UNIVERSITY OF NAIROBI SCHOOL OF LAW

PAKLANDS CAMPUS

CHALLENGES FACING IMPLEMENTATION OF ADMINISTRATIVE JUSTICE BY THE KENYAN OMBUDSMAN

A RESEARCH PROJECT SUBMITTED TO THE UNIVERSITY OF NAIROBI IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M)

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G62/11079/2018

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NOVEMBER 2019

Declaration

Student's Declaration

I declare that this research project is my original work and has not been presented before for a degree in this or any other University. Secondary sources have been duly acknowledged and referenced.

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Owino Kojo G62/11079/2018

Date: ……...

Supervisor's Declaration

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

…….

Dr. Seth Wekesa

University of Nairobi

School of Law

Date: ……...

This is for Kyla

May you grow to be HAPPY and enjoy the gift of Life and to overcome its challenges

Acknowledgements

The Commission on Administrative is an invaluable constitutional gift to the people of the Republic of Kenya. It is the Commission's modus operandi, and my desire to see a positive change in the governance system in Kenya, that inspired this research project. In the course of my research, I interacted with and consulted a number of (former) members of the Commission, the secretariat and scholars in the field of administrative justice on the research topic herein from where I obtained useful ideas and guidance.

I received wise advice and valuable insight from Ms. Irene Naserian, a Senior Legal Officer at the Commission on Administrative Justice, which advice and ideas have immensely contributed to the development and finalization of this study. I will, forever remain grateful.

This study would not have been complete without the guidance, support and cooperation of Dr. Seth Wekesa, