights issues as the Kenya National Commission on Human Rights (KNCHR) is mandated to tackle the same.²⁹¹

A perception study commissioned by the CHRAJ and conducted by the African Peer Review Mechanism (APRM), while disclosing deficiencies in the discharge of the CHRAJ's functions, disclosed that the mediation mechanism was generally highly regarded.²⁹² It can therefore be concluded that the CHRAJ's sustained public awareness policy coupled with the adoption of ADR mechanisms in dispute resolution and improved physical accessibility have enhanced the institution's accessibility. The Kenyan *Commission* is mandated to resolve matters brought before it through conciliation, mediation and negotiation.²⁹³ Be that as it may, these mechanisms are rarely used as the *Commission* largely handles complaints through carrying out of investigations and making recommendations.²⁹⁴ Ghana's example nonetheless is proof that ADR mechanisms are considered as 'friendly mechanisms' by complainants and lead to a higher complaint resolution rate while at the same time maintaining relationships between disputants.

The hybridity of the CHRAJ implies that the formal and informal systems of justice are mutually supportive, as opposed to working at cross-purposes, contrary to most governance institutions in Africa.²⁹⁵ This goes a long way in promoting accessibility of the institution. In Kenya, the *Commission* is mandated to deal with maladministration and administrative injustices though at times they also receive complaints on human rights abuses or corruption allegations that may arise as a result of such maladministration. Even in such cases the *Commission* cannot

²⁹¹ See (n 205) Article 59.

²⁹² Joseph Whittal, Deputy Commissioner, Commission on Human Rights and Administrative Justice, *The Dispute Resolution Mechanism in the CHRAJ in Ghana*, available at <<https://www.essex.ac.uk/hrc/documents/practice/joseph-whittal-dispute-resolution-mechanism-in-the-chraj-in-ghana-presentation.pdf>>, accessed 13 October 2015.

²⁹³ See (n 22) s 29(2).

²⁹⁴ See generally *ibid* Parts III and IV.

²⁹⁵ Crook & Asante (n 271) 9.

deal with such issues that are resultant to maladministration and have to refer the same either to the KNCHR or the Ethics and Anti-Corruption Commission (EACC). Be that as it may, the CHRAJ's hybrid model is criticized for stretching itself too thin and for suffering from deficiencies in human and financial resources as well as a general lack of financial independence and lack of government commitment or political will.²⁹⁶ Sondem laments thus on the CHRAJ's hybridity:

“The mandate of the Commission is arguably too broad and this calls into question its capacity to effectively address traditional human rights abuses...the Commission is likely to be inundated with complaints that could overstretch its financial and human resources.”²⁹⁷

There are however calls for constitutional amendments to detach the Commission's tripartite mandate.²⁹⁸

4.2.2 Cooperation of government institutions and agencies with the CHRAJ in the discharge of its mandate

Dr. Gyimah-Boadi and Kojo Asante argue that the CHRAJ has “emerged as an effective institution with a willingness to challenge the power of government when necessary.”²⁹⁹ This zeal is however greatly dependent on the government of the day and the political will of government ministries, agencies and departments. As regards investigations of corruption and abuse of power by public officers, the CHRAJ has received little to no support as the public institutions and administrators under investigations have on several occasions sought to

²⁹⁶ See generally Bossman (n 278) and Iyer (286).

²⁹⁷ Sondem (n 270) 245.

²⁹⁸ Sondem (n 270) 253.

²⁹⁹ Boadi (n 284) 2.

challenge the jurisdiction of the CHRAJ to investigate them.³⁰⁰ This has greatly hampered the institution's ability to fight maladministration and corruption.

Additionally, such non-cooperation also stems from the question of whether the CHRAJ can act upon media reports to initiate investigations or whether a formal complaint must first be made before an investigation is initiated.³⁰¹ The controversial nature of the institution's investigatory mandate has since hindered it from effectively carrying out investigations. This also to some extent bars it from carrying out systemic investigations since it is expected to only act on complaints received and not on its own motion. Such restrictions tend to reduce the CHRAJ to a reactive rather than proactive institution. The Kenyan *Commission* is however different in this regard as it is mandated and does carry out own motion investigations though the number of investigations tend to be limited by resources.³⁰² Further, it can initiate investigations without necessarily receiving a formal complaint as part of its proactive role.

The cooperation of government institutions, agencies and officials is also called into question when it comes to furnishing the CHRAJ with documents during investigations. Samuel Asibuo contends that the institution faces great limitations in obtaining information from public agencies and institutions during investigations.³⁰³ The Constitution gives the Supreme Court exclusive jurisdiction in determining whether or not an official document is to be produced or its contents disclosed to the CHRAJ during investigations due to confidentiality.³⁰⁴ The *CHRAJ Act*

³⁰⁰ Sondem (n 270) 247.

³⁰¹ *ibid.*

³⁰² See generally (n 22), Part III.

³⁰³ Samuel K. Asibuo, *The Role of the Commission on Human Rights and Administrative Justice (CHRAJ) in Promoting Public Service Accountability Under Ghana's Fourth Republic*, 9, available at <<http://unpan1.un.org/intrdoc/groups/public/documents/CAFRAD/UNPAN017693.pdf>>, accessed 21 April 2016.

³⁰⁴ See (n 268) Article 135.

prohibits the institution from compelling a person to give evidence or produce papers whose contents are considered confidential.³⁰⁵ Joseph Ayee nevertheless argues thus on the issue:

“...what is termed ‘confidential’ document or maintaining ‘secrecy or non-disclosure’ are purely subjective criteria which could provide a mask behind which government institutions, officials and agencies and above all the government itself can hide to abuse discretionary powers.”³⁰⁶

In light of enforcement of its decisions, the CHRAJ lacks powers to enforce the same and can only rely on courts of law for a remedy which the court at times gives.³⁰⁷ In addition, such action can only be taken by the CHRAJ when the offending party fails to comply with its recommendations after a span of three months.³⁰⁸ The Kenyan *Commission* also lacks powers of enforcement and must rely on the courts of law to ‘force’ a defaulting government institution to comply with its decision. Neither the Constitution nor the *CHRAJ Act* stipulates enforcement mechanisms that may aid in enforcing the institution’s recommendations. It is therefore left to the offending party to decide whether or not to comply with the recommendations of the CHRAJ. The same is true for the Commission.

It would appear that the CHRAJ has a working relationship with the courts and it can to some extent rely on the courts to secure compliance with its decisions. The *Commission* nevertheless does not enjoy a similar relationship with the Kenyan Courts especially in view of

³⁰⁵ See (n 283) s 15(3) & (4).

³⁰⁶ Joseph R.A. Ayee, ‘Notes on the Commission on Human Rights and Administrative Justice under the 1992 Ghanaian Constitution’ in *Law and Politics in Africa, Asia and Latin America* Vol.27, No.2, 1994, (University of Hamburg, Germany) 164, available at <<http://www.jstor.org/stable/pdf/43110725.pdf>>, accessed 21 October 2016.

³⁰⁷ See (n 283) s 18(2).

³⁰⁸ *ibid.*

the *Judah Abekah Case*. As it were, the *Commission* has to wholly depend on the good will of public institutions for compliance with its decisions.³⁰⁹

4.2.3 *Jurisdiction and powers of the CHRAJ*

The CHRAJ was established as an alternative forum for redress to the judiciary and is vested with jurisdiction and powers to discharge its mandate.³¹⁰ It has jurisdiction and powers to promote administrative justice and protect universal human rights and freedoms as well as investigate abuse of power and all instances of corruption and misappropriation of public funds by public officers.³¹¹ Deepa Iyer argues that the institution has set a trend in Ghana especially as far as corruption matters are concerned.³¹² She adds that “the CHRAJ has in the past tackled high-profile corruption cases that have exposed high-ranking public officials and forced some of those found culpable to resign from office.”³¹³ This has led to increased public confidence in the institution.

The CHRAJ also has an additional mandate to investigate disclosures of impropriety such as misappropriation of public resources, economic crime and environmental degradation under the Whistle-Blower Act.³¹⁴ The CHRAJ’s additional environmental degradation role is unique and can be said to be in line with the defining features of the ‘new’ ombudsman which include expansion of the functions of the ombudsman beyond the traditional mandate of addressing maladministration.³¹⁵

³⁰⁹ See (n 79).

³¹⁰ Sondem (n 270).

³¹¹ See (n 269).

³¹² Iyer (n 286) 6.

³¹³ *ibid.*

³¹⁴ See generally the Whistleblower Act 2006, Act No. 720.

³¹⁵ See generally Linda C. Reif, ‘Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman’ 31 *Boston College Third World Law Journal* 269 (2011), 271, available at http://heinonline.org/HOL/Page?handle=hein.journals/bctw31&div=22&start_page=269&collection=journals&set_as_cursor=0&men_tab=srchresults#, accessed 10 October 2016.

The CHRAJ's investigations are triggered by complaints.³¹⁶ According to Gyimah-Boadi, "the CHRAJ cannot initiate investigations without first receiving a complaint."³¹⁷ This implies that the institution cannot act on behalf of an individual where it has reason to unless a formal complaint is made. To that end, it is argued that the CHRAJ is therefore "relatively weak as a result of the unclear legal status of its findings and resolutions especially as regards those that are as a result of investigations that are not triggered by complaints."³¹⁸ In this regard, the CHRAJ's mandate in relation to anti-corruption complaints-handling has also become a controversial issue especially as regards how a complaint should be initiated.

According to Sondem, the bone of contention is whether the institution's jurisdiction in such matters can only be invoked through a formal complaint or can be initiated *suo motu*.³¹⁹ It should be noted that there are instances where an aggrieved party is unable, for one reason or another, to lodge a complaint against a public institution or administrator for maladministration. This then makes it imperative for the CHRAJ to be able to invoke its jurisdiction in such instances without a formal complaint necessarily being made. Such restrictions in powers make it difficult to tackle maladministration. The *Commission* is however different in that they can initiate investigations either on their own motion or upon receiving a complaint.³²⁰

The CHRAJ has no direct enforcement powers and can only seek a suitable remedy from a court of law to back its recommendations.³²¹ Be that as it may, neither the Constitution nor

³¹⁶ Boadi *et al* (n 284) 3.

³¹⁷ Boadi *et al* (n 284) 6.

³¹⁸ Boadi *et al* (n 284) 2.

³¹⁹ Sondem (270) 247.

³²⁰ See (n 283) s 29.

³²¹ See (n 283) s 18 which provides that after arriving at a decision on an issue, the Commission should submit its report including its findings and recommendations to the appropriate person, minister, department or authority concerned, with a copy to the complainant. If after three months the recommendations are not enforced, the

CHRAJ Act sets out the method through which the CHRAJ may seek to enforce its decisions in a court of law.³²² It is also not clear what procedure is to be used by the institution in bringing an action to seek enforcement of its decisions and also whether the court is to simply order enforcement or compliance of recommendations or whether it can review the said recommendations.³²³ This state of affairs leaves the CHRAJ in limbo as its efforts to carry out investigations into maladministration and thereafter make findings seems like an exercise in futility. In addition, this greatly hampers its ability to promote access to administrative justice.

Another problematic aspect of enforcement of decisions is the enlisting of the assistance of the Attorney General when it comes to prosecution of offenders in maladministration related cases and enforcement of decisions of the CHRAJ.³²⁴ Gyimah-Boadi asserts that this presents serious conflict of interest challenges especially in the event that investigations into abuses are linked to the Executive.³²⁵ He further affirms that:

“Presently CHRAJ decisions have no firm legal bite and they can only be enforced through court proceedings initiated by the Attorney-General’s office. Judges at the law courts are also unsure of the legal status of CHRAJ decisions; they are unsure about whether courts only have powers of review over CHRAJ decisions or whether they must conduct fresh trial of cases previously examined at the CHRAJ. This confusion has left CHRAJ-decided cases in legal limbo.”³²⁶

Commissioner may bring an action before any court and seek remedy as may be appropriate for an enforcement of its decision.

³²² Sondem (n 270) 252.

³²³ *ibid.*

³²⁴ Boadi *et al* (n 284) 6.

³²⁵ *ibid.*

³²⁶ Boadi *et al* (n 284) 12.

In Kenya, public bodies or officers who are found liable of maladministration, in an attempt not to comply with the *Commission's* recommendations at times seek the opinion of the Attorney General on such recommendations. Such opinions are however only merely persuasive and only a court of law can determine whether they are to be followed or not.

Another key challenge is the duplication of mandates between the Serious Fraud Office (SFO) and the CHRAJ. In addition to the CHRAJ's anti-corruption mandate, the Constitution also mandates the SFO to investigate cases in which a financial loss has been occasioned to the state while at the same time mandating the institution to investigate all instances of alleged or suspected corruption. Such unclear and conflicting mandates may only work to weaken the mandate of the CHRAJ as an anti-corruption agency unless there is collaboration and cooperation between the SFO and the CHRAJ. In addition, the lack of power to prosecute corruption cases and to fine and commit individuals for contempt other than for failure to honor a subpoena further weakens the powers of the institution.³²⁷

The CHRAJ seems to face similar challenges as the *Commission* in terms of lack of coercive powers of enforcement and lack of powers to prosecute corruption cases, especially those that arise from maladministration. The *Commission* nevertheless has less powers compared to the CHRAJ and is only mandated to deal with maladministration and administrative injustices.³²⁸ Further, the *Commission* need not enlist the assistance of any office so as to institute a matter to compel compliance with its decisions as is the case with the CHRAJ which can only institute such proceedings through the Attorney General.

³²⁷ *Supra* n 36 at 16.

³²⁸ *Supra* n 26, s 8(d).

4.3 The South African Public Protector

The Office of the Public Protector (hereinafter referred to as the OPP) was established in 1995 and is provided for by Section 182(1) of the South African Constitution.³²⁹ The office is vested with 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.³³⁰ Additional powers are vested in the OPP in relation to among others investigations, reporting and publication of findings, as well as entering premises for purposes of investigations.³³¹ The key role of the Public Protector is to “ensure good administration by investigating and rooting out improper conduct or maladministration in the management of state affairs.”³³² The office exists to strengthen democracy, monitor compliance with and respect for the rule of law, give citizens a voice as well as provide remedies for citizens who have suffered administrative injustices.³³³

Caiden, MacDermott and Sandler summarize the role of the OPP as “an instrument of human rights; a unique mechanism of democratic control over the bureaucracy; a formal avenue for redress of grievances against administrative wrongdoing; and an instrument for tackling ‘bureau-pathologies.’”³³⁴

³²⁹ The Constitution of the Republic of South Africa, No. 108 of 1996, available at <<https://www.ru.ac.za/media/rhodesuniversity/content/humanresources/documents/employmentequity/Constitution%20of%20the%20Republic%20of%20South%20Africa%201.pdf>>, accessed 22 May 2017.

³³⁰ *ibid* s 182.

³³¹ The Public Protector Act, No. 23 of 1994, s 6-9, available at <<http://www.gov.za/sites/www.gov.za/files/Act23of1994.pdf>>, accessed 22 May 2017.

³³² Madonsela (n 138) 6.

³³³ Malunga (n 33) 9-15.

³³⁴ G E Caiden, N MacDermott & A Sandler, *The institution of the ombudsman: International handbook of the ombudsman*, Greenwood, London, 1993 at 4-8 as cited in Gary Pienaar, Office of the Public Protector, Pretoria, The role of the public protector in fighting corruption, (2000) *African Security Review*, Vol. 9, No.2, at 54, available at <<https://www.issafrica.org/pubs/ASR/9No2/Pienaar.html>>, accessed 16 March 2016.

4.3.1 Accessibility of the OPP

Kevin Malunga acknowledges that the OPP has witnessed massive growth over the years in among other areas, accessibility and awareness.³³⁵ In this regard, there has been a steady increase in the number of complaints lodged which has been directly attributed to increased publicity, awareness and growing public confidence.³³⁶ The Public Protector is required by law to be accessible to all persons and communities.³³⁷ An equivalent provision however does not exist for the Kenyan *Commission*. This is a very crucial provision as it ensures that the office achieves real accessibility especially for the sake of those most in need. Real accessibility is not only in terms of physical access but also includes flexibility of processes and procedures. The OPP primarily exists to serve the needs of the public and therefore how the office relates with them as it seeks to achieve its mandate has a bearing on whether it promotes access to administrative justice or not. The *Commission* is not as accessible as it should be and the public is largely unaware of its existence.³³⁸

Gary Pienaar contends that the OPP is regarded as suitable for the protection of certain basic human rights in addition to maladministration as it is considered as being more accessible to the individual in terms of operational flexibility and cost effectiveness.³³⁹ Section 182(5) of the South African Constitution requires that any Report written by the Public Protector must be made open and accessible to the public unless otherwise provided by national legislation. As

³³⁵ Malunga (n 33) 15.

³³⁶ Malunga (n 33) 21.

³³⁷ See (n 329) s 182(4).

³³⁸ Out of the respondents reached through interviews and questionnaires, only 35% knew about the *Commission* while 65% were unaware of its existence.

³³⁹ Gary Pienaar, Office of the Public Protector, Pretoria, The role of the public protector in fighting corruption, (2000) Vol. 9, No.2, *African Security Review*, 58, available at <<https://www.issafrica.org/pubs/ASR/9No2/Pienaar.html>>, accessed 16 March 2016.

regards the centrality of accessibility, the South African Deputy Public Protector comments as follows:

“Accessibility does not only refer to the ability to lodge and submit complaints and report matters to the Public Protector, but more importantly, requires real access to the services of the Public Protector-investigating, rectifying and redressing any improper or prejudicial conduct in state affairs and resolving related disputes through mediation, conciliation, negotiation and other measures.”³⁴⁰

Accessibility of the office of the ombudsman is informed by among other factors, its ability to initiate ‘own motion’ investigations as opposed to being limited to the investigation of complaints individually.³⁴¹ The Public Protector, subject to the *Public Protector Act*, may launch ‘own motion’ investigations.³⁴² The *Commission* is similar to the Public Protector in this regard as it is also carries out own motion investigations.³⁴³ The OPP is therefore more of a “complaint-handling mechanism as opposed to a complaint repository”. These make the Public Protector appear as one whose sole aim is to protect the rights of the citizen at all times. The Public Protector may subsequently make recommendations but it is notable that the office has limited coercive powers. Complainants can also lodge complaints orally or in writing and submit the same through their website, e-mail or in print.³⁴⁴

The OPP argues that accessibility of the institution is hampered by unrealistic expectations coupled with an ever-growing mandate since its inception.³⁴⁵ According to

³⁴⁰ Malunga (n 33) 20.

³⁴¹ Caiden *et al* (n 334).

³⁴² See (n 283).

³⁴³ See generally (n 22).

³⁴⁴ Public Protector South Africa, available at <<http://www.pprotect.org/#/style/>>, accessed 10 October 2016.

³⁴⁵ Malunga (n 33) 21.

Malunga, “the institution’s mandate is currently informed by 16 different statutes, with an oversight responsibility over more than 1000 state organs, public bodies and municipalities.”³⁴⁶ This tends to limit its accessibility as the OPP has to perform its function over a wide scope. It should be appreciated that despite the Public Protector’s attempts to be accessible, resource allocations to the institution do not match its scope of mandate. It is argued that resource constraints have a huge bearing on the accessibility of the OPP. In this regard, Pienaar asserts that resource constraints have led to uneven accessibility of the office.³⁴⁷ The same is true for the *Commission*.

4.3.2 Cooperation of government institutions and agencies with the OPP in the discharge of its mandate

Section 181(3) of the South African Constitution expressly obliges state organs to extend support and to cooperate with the Public Protector, through legislative and other means in the discharge of its functions.³⁴⁸ On the face of it, this provision makes it mandatory for government institutions and agencies to cooperate with the OPP while carrying out its functions and such cooperation is not dependent on good will on the part of a public administrator. Kenyan government institutions and agencies however are not obliged to extend their support and cooperation to the *Commission* and may only do so at will or when it suits them.

While highlighting the importance of cooperation between the Public Protector and government institutions and agencies, Pienaar posits that the office has a very broad mandate and a widened scope of control over executive power hence a broadened sphere of investigation.³⁴⁹

³⁴⁶ *ibid.*

³⁴⁷ See generally (n 334).

³⁴⁸ See (n 329).

³⁴⁹ See (n 334).

Such broadened mandate necessitates full cooperation from the relevant agencies as well as concerned parties or else the OPP runs the risk of being frustrated. Further, John Mubangizi contends that:

“...although the OPP enjoys priority over other institutions in the exercise of its functions, it still has to act together with the courts and other Chapter 9 institutions.”³⁵⁰

Mubangizi’s sentiments emphasize the crucial nature of a cordial relationship between the courts and the OPP as well as other like-minded agencies.

Malunga holds the view that in general, cooperation by government institutions with the OPP has been relatively commendable since its inception though much more needs to be done.³⁵¹ According to Selby Baqwa, the very first Public Protector, the office at inception experienced excellent levels of cooperation and government institutions and agencies responded well to the presence and role of the office.³⁵² In view of this, Malunga made the following observation:

“An estimated 70% of the matters dealt with by the Public Protector are being resolved in good time through early resolution approaches involving the State taking responsibility in a voluntary and cooperative manner, without having to resort to the Public Protector’s formal powers.”³⁵³

Be that as it may, there are still instances of limited to no cooperation at all. Such cooperation is most often than not extended and concessions mostly made by government

³⁵⁰ John C. Mubangizi, ‘The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: a comparative review of their roles in good governance and human rights protection’, *Comparative and International Law Journal of South Africa*, Vol. 45, Issue 3 (2012) 312, available at <http://heinonline.org/HOL/Page?handle=hein.journals/ciminsfri45&div=22&start_page=304&collection=journals&set_as_cursor=0&men_tab=srchresults>, accessed 10 October 2016.

³⁵¹ Malunga (n 33) 5.

³⁵² *ibid.*

³⁵³ Malunga (n 33) 16.

institutions where the issue at stake involves individual's rights for instance where the aggrieved party runs the risk of losing their pension or source of livelihood as a result of an administrative injustice.³⁵⁴ Malunga refers to these as 'bread and butter' cases.³⁵⁵ The level of cooperation is however somewhat different in instances where public institutions or a public administrator stands to lose. It is emphasized that limited cooperation by some state institutions and departments continues to act as a great hindrance to achieving the Public Protector's mandate.³⁵⁶

Malunga contends that the limited cooperation and support manifests itself through "unwillingness to acknowledge and take responsibility for findings of maladministration, government institutions legally challenging the decisions of the OPP, and disregarding the Public Protector's power to provide remedial action."³⁵⁷ It is argued that the lack of cooperation by government ministries, agencies and departments with the public protector may be attributed, though not entirely, to lack of awareness of the OPP's constitutional status, role and function.³⁵⁸ This calls for deliberate efforts by the OPP to carry out sustained public education in a bid to make government institutions more aware hence encouraging cooperation.

The OPP has a very broad mandate and apart from support and cooperation extended by government institutions and agencies, the OPP must in the spirit of inter-agency cooperation, work closely with other institutions with similar mandates if it is to achieve its mandate. The crucial nature of cooperation between the OPP and other like-minded institutions stems from the fact that a number of agencies with mandates similar to the OPP exist hence at times causing

³⁵⁴ See generally Malunga (n 33) 15-16.

³⁵⁵ *ibid.*

³⁵⁶ Malunga (n 33) 26.

³⁵⁷ Malunga (n 33) 27. (Fairness takes into account both the legal and non-legal considerations).

³⁵⁸ Caiden *et al* (n 334).

overlaps in their mandates.³⁵⁹ For instance a duplication of functions exists between the Public Protector and the South African Public Service Commission as regards guarding against maladministration begging the question whether it is necessary to have both institutions dealing with the same issue.³⁶⁰ Similarly, the *Commission* may receive a complaint on corruption as a result of maladministration yet the EACC is at the same time mandated to deal with corruption matters. Such overlaps may hinder the *Commission* from effectively carrying out its mandate.

In terms of inter-agency cooperation, the *Commission* has come up with an Intergrated Public Complaints Referral Mechanism (IPCRM) which it uses to refer complaints to the relevant bodies whenever complaints received do not fall within its mandate. This mechanism encourages swift resolution of complaints. The bodies involved are the Commission, the Ethics and Anti-Corruption Commission (EACC), the Kenya National Commission on Human Rights (KNCHR), the National Anti-Corruption Campaign Steering Committee, the National Cohesion and Integration Commission (NCIC) and Transparency International (TI-Kenya Chapter).

4.3.3 Jurisdiction and Powers of the Public Protector

The Public Protector has 6 key mandates. These are: maladministration, anti-corruption, enforcement of Executive ethics, regulation of information, protection of whistle blowers and the review of decisions of the Home Builders Registration Council.³⁶¹ The OPP therefore has extensive powers. The Public Protector can carry out own-motion investigations and need not

³⁵⁹ ‘The Office of the Public Protector in the Republic of South Africa: A Discussion of Key Issues in International Perspective’, July 2000 by National Democratic Institute for International Affairs at 26, available at <<https://www.ndi.org/node/14022>>, accessed 10 October 2016.

³⁶⁰ See generally (n 329) s 196(4) and s 8, 10 and 11 of the Public Service Laws Amendment Act as well as (n 329) Section 182 as read with s 7 and 8 of the Public Protector Act.

³⁶¹ Malunga (n 33) 3.

Also see generally the Executive Members’ Ethics Act of 1998, Executive Ethics Code, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Protected Disclosures Act 26 of 2000, the Promotion of Access to Information Act 2 of 2000 and the Housing Protection Measures Act 95 of 1998

receive a complaint.³⁶² In this regard, it can be said that the office plays both a reactive and proactive role. As regards carrying out own-motion investigations, Malunga asserts that “since its establishment, the OPP acts proactively with a view to contributing to the enhancement of public administration through identifying root causes of maladministration and recommending possible areas of improvement.”³⁶³

The OPP has for a long time lacked executive authority in the sense that it can only make recommendations but cannot enforce the same.³⁶⁴ In this regard, it has often been referred to as ‘powerless’ since it cannot make binding decisions and has to rely on the courts in securing compliance with its recommendations.³⁶⁵ This position however changed when the Constitutional Court of South Africa declared in its recent Judgment that “the remedial action taken by the Public Protector, in line with her constitutional powers to take appropriate remedial action, against President Jacob Zuma for misappropriation of public funds were indeed binding.”³⁶⁶

In rendering its Judgment, the Court argued that it was doubtful whether “the time, money and energy expended on investigations, findings and remedial action taken, would ever make sense if the Public Protector’s powers or decisions were meant to be inconsequential.”³⁶⁷

The Court contended that in order to ‘cure incidents of impropriety, prejudice and corruption in

³⁶² Madonsela (n 138) 8.

³⁶³ Malunga (n 33) 7.

³⁶⁴ See generally Caiden *et al* (n 334).

³⁶⁵ Mubangizi (n 350) 312.

³⁶⁶ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) Par 105[3] 51, available at <<http://www.saflii.org/za/cases/ZACC/2016/11.html>>, accessed 22 July 2016.

³⁶⁷ *ibid* paragraph 49 at 25.

government circles, remedial action should be responsive in nature.”³⁶⁸ Further, that for remedial action to be said to be effective and responsive it should essentially be binding.³⁶⁹ This landmark decision affirms that the Public Protector’s recommendations as part of taking appropriate remedial action are not just mere declarations but have the force of law.

Whistleblower protection is yet another role that the OPP plays.³⁷⁰ According to the *Access to Information Act*, the Public Protector can refuse access to information where such disclosure would constitute a breach of duty owed to a ‘third party’, most often an informer.³⁷¹ Such role is aimed at protecting whistleblowers from prejudice that may be suffered as a result of information that is of public interest that is volunteered to the OPP. Pienaar however argues that difficulties arise where a ‘third party’ or whistleblower happens to be a public body.³⁷² Information from such public body is not protected from disclosure implying that the identity of a whistleblower who is a public administrator is not protected and hence resulting in reluctance in giving such information.³⁷³ The net effect may be fewer complaints on serious maladministration matters being lodged with the OPP. It would appear that despite the importance of such role, the OPP experiences difficulties in carrying out the same.

4.4 The Ugandan Inspectorate of Government

The Inspectorate of Government (hereinafter referred to as the IG) was first established in 1988 by the National Resistance Army and was considered the hallmark of the government’s

³⁶⁸ See (n 366) paragraph 64 at 32.

³⁶⁹ See (n 366) paragraph 68 at 34.

³⁷⁰ Promotion of Access to Information Act, No. 2 of 2000, s 37, available at <<http://www.justice.gov.za/legislation/acts/2000-002.pdf>>, accessed 22 May 2017.

³⁷¹ *ibid.*

³⁷² Caiden *et al* (n 334) 64.

³⁷³ *ibid.*

anti-corruption strategy.³⁷⁴ Simon Ababo argues that “despite the creation of these public institutions to combat corruption in Uganda, the IG is empowered as an independent anti-corruption agency with more powers of enforcing and preventing corrupt practices.”³⁷⁵ The institution was initially established as a hybrid human rights and anti-corruption institution.³⁷⁶ Despite this broad mandate, the institution was unable to fully achieve its mandate as it had weak powers.

According to Linda Reif, the Inspector General of Government (hereinafter referred to as the IGG) was seen to have limited effect in fulfilling its human rights protection function, *firstly* because its mandate in dealing with human rights issues was interpreted through a narrow prism and *secondly*, as with most novel ombudsmen institutions, was crippled by insufficient financial support.³⁷⁷ The mandate of the IG however changed for the better with the ushering in of the 1995 Ugandan Constitution.

The human rights mandate was conferred upon the Uganda Human Rights Commission, established under the new constitutional dispensation. Under the 1995 Constitution, the IG is a constitutional body mandated under Chapter 13 to *inter-alia* promote good governance, fight corruption and enforce the Leadership Code of Conduct.³⁷⁸ The functions of the IG are spelt out in Article 225(1) of the Constitution and Part III, Section 7(1) of the Inspectorate of Government

³⁷⁴ Inspector General of Government, 1, available at <www.track.unodc.org/LegalLibrary/.../Uganda/authorities/Uganda%20authorities.pdf>, accessed 20 June 2016.

³⁷⁵ Simon Ababo, ‘The Functioning of the Public Anti-Corruption Institutions: A case of Inspectorate of Government (IG) in Arua District, Uganda’, International Institute of Development Studies 26, available at <<https://thesis.eur.nl/pub/8724/>>, accessed 10 October 2016.

³⁷⁶ See (n 374).

³⁷⁷ Reif (n 68) 218-19.

³⁷⁸ The Constitution of the Republic of Uganda, 1995, available at <<https://www.google.com/search?q=Commission+on+Human+Rights+and+Administrative+Justice+Act%2C+No.+456+of+1993&oq=Commission+on+Human+Rights+and+Administrative+Justice+Act%2C+No.+456+of+1993&qs=chrome..69i57.2177j0j4&sourceid=chrome&ie=UTF-8#q=ugandan+constitution>>, accessed 22 May 2017.

Act, (hereinafter referred to as the *IG Act*).³⁷⁹ The functions include among others, promoting and fostering strict adherence to the rule of law and principles of natural justice in administration, eliminating and fostering the elimination of corruption, abuse of authority and of public office as well as stimulating public awareness about the values of constitutionalism in general and the activities of its office, in particular, through any media or other means it considers appropriate. In order to fulfill the above mandate, the IG is granted general and special powers as highlighted under Section 8 of the *IG Act* and broadly entails investigations into allegations of corruption, abuse of office and neglect of duty.

4.4.1 Accessibility of the IG

The accessibility of the IGG is hinged upon its mandate to create public awareness, sensitize and educate the public subject to Article 225 (1) (f) of the Ugandan Constitution. This mandate is key as apart from physical accessibility, the level of awareness about the institution determines whether aggrieved persons can approach the IGG or not. This is a crucial provision as the supreme law calls for the IG to make itself visible. The same is however not provided for by Kenyan legislation and hence it is yet again left to the *Commission's* discretion how far it will go in creating awareness. The *Commission* is only expressly mandated to promote public awareness on policies and administrative procedures that relate to administrative justice.³⁸⁰

In the main, the scope of the IG's awareness creation is to educate the public on their constitutional right to access public services without having to pay out bribes as well as their civic duties and responsibilities to demand for accountability of public funds from leaders, mismanagement or abuse of the office. These reports are all made to the office of the IG. The

³⁷⁹ See generally *ibid* and Inspectorate of Government Act, 2002, available at <<https://www.igg.go.ug/static/files/publications/ig-act.pdf>>, accessed 22 May 2017.

³⁸⁰ See (n 22) s 8(j).

fact that public awareness and sensitization by the IG is expressly provided for by the Constitution goes a long way in ensuring that the public are not only aware of the institution, but can also approach it when need arises.

The IGG can generally be lauded for its efforts in sensitizing the general public on its mandate and functions. The institution has been at the forefront in creating awareness on corruption and has employed various means as reported in depth in its annual reports to Parliament.³⁸¹ Public awareness by the IG is carried out in the form of workshops, integrity clubs, media and communication programs as well as interactive film shows.³⁸² This is in keeping with the Inspectorate's function to disseminate information to the public on the adverse effects of corruption and by virtue of the same to enlist and foster public support against corrupt practices.³⁸³ The workshops mainly target the student leadership at the university level and tertiary institutions under the jurisdiction of the IG's regional offices in various parts of the country. This group is influential and can act as champions in the fight against corruption. At the university level, the student leadership, with the support of the IG's office, spearhead formation of integrity clubs whose goal is to encourage and nurture students in their formative and transitional stages to be ambassadors in the fight against corruption and poor administration in their respective institutions.

Traditional media, more specifically radio, is mostly used by the institution as a means of carrying out public awareness and education. This is because radio broadcast is considered to be

³⁸¹ See for instance Inspectorate of Government Annual Report to Parliament, January- June 2010, available at <http://www.theioi.org/downloads/li68p/Africa_Uganda_Inspector%20General_Report_2010.pdf>, accessed 10 October 2016.

³⁸² Inspectorate of Government Annual Report to Parliament January-June, 2011 at 39, available at <<file:///C:/Users/mogonjo/Downloads/uganda%20jan%20jul%202011.pdf>>, accessed 10 October 2016.

³⁸³ Inspectorate of Government Act, 2002, s 7, available at <<https://www.igg.go.ug/static/files/publications/ig-act.pdf>>, accessed 22 May 2017.

the most efficient, cheap, flexible and accessible mass medium. The IG employs the use of radio talk shows to enlighten the public on its mandate in the fight against corruption and preventive measures that should be put in place to reduce the practice of the vice. Some of the most commonly used radio stations include Radio Pacis and the Nile Broadcasting Services (NBS).³⁸⁴ The IG also utilizes TV Programs as well as newspaper supplements which serve a wide geographical spread. In addition to television and radio programmes, the IG has come up with interactive film shows to spread messages on anti-corruption.³⁸⁵ The main purpose behind the short-films and spot messages is generally to inspire and trigger debate among the public on issues of accountability, corruption, administrative justice, the rule of law and ethics.³⁸⁶ The *Commission* also adopts similar approaches in creating awareness among the public though the same seem to be sporadic.³⁸⁷ As a result not very many people know about the *Commission*.

In a bid to enhance accessibility, the IG reorganized its office in 2001 and now has five Directorates which include Education and Prevention; Legal Affairs; Regional Offices and Follow Up; Operations; and Leadership Code.³⁸⁸ Such reorganization has encouraged functional specialization and ensures that members of the public are better dealt with whenever complaints arise.³⁸⁹ The Directorate of Education and Prevention deals with “stimulating awareness about the value of constitutionalism and the activities of the Inspectorate of Government” while the Directorate of Regional Offices and Follow Up is “responsible for improving efficiency in service delivery by taking the services of the institution nearer to the people and ensuring that the

³⁸⁴ See (n 382).

³⁸⁵ *ibid.*

³⁸⁶ See (n 382).

³⁸⁷ See (n 12) 49-53.

³⁸⁸ Office of the Inspector General of Government, *Inspector General of Government*, 2, available at <<http://www.track.unodc.org/LegalLibrary/LegalResources/Uganda/authorities/Uganda%20authorities.pdf>>, accessed 5 June 2016.

³⁸⁹ *ibid.*

implementation of the recommendations of the IG by public officials and institutions is undertaken or implemented.³⁹⁰ These two Directorates are key to achieving accessibility of the IGG.

As regards physical accessibility, the IGG has 16 regional offices despite having 111 districts in total.³⁹¹ The regional offices continue to serve the public and have made the IG more accessible.³⁹² This has encouraged people to report cases of corruption as well as reducing backlog of cases at the IG headquarters.³⁹³ While acknowledging that the regional offices may not be adequate to serve the entire Ugandan populace, one of the IGG's future plans is to strengthen the existing regional offices to enhance accessibility and to make the institution more accessible at the local government level.³⁹⁴ The *Commission* currently has five offices in five major towns though these cannot be said to adequately serve the Kenyan populace.

4.4.2 Cooperation of government institutions and agencies with the IG

Cooperation by leaders and officials both in the public and private sectors with the IGG has been very limited if at all. This has been attributed to the prevailing political and democratic dynamics in Uganda that continue to negatively impact on the IG's work.³⁹⁵ In 2013, the IGG, Irene Mulyagonja, in an interview with *the Ugandan Diaspora* when asked to comment on the challenges she was facing in carrying out her mandate expressed herself as follows on the issue of political interference:

³⁹⁰ Ababo (n 375) 27.

³⁹¹ Inspectorate of Government, 'Fight Against Corruption and Administrative Injustices in Public Offices: Achievements of the Inspectorate of Government', available at <https://www.igg.go.ug/static/files/publications/inspectorate_of_government_words.pdf>, accessed 3 June 2016.

³⁹² *ibid.*

³⁹³ See (n 391).

³⁹⁴ *ibid.*

³⁹⁵ Mubangizi (n 350) 317-319 and Ababo (n 375) 41-42.

“Very many challenges. We are dealing with governance and it has a political aspect. The people who make government are the people who won the elections. In our system of doing things, say in local government and central government, people tend to have godfathers and godmothers. So when you touch a person in the public service for wrongdoing, many times there will be someone who will come and say: “Why are you doing this? This person has been helping us.” Sometimes it is even said that they are being witch-hunted...that the IGG is sent to investigate certain parliamentarians out of political motivation or at the urging of some MPs or the Head of State. So political interference is something to deal with every day.”³⁹⁶

Ababo argues that lack of political will has greatly affected the IG’s mandate in fighting corruption.³⁹⁷ According to the IGG’s 2009 Annual Report, lack of political will is most evident when it comes to non-compliance with the recommendations of the IG by relevant officials, leaders or institutions.³⁹⁸ The *Commission* faces similar challenges and cooperation by government institutions and agencies largely depends on political will and the political leadership of government.³⁹⁹

The IG is mandated by law to enforce the Leadership Code of Conduct.⁴⁰⁰ However, the office has experienced difficulties in achieving this mandate due to non-cooperation by various leaders and officers. In its 2009 Annual Report, the IGG for instance laments that “since 2002

³⁹⁶ Sulaiman Kakaire and Hussein Bogere ‘Uganda’s IGG Speaks Out-Political Interference Favours the Big Thieves’ in the *Observer* (23 February 2013), available at <<http://www.ugandandiasporanews.com/2013/02/23/the-observer-ugandas-igg-speaks-out-political-interference-favours-the-big-thieves/>>, accessed 3 July 2016.

³⁹⁷ Ababo (n 375) 20-23.

³⁹⁸ See generally *Inspectorate of Government Annual, Report to Parliament*, July- December, 2009, available at (accessed 22 May 2017).

³⁹⁹ See generally Chapter 3 of this Thesis.

⁴⁰⁰ Leadership Code Act, 2002, s 3(1), available at <<https://www.igg.go.ug/static/files/publications/leadership-code-act.pdf>>, accessed 22 May 2017.

when the Code of Conduct became operational, out of 125 specified leaders in Arua District (district with the highest reported incidences of corruption) mandated by law to comply with the Code of Conduct, no declarations were made to the IG by the specified officers from 2002 to 2006 and very few leaders made declarations to the IGG in 2008.”⁴⁰¹ Such lack of cooperation renders the IGG powerless. Further, Mubangizi asserts that “although the IG has regularly reported breaches of the Code by many ‘leaders’, there have been few penalties or sanctions for such non-compliance.”⁴⁰² He adds that “cases have been reported where efforts to penalize the offenders of the Code have been thwarted by President Museveni himself.”⁴⁰³

Inter-agency cooperation is yet another aspect of cooperation. Ababo argues that such cooperation has proved to be very weak as some of the institutions that are supposed to support the IGG in the fight against corruption such as the Police and the Directorate of Public Prosecutions are in themselves highly corrupt.⁴⁰⁴ This implies that the IG’s mandate of combating corruption at central government departments and local government administrative units is greatly weakened.⁴⁰⁵ Inter-agency cooperation in Kenya is mainly through the IPCRM mechanism.⁴⁰⁶

Be that as it may, over the course of the past two years, the IGG has put in tremendous efforts to liaise with local and international agencies to boost its efficiency in carrying out its three-pronged mandate. Its most recent partnership with the Financial Intelligence Authority (FIA) is illustrative of its efforts to tame money laundering and corruption. The essence of the

⁴⁰¹ Ababo (n 375) 29.

⁴⁰² Mubangizi (n 350) 317.

⁴⁰³ Mubangizi (n 350) 318.

⁴⁰⁴ Ababo (n 375) 42.

⁴⁰⁵ *ibid.*

⁴⁰⁶ *The Observer* ‘Deal between IGG and Financial Intelligence Authority is promising’ (6 June, 2016), available at <<http://www.observer.ug/viewpoint/editorial/44633-deal-between-igg-financial-intelligence-authority-is-promising>>, accessed 4 June 2016.

partnership is to enable both bodies to share information and strategies on tracking dirty money as well as investigating the sources of stolen wealth whether in private or public hands.⁴⁰⁷

Non-cooperation is not exclusive to the Executive arm of government. The legislative arm which has in the past been lauded for its role in the fight against corruption appears to have back-peddled over the last few years. Notably, Parliament has in the past not taken timely action on the bi-annual Reports submitted by the IGG's office as required by law.⁴⁰⁸ This position has hampered the implementation of any reforms or recommendations tabled by the IGG. The *Commission* also enjoys little to no parliamentary oversight with regards to Annual and Special Reports tabled before the National Assembly as required by law. As a result of little or no feedback, the *Commission* is unable to tell whether or not it is on course with regards to its mandate.

4.4.3 Jurisdiction and powers of the IG in the discharge of its mandate

The scope of the IG's jurisdiction and powers is established under Articles 226 and 227 of the Ugandan Constitution. The jurisdiction of this office covers officers or leaders whether employed in the public service or not, and also such institutions, organizations or enterprises as Parliament may prescribe by law.⁴⁰⁹ This broad scope ensures that anti-corruption is tackled in all spheres of society, both private and public. It appears that the IG's reach is much wider than the scope allowed under Section 29 of the *CAJ Act* which limits the *Commission's* investigatory mandate to matters arising from the carrying out of an administrative action of a public office, a state corporation within the meaning of the State Corporation Act (Cap 446) or any other body or

⁴⁰⁷ *ibid.*

⁴⁰⁸ John Smith 'Case study on the Role of Parliament and the Media in the Fight Against Corruption' in Rick Staphenurst, Niall Johnston Ricardo Pelizzo (eds) *The Role of Parliament in Curbing Corruption (2006)* 130.

⁴⁰⁹ See generally (n 381).

agency of the State. Apart from the jurisdiction prescribed under the Ugandan Constitution, and the *IG Act*, the Anti-Corruption Act, 2009 also prescribes the jurisdiction of the IG over both the public and private sector as a way of effectively combatting and preventing corruption.⁴¹⁰ In comparison to Kenya, the IGG's power over both the private and public sector in view of fighting corruption is quite wide and ensures that it is tackled effectively.

In addition to carrying out investigations, the IG has special powers of arrest and prosecution in respect of cases involving corruption, abuse of authority or of public office.⁴¹¹ These powers are considered as a distinctive feature of the institution as they enable the IG to have real powers of enforcement. Further, these powers are granted in furtherance of the IGG's functions and are designed to strengthen the institution when it comes to discharging its functions. The *Commission* is however handicapped in this regard, as it has to for instance rely on the Office of the Director of Public Prosecutions to carry out prosecutions and this is only after it has submitted a Report to the National Assembly recommending prosecution and the Assembly agrees with the same.

The IG also has a constitutional mandate to enforce the Leadership Code of Conduct.⁴¹² Whereas the Leadership Code Act provides for the standard of conduct that leaders should exemplify, the IG is established as a watchdog institution. In line with this, all specified leaders are required to declare their incomes, assets and liabilities to the Inspector General of Government every two years.⁴¹³ In order to confirm the accuracy of the declarations lodged, the IGG is empowered to verify the same.⁴¹⁴ Ababo however argues that despite these wide powers, the IGG is faced with serious financial and human resource constraints to the extent that it is

⁴¹⁰ See generally (n 382).

⁴¹¹ See generally (n 378) Article 230 and (n 383) s 14 (5).

⁴¹² See generally (n 378) Articles 225 (1) (d) & 234, (n 400) s 3 (1) and (n 383) s 8 (1).

⁴¹³ See (n 400) s 4.

⁴¹⁴ See (n 400) s 5.

unable to carry out verification of incomes, liabilities and assets of those officers who actually make declarations.⁴¹⁵ The net effect of this is that no arrests are made or prosecutions carried out by the office for defaulting officers despite the fact that it is admitted that these are wide powers indeed.⁴¹⁶ The *Commission* however does not possess such powers and the same are reserved for the Ethics and Anti-Corruption Commission.

Section 3(3) of the Leadership Code requires the IG to delegate its powers to other like-minded agencies or authorities to ensure proper enforcement of the Code. This mandate also requires the Inspectorate to report to Parliament on its enforcement of the Code in its Statutory Report to Parliament.⁴¹⁷ Strikingly, in its 2011 Parliamentary Report, the IG noted that its enforcement of the Leadership Code was substantially paralyzed by the Supreme Court's Judgment of *John Ken Lukyamuzi v Attorney General and Another*, in which the bench declared that the IG was not the appropriate Tribunal as envisaged under Article 83 (1) (e) for enforcement of the Code against members of Parliament or Article 235A of the Constitution which provide for the establishment of the Leadership Code Tribunal.⁴¹⁸

The Supreme Court further clarified that the IG and the proposed Leadership Code Tribunal would be institutions complementary to each other as majority of the offences under the Leadership Code were criminalized under the Anti-Corruption Act. As a result, the IG has instead resorted to enforcing the Anti-Corruption Act as a means of accomplishing its anti-corruption mandate.⁴¹⁹ Such hostility from Parliament and the IG is not unique as the

⁴¹⁵ Ababo (n 375) 30.

⁴¹⁶ *ibid.*

⁴¹⁷ See (n 400) s 37.

⁴¹⁸ Constitutional Appeal No. 2 of 2008.

⁴¹⁹ See (n 382) 36.

Commission also continues to grapple with the same as it endeavors to promote access to administrative justice.

4.5 Comparative lessons

It should from the onset be acknowledged that the three ombudsman institutions have been able to achieve different levels of success while operating under unique contexts and circumstances. The same is true for the *Commission*. All these institutions are established constitutionally and operate through enabling Acts of Parliament. In addition, the CHRAJ has been in existence for eighteen years, the OPP twenty-one years, the IG twenty-eight years and the *Commission* for only five years. It could be argued that the *Commission* has been in existence for a much shorter period and therefore there is room for improvement. Whereas this is partly true, the researcher argues that it can pick lessons from these older institutions while trying as much as possible to avoid the pitfalls that have hindered them from fully achieving their mandates and subsequently promoting access to administrative justice.

The OPP, CHRAJ as well as the IG are all generally accessible. Nonetheless, the CHRAJ is arguably more accessible to the public due to its hybrid nature and incorporation of ADR mechanisms in its workings. Iyer opines that the institution's power lies in its "evidence-based investigations and public hearings coupled with media support and public confidence."⁴²⁰ He adds that "this has helped to expose high-level corruption and mobilize social pressures for greater accountability."⁴²¹ Its offices generally also have a wide geographical coverage implying that more people can approach the office. As regards the *Commission*, one of the respondents interviewed argued that going forward, the *Commission* should take full advantage of ADR

⁴²⁰ Iyer (n 286) 1.

⁴²¹ *ibid.*

mechanisms as that way, disputants own the decision made after such deliberations and are more likely to act in accordance with the same. Further, the *Commission* will no longer have to deal with problems of enforcement of its decisions.

Cooperation of government agencies and institutions with the four ombudsman institutions is generally very poor especially due to the fact that the ombudsman institution in Africa is largely perceived by public administration as a 'hostile' entity merely 'baying for blood'. The ombudsman institution seems to be a foreign concept to the African continent and therefore its operations and benefits are yet to be fully appreciated. In Uganda for instance, efforts to bring defiant agencies and individuals to book has at times been thwarted by the President himself.

In Ghana, non-cooperation is manifested in the form of attacks on the legitimacy of the institution to seek enforcement of its decisions or even its authority to carry out investigations where a formal complaint has not been lodged. The Kenyan *Commission* also continues to suffer from such frustrations in the hands of the Executive, Judiciary and Legislature. Such attacks paralyze these ombudsman institutions making it difficult for them to achieve their mandates and promote access to administrative justice.

In Kenya, the *Commission* is at the mercy of the political will of both Parliament and the Executive and cooperation is only extended when neither of the arms of government have anything at stake. Due to a recent ruling however, the situation in South Africa has changed for the better. The Constitutional Court of South Africa has set an example regarding cooperation of the Executive with the OPP in the area of compliance with its decisions and has held that such decisions are binding and cannot be disregarded or complied with at will.⁴²² This long-awaited

⁴²² See generally (n 366).

landmark ruling has shown the African continent that the ombudsman is indeed a force to reckon with and that his role in defending the defenseless against the excesses of bureaucracy must be taken seriously.

Inter-agency cooperation is also very commendable in South Africa as opposed to Uganda and this has enabled the Public Protector to carry out its functions with more ease despite having a broad mandate. The *Commission* also adopts inter-agency cooperation in the form of IPCRM mechanism.

The Ugandan IG has extensive powers and in addition to investigatory powers, which its counterparts also possess, it has powers of arrest and prosecution. Such powers are crucial especially in an era of impunity and negative attitude by government institutions and agencies towards oversight institutions such as the ombudsman. More recently the Constitutional Court of South Africa in the *Jacob Zuma case* has affirmed that the OPP indeed has powers of enforcement and that its decisions are binding. The *Commission* and the CHRAJ seem to be lagging behind as they lack such powers and heavily rely on inter-agency cooperation for arrests to be made and prosecutions to be conducted where institutions or individuals are found culpable of maladministration.

All four ombudsman institutions share common challenges in one respect or the other that threaten to undermine the admirable work that they do. The most cited challenge is resources, both financial and human. These institutions have broad mandates and require abundant resources as well as overwhelming political support to achieve such mandates. Further, whereas most ombudsman institutions have witnessed an increase in the number of complaints received since inception, this has put a great strain on resources and has resulted in a compromise between the quality of investigations and prompt remedial action and swiftness of

handling complaints and offering remedies.⁴²³ The situation is no different for the *Commission*, CHRAJ, OPP and the IG. Interestingly, some of these institutions are ‘starved’ of funds where they are perceived to be a threat to the ‘normal’ workings of public administration.

Another key challenge is a negative political attitude from the prevailing governments which have little to no regard for such oversight institutions perhaps due to the political history of the African continent. The success of the ombudsman institution heavily relies on the political will and attitude of those in power. Where such attitude is dismissive, the work of the institutions are hindered as witnessed with the institutions discussed.

In conclusion, the CHRAJ, OPP and IG are indeed promoting access to administrative justice despite the numerous challenges they face. These institutions are however kept going by the plight of the lowly and downtrodden in society who are unable to assert themselves when faced with administrative injustices.

⁴²³ Malunga (n 33) 22.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Kenya's Commission on Administrative Justice was established as one of the independent constitutional commissions provided for in the Constitution of Kenya 2010 and represents a major turning point in the administrative justice landscape in Kenya.⁴²⁴ The *Commission* is viewed as an avenue for redress of administrative injustices and is trusted by many Kenyans to promote access to administrative justice. Nevertheless, five years since its inception, this study has established that it is still not clear to many Kenyans whether the *Commission* is promoting access to administrative justice in accordance to its mandate.

The main objective of this study was to find out whether the *Commission* is promoting access to administrative justice. To this end, the research questions that this study sought to answer were whether the *Commission* is accessible to the public; whether government institutions and agencies cooperate with and support the *Commission* in carrying out its functions; whether its jurisdiction and powers act as a limitation in the discharge of its functions and how the Ghanaian, South African and Ugandan ombudsman institutions are performing in light of their accessibility to the public, cooperation of government institutions and agencies with them and the reach of their jurisdiction and powers in comparison to the *Commission*. It was further hypothesized that non-cooperation by government institutions and agencies with the *Commission* in carrying out of its functions coupled with limited accessibility and restraints on

⁴²⁴ Established under the Commission on Administrative Justice Act, No. 23 of 2011 and Article 59(4) Constitution of Kenya, 2010.

its jurisdiction and powers while discharging its mandate, have a drawback effect on the promotion of access to administrative justice by the *Commission*.

This chapter summarizes the major findings and presents the conclusions and recommendations of this study.

5.2 Conclusions and Recommendations

This study established that minimal cooperation by government institutions and agencies with the *Commission* in executing its mandate, together with the *Commission's* limited accessibility and limited jurisdiction and powers, continue to act as hindrances to the promotion of access to administrative justice by the *Commission*.

5.2.1 The Commission is inaccessible to the public

As hypothesized in Chapter 1 of this Thesis, this research has shown that the *Commission* is inaccessible to the public. Accessibility of the *Commission*, to those it was set up to serve, remains the first step towards promoting access to administrative justice. Throughout this study, the accessibility of the *Commission* was looked at in terms of physical accessibility to its office premises, awareness of the public on the location of its office premises and the ease of lodging complaints with it. The study used these aspects to gauge the level of engagement between the *Commission* and the public. It is the conclusion of the study that it is both essential and critical for the public to be enlightened on the existence of an alternative means of redress for administrative injustices and that it is also aware of the existence of the means, its physical location, and how it operates.

As provided in Chapter 3 of this Thesis, only 33 per cent (14 out of 43 members of the public) of the respondents in this study were aware of the existence of the *Commission*. This is

very telling of how accessible the *Commission* is. Despite efforts made so far by the *Commission* to create awareness, a good percentage of the public is still largely unaware of the *Commission's* existence let alone its mandate or the work it is doing. According to the study, whereas the *Commission* has experienced an increase in the reporting rate of administrative injustices, the complaints received are limited to a mostly urban-based small number of members of the public that is informed about the *Commission* and the work it does. The fact that very few Kenyans know about the *Commission* implies that those mostly in need of the services of the *Commission* are unable to access the same as they are unaware of the existence of such a mechanism.

Whereas it is appreciated, as discussed in Chapter 3, that the *Commission* has made strides in reaching out to the public and making itself known, a lot still needs to be done in order to achieve critical mass levels of awareness and information. The study for instance revealed that social media is the most used awareness creation approach by the *Commission* yet the same is not very popular among the lowly and downtrodden in society who form the bulk of the *Commission's* primary constituents. This is because the information shared on social media is largely considered 'elitist' and tends to exclude this group of the society from effectively engaging on such online platforms.

In light of the above, it is recommended that the *Commission* rethinks its awareness creation approaches and takes advantage of various modes of communication that are likely to reach its primary constituents. Such widespread awareness creation can be carried out through airing shows on prime-time radio and television stations both mainstream as well as local. For instance *KBC Kiswahili Radio Station*, *AM Live*, *The Chamwada Report*, *Citizen TV Monday Special*, *Citizen Power Breakfast* and *Jeff Koinange Live* on television and *Nation Morning Show* with Jimmy Gathu. Sustained awareness creation on the *Commission's* mandate, its operations

and its accessibility will make the public more aware of it and will lead to more Kenyans seeking its services.

The study has established that the *Commission* greatly relies on technology driven mass media to create awareness among the public. Be that as it may, Kenyans in most parts of the country are unable to access such media either because such technologies do not exist in certain parts of the country or where they do exist, it is only in a limited form. This necessitates concerted grass-root campaigns in all parts of the country so as to reach those that are most in need. Such campaigns will provide an opportunity for the public to seek out the services of the *Commission* on a more localized level. To this end, it is recommended that the *Commission* takes advantage of Huduma Centres and establishes Help Desks in all counties countrywide so that the public can better seek their services.

Huduma Kenya is a programme that provides Kenyans with access to public services and is operated through an integrated technology platform.⁴²⁵ The study revealed that the *Commission* already has Help Desks in Kisii, Nakuru, Kakamega, Nyeri, Kajiado, Mombasa, Nairobi, Embu, Eldoret and Kisumu. These are however not sufficient to serve the entire Kenyan populace. There are for instance four Huduma Centres in Nairobi; one is located within the Central Business District (CBD) while the rest are found in Makadara, Eastleigh and Kibera.⁴²⁶ The *Commission* has a Help Desk within the CBD but not in Makadara, Eastleigh and Kibera where its primary constituents reside. It is further recommended that for increased accessibility, the *Commission* does set up Help Desks in these centres as a matter of priority.

⁴²⁵ See generally *Huduma Centres Kenya- Huduma Kenya Services, Centres and Contacts*, available at <<https://softkenya.com/kenya/huduma/>>, accessed 10 April 2017.

⁴²⁶ *ibid.*

The study revealed that the *Commission* has branch offices in Mombasa, Eldoret, Kisumu and Isiolo in addition to its Nairobi head office. The study further established that 90 per cent (39 out of 43 members of the public) of the respondents in this study, who were aware of the *Commission's* physical location, were of the view that the *Commission's* head office was not conveniently located as its current Westlands location is mostly associated with the affluent. This tends to exclude the *Commission's* primary constituents who comprise of the common *mwananchi*. It is therefore recommended that in a bid to be more accessible to the public, the *Commission* should consider locating its Head Office in a more central place, for instance within the CBD to enable as many people as possible to access the same. Its current Westlands location is not ideal as its access is limited due to transport difficulties coupled with the fact that the office building itself is largely perceived as 'intimidating' to the common *mwananchi*.

The study revealed that in principle, the processes and procedures involved in lodging of complaints are fairly easy and straightforward as complaints can be lodged electronically or orally. In addition, a complainant who cannot lodge a complaint on their own can have the same lodged on their behalf. However, owing to the fact that most respondents were unaware of the *Commission*, they were not able to tell whether lodging of complaints with the *Commission* is easy or not. This shows that awareness creation will not only enhance the public's knowledge of the *Commission*, it will also encourage the usability and approachability of such mechanism. It is therefore recommended that the *Commission* allocates more resources towards awareness creation activities to enhance awareness by the public.

This research has shown, in Chapter 3, that the *Commission's* accessibility is greatly influenced by both funding and staffing. Inadequate funding is cited as a major hindrance to the

implementation of the *Commission's* mandate.⁴²⁷ Limited funding and inadequate staffing continues to hamper the *Commission's* accessibility in the sense that it cannot effectively reach out to the public through carrying out sustained awareness campaigns or establishing additional offices to the already existing ones.⁴²⁸ As a result, the *Commission* has been unable to make itself visible and create awareness especially among its primary constituents. The net effect is that Kenyans continue to suffer in silence as they are unaware of the *Commission* as an avenue to redressing administrative wrongs.

Most of the *Commission's* budget comes from the Exchequer though the same is rarely adequate to cater for its activities and operational expenses.⁴²⁹ To supplement its funding, the *Commission* also reaches out to various development partners to raise funds for its activities.⁴³⁰ The study has however shown that the funds are most often than not inadequate and this hinders the *Commission* from achieving its mandate. In this regard, it is recommended that Parliament, through the Parliamentary Budget Committee, should prioritize adequate budget allocation to the *Commission* due to the crucial role it plays in the administrative justice landscape in Kenya. This will go a long way in ensuring that the *Commission* is less dependent on development partners. Ideally, a commission such as the Commission on Administrative Justice should be wholly funded from citizens' taxes to avoid falling captive of external influences such as those from donors.

In a bid to supplement their current staffing, it is recommended that the *Commission* engages the youth, especially those in tertiary institutions, to create awareness. This can be done

⁴²⁷ *ibid.*

⁴²⁸ See generally (n 12, 20, 177).

⁴²⁹ See (n 20) 101.

⁴³⁰ *ibid.*

through the *Commission* targeting the student leadership at various universities, colleges as well as polytechnics and sensitizing them on its mandate and operations and subsequently engaging them to create awareness. This group can then act as champions against maladministration in their various learning institutions and communities and can also help channel grievances to the *Commission*. This will go a long way in creating awareness about the *Commission* and ensuring that more members of the public are aware of it.

5.2.2 There is very limited cooperation with and support for the Commission from government institutions and agencies

Ideally, the work of a Commission such as the Commission on Administrative Justice is heavily dependent on the good will and support of government institutions and agencies. This research has however revealed that there is very limited cooperation with and support for the *Commission* from government institutions and agencies. The study further established that the limited or lack of cooperation and support by government institutions was mostly attributed to an insufficient legal framework that limits the *Commission's* powers, lack of support by courts of law in instances of non-compliance by government institutions and agencies with the *Commission's* decisions and impunity as well as political resistance. Support and cooperation of government institutions and agencies with the *Commission* is a vital aspect of the work it does as failure to cooperate with the *Commission* renders it powerless and prevents it from serving the public. In the long run, the *Commission's* ability to promote access to administrative justice is curtailed.

This research has revealed that the political leadership of the government of the day determines the extent of cooperation and support extended to the *Commission* by government

institutions and agencies. Further, the research has also shown that the current government of Kenya has made it increasingly difficult for oversight institutions such as the *Commission* to work effectively. For example according to the study, in instances where some Commissions have insisted to work in accordance with their mandate without fear or favour, they have received threats from the government of the day including starved funding or disbandment altogether. This is a critical observation in relation to the public accessing administrative justice since it does not solely depend on the ombudsman as an institution, but more so on the overall political leadership of the government of the day. The public tends to lose faith in oversight institutions such as the *Commission* when they witness harassment towards such institutions from the government of the day.

In view of the above, it is recommended that in line with respect for the rule of law, the current government of Kenya should abide by and respect the new constitutional dispensation that provides for oversight institutions such as the *Commission* that is mandated to challenge governmental power.

The relationship between the National Assembly and the *Commission* is a very crucial one owing to the nature of their engagements. The National Assembly plays an oversight role over the *Commission* and it tables its Annual and Special Reports before the National Assembly for debate and appropriate action. The research has however shown that the National Assembly rarely gives such Reports the seriousness they deserve due to ‘more pressing’ parliamentary business rendering the *Commission’s* work an exercise in futility. The National Assembly also rarely takes any action when Reports are submitted by the *Commission* on failure of a public body or officer to comply with its recommendations.

In light of the above, it is recommended that the *Commission* partners with civil society organizations to make issues of administrative justice politically relevant not only to citizens but also to the National Assembly so that the required support is extended to the *Commission*. It is further recommended that a Standing Select Committee on the Commission on Administrative Justice be set up in the National Assembly comprising of members from all or a majority of the political parties whose key role will be to discuss, debate and vote upon the Reports of the *Commission* as is the practice in Ontario.⁴³¹ Such a Standing Select Committee will give the *Commission* the much needed ‘access’ to Parliament hence more meaningful and fruitful engagements.

This study established that the Judiciary is yet to fully appreciate the need for interdependence typified in the modern legal jurisprudence where the Court enforces the decision of the ombudsman where it has acted within the scope of its powers.⁴³² The *Commission* currently lacks coercive powers of enforcement and hence has to rely on the courts to enforce its decisions. The Court’s position as regards the same was made clear in the *Judah Abekah* decision where the Learned Judge contended that public bodies have no obligation to implement the reports, findings and recommendations of the *Commission*.⁴³³ This essentially implied that the decisions or recommendations of the *Commission* are non-binding in nature.

Despite the Court’s view in the *Judah Abekah* decision, emerging jurisprudence from the Constitutional Court of South Africa gives a different position. The South African Constitutional

⁴³¹ See generally, Brian Goodman, The Ontario Legislature’s Select Committee on the Ombudsman, (1983) Vol. 21 No.3, *Osgoode Hall Law Journal*, available at <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1955&context=ohlj>>, (accessed 1 August 2016).

⁴³² Otiende Amollo, former Chairperson of the Commission on Administrative Justice, *Enhancing Access to Justice: The Role of the Commission on Administrative Justice in Kenya’s Constitutional Dispensation*, 18.

⁴³³ See generally (n 79).

Court declared that the Public Protector's recommendations were indeed binding and that President Jacob Zuma's failure to comply with the same was therefore unconstitutional.⁴³⁴ It is recommended that the Kenyan Courts do follow suit in light of emerging jurisprudence on the binding nature of the ombudsman's findings and support the *Commission* in enforcing its decisions. It is only through such support that the public will be able to access administrative justice.

It is also recommended that the *Commission* takes advantage of alternative dispute resolution (ADR) mechanisms to resolve complaints, where possible, as opposed to only resorting to courts of law. This research has shown, in Chapter 4 that adoption of such mechanisms leads to disputants owning the decision made after such deliberations and are more likely to act in accordance with the same. Such deliberations also eliminate the difficulties experienced by the *Commission* in seeking to enforce its decisions.

Emphasis needs to be placed on cultivating as well as strengthening a close working relationship between the *Commission* and the Judiciary as well as other agencies such as the Ethics and Anti-Corruption Commission (EACC), the Kenya National Commission on Human Rights (KNCHR), the National Anti-Corruption Campaign Steering Committee, the National Cohesion and Integration Commission (NCIC) and Transparency International (TI-Kenya Chapter) so as to complement the work the *Commission* does. In the case of the Judiciary for example, such a close working relationship will enable the Judiciary to appreciate its role in providing access to administrative justice in Kenya.

⁴³⁴ See generally (n 366).

5.2.3 Restraints in the Commission's jurisdiction and powers act as a limitation to the execution of its mandate

One of the specific objectives of this research was to examine whether the jurisdiction and powers of the *Commission* act as a limitation in the execution of its mandate. As this study has shown, in Chapter 3, the *Commission's* jurisdiction and powers suffer from restraints that act as a limitation to execution of its mandate. The *Commission* generally has extensive powers but the same seem to be curtailed where it matters the most; enforcement of the *Commission's* decisions. This research has revealed that the *Commission's* recommendations are not accorded the seriousness they deserve by government institutions and are treated as mere declarations. This is especially the case where such recommendations are made against influential figures in government.

The study has also established that limited cooperation with and support for the *Commission* from government institutions and agencies has a bearing on the *Commission's* jurisdiction and powers. This is because failure to cooperate with the *Commission*, especially as regards non-compliance with its decisions and recommendations renders it incapable of exercising its powers.

The *Commission* exists to seek justice for the lowly and downtrodden in society who are defenseless against governmental power. The *Commission's* lack of coercive powers of enforcement therefore has dealt a huge blow to its ability to promote access to administrative justice. This is because an aggrieved party who lodges a complaint against a public officer or institution, due to non-compliance by such officer or institution with the decisions of the *Commission*, is unable to get justice for an administrative wrong suffered. It is recommended that

the *Commission* lobbies for the amendment of relevant legislation to enhance the legal framework for the enforcement of its recommendations and decisions. More specifically, the *Commission* needs to lobby for legally entrenched coercive powers of enforcement if at all they are to impact the administrative justice landscape in Kenya. Such powers are bound to bring about efficiency in the *Commission's* work.

The study has revealed, through the *Judah Abekah* decision, that the decisions and recommendations of the *Commission* lack any binding force and are complied with merely on the basis of moral suasion. This continues to weaken the *Commission's* mandate as it is unable to secure compliance with its decisions. It is therefore recommended that the Commission on Administrative Justice Act be amended to elevate the decisions and recommendations of the *Commission* to the level of court decisions and be formally adopted by the courts as final and binding as is the case in Ghana. This will enhance compliance with the same.

The study has established that the *Commission's* powers are generally limited to carrying out investigations on complaints, offering advice through advisory opinions, litigating and referring cases to the Office of the Director of Public Prosecutions (ODPP) where parties fail to honor summonses or where there is need for prosecution as well as making recommendations. Despite this, the study has established that the Judiciary, Executive and Legislature interpret the reach of the *Commission's* jurisdiction and powers in the most limited sense resulting in non-compliance with their decisions by government institutions and agencies. It is recommended that the various arms of government should appreciate the transformative effect of the 2010 Constitution and should take into account the spirit as opposed to the letter of Constitution.

This study has further revealed that inadequate funding curtails the *Commission's* jurisdiction and powers especially in terms of its ability to execute its mandate of taking appropriate remedial action. In that regard, the *Commission* must have adequate resources for the same. The Constitutional Court of South Africa for instance contends that “within the context of breathing life into the remedial powers of the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy.”⁴³⁵ It is recommended that Parliament should avail the required resources to the *Commission* to enable it to effectively execute its mandate.

⁴³⁵ See (n 366) 28.

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APPENDIX 1: DATA COLLECTION SCHEDULES

I. INTERVIEW SCHEDULE

PARTICIPANT NO.	PSEUDONYM	SEX	OCCUPATION OF PARTICIPANT	DATE OF INTERVIEW	PLACE OF INTERVIEW
1.	Eliud	Male	Lawyer	1 st July 2016	Nairobi
2.	Terry	Female	Lawyer	5 th July 2016	Nairobi
3.	Ken	Male	Lawyer	5 th July 2016	Nairobi
4.	Waweru	Male	Lawyer	5 th July 2016	Nairobi
5.	Annette	Female	Lawyer	5 th July 2016	Nairobi
6.	Eric	Male	Lawyer	5 th July 2016	Nairobi
7.	James	Male	Lawyer	5 th July 2016	Nairobi
8.	Mark	Male	Lawyer	5 th July 2016	Nairobi
9.	Joy	Female	Lawyer	13 th July 2016	Machakos
10.	Nguku	Male	Consultant	19 th July 2016	Nairobi
11.	Kisinga	Male	Driver	4 th July 2016	Machakos

12.	Chebet	Female	Lawyer	4 th July 2016	Machakos
13.	Kisilu	Male	Office Assistant	4 th July 2016	Machakos
14.	Jennifer	Female	Self-employed	4 th July 2016	Machakos
15.	Valerie	Female	Self-employed	4 th July 2016	Machakos
16.	Mwende	Female	Court Clerk	4 th July 2016	Machakos
17.	Mokoi	Male	Record Keeper	4 th July 2016	Machakos
18.	Diana	Female	Lawyer	8 th July 2016	Uasin Gishu County (Eldoret)

II. QUESTIONNAIRE SCHEDULE

PARTICIPANT NO.	PSEUDONYM	SEX	COUNTRY	OCCUPATION OF PARTICIPANT	DATE OF ISSUANCE OF QUESTIONNAIRE	DATE OF RECEIPT OF QUESTIONNAIRE
1.	Claire	Female	Nairobi	Lawyer/Lecturer	2 nd July 2016	20 th July 2016
2.	Mogusu	Male	Nairobi	Student	11 th July 2016	16 th July 2016
3.	Akoth	Female	Nairobi	Lawyer	2 nd July 2016	5 th July 2016
4.	Benta	Female	Kajiado	Lawyer	2 nd July 2016	10 th July 2016
5.	Mwangi	Male	Nairobi	Lecturer	9 th July 2016	12 th July 2016
6.	Mutugi	Male	Nairobi	IT Specialist	15 th July 2016	15 th July 2016
7.	Wamuyu	Female	Nairobi	Campus Student	11 th July 2016	16 th July 2016
8.	Damaris	Female	Machakos	Lawyer	9 th July 2016	15 th July 2016

9.	Prisca	Female	Nairobi	Lawyer	4 th July 2016	4 th July 2016
10.	Wanyama	Male	Nairobi	Lawyer	15 th July 2016	20 th July 2016
11.	Peter	Male	Kisumu	Lawyer	7 th July 2016	14 th July 2016
12.	Kamau	Male	Nairobi	Self-employed	6 th July 2016	12 th July 2016
13.	Melba	Female	Nairobi	Lawyer	2 nd July 2016	12 th July 2016
14.	Tony	Female	Nairobi	Self-employed	11 th July 2016	16 th July 2016
15.	Karen	Female	Nairobi	Lawyer	4 th July 2016	5 th July 2016
16.	Christine	Female	Busia	Lawyer	2 nd July 2016	8 th July 2016
17.	Mbinga	Male	Mombasa	Researcher	2 nd July 2016	12 th July 2016
18.	Denah	Female	Mombasa	Lawyer	9 th July 2016	12 th July 2016
19.	Charity	Female	Mombasa	Nurse	9 th July 2016	12 th July 2016

		e	sa			
20.	Purity	Femal e	Momba sa	Tailor	9 th July 2016	12 th July 2016
21.	Joel	Male	Narok	Self- employed	6 th July 2016	12 th July 2016
22.	Martin	Male	Momba sa	Businessman	11 th July 2016	15 th July 2016
23.	Bettina	Femal e	Momba sa	Business lady	11 th July 2016	15 th July 2016
24.	Margaret	Femal e	Momba sa	Teacher	11 th July 2016	15 th July 2016
25.	Obarima	Male	Kisii	Farmer	6 th July 2016	12 th July 2016

APPENDIX 2

INTERVIEW GUIDE

THE OFFICE OF THE OMBUDSMAN AS AN ADVOCATE OF ACCESS TO ADMINISTRATIVE JUSTICE: LESSONS FOR KENYA

To be filled by the interviewer

Interview location (city and country): _____

Date: _____ day of _____, 2016.

Place of interview: _____

Section A: Preliminary

Good morning/afternoon/evening. My name is Judy Achieng Kabillah. I am currently pursuing a Masters Degree in Law at the University of Nairobi. I am carrying out this interview as part of a study on the Commission on Administrative Justice (hereinafter referred to as the *Commission*) as an advocate of access to administrative justice. This study is intended to examine whether the *Commission* is promoting access to administrative justice. This is done through assessing the accessibility of the *Commission* to the public, the extent of cooperation of government institutions and agencies with the *Commission* as well as the extent of jurisdiction and powers of the *Commission* in carrying out its functions.

Section B: Respondent's Personal Information (Optional)

Respondent's Name (and Title): _____

Position: _____

Contact Address: _____

Telephone: _____

Respondent: I hereby certify that the above personal details are correct and true to the best of my knowledge.

Date: _____ Sign: _____

Section C: Questions for Commission on Administrative Justice Commissioners and Staff

1. Does Parliament take any action against public institutions whenever the *Commission* reports failure to comply with its recommendations?
2. If yes, what kind of action is taken?
3. Whether Parliament has taken action or not, what effect does this have on the *Commission's* effectiveness?
4. Are there any deliberate attempts to reach disadvantaged persons (disabled, illiterate or those that speak only in mother-tongue)?
5. If yes, what kind of steps?
6. What causes lack of cooperation by government institutions and agencies?
7. Can lack of cooperation by government institutions and agencies be attributed to lack of knowledge on the *Commission's* constitutional status, role and function?
8. Explain your answer.
9. If yes, what has the *Commission* done to rectify this position?

Section D: Questions for members of the public

1. Do you know about the Commission on Administrative Justice?
2. How did you know about the *Commission*?
3. What do you know about the *Commission*?
4. Do you know where their offices are located?
5. If yes, kindly state where.
6. Is the office located in an area that is convenient to reach?
7. How easy or difficult is it to lodge a complaint?
8. Do you know about any outreach/ awareness raising activities or programs carried out by the *Commission*?
9. In your view, is the *Commission* making enough efforts to make itself known to the public?
10. What would you recommend to the *Commission* to make it more known to the public?

QUESTIONNAIRE

THE OFFICE OF THE OMBUDSMAN AS AN ADVOCATE OF ACCESS TO ADMINISTRATIVE JUSTICE: LESSONS FOR KENYA

Section A: Preliminary

Good morning/afternoon/evening. My name is Judy Achieng Kabillah. I am currently pursuing my Masters Degree in Law at the University of Nairobi. I am carrying out this interview as part of a study on the Commission on Administrative Justice (hereinafter referred to as the *Commission*) as an advocate of access to administrative justice. This study is intended to examine whether the *Commission* is, so far, promoting access to administrative justice. This is done through assessing the accessibility of the *Commission* to the public, the extent of cooperation of government institutions and agencies with the *Commission* as well as the extent of jurisdiction and powers of the *Commission* in carrying out its functions.

Section B: Respondent's Personal Information (Optional)

Respondent's Name : _____

Contact Address: _____

Telephone: _____

Respondent: I hereby certify that the above personal details are correct and true to the best of my knowledge.

Date: _____ Sign: _____

Section C: Questions for members of the public

1. Do you know about the Commission on Administrative Justice?

Yes/No (Please tick appropriately)

2. How did you know about the *Commission*?
-

3. What do you know about the *Commission*?

4. Do you know where their offices are located?

Yes/No (Please tick appropriately)

5. If yes, kindly state where _____

6. Is the office located in an area that is convenient to reach or access?

Yes/No (Please tick appropriately)

Explain your answer.

7. In your view, is it easy or difficult to lodge a complaint?

Easy/Difficult (Please tick appropriately)

8. Explain your answer.

9. Do you know about any outreach/ awareness raising activities or programs carried out by the *Commission*?

10. If yes, which ones?

11. In your view, is the *Commission* making enough efforts to make itself known to the public?

Yes/No (Please tick appropriately)

12. Explain your answer.

13. What would you recommend to the *Commission* to make it more known to the public?

Your time and cooperation is highly appreciated!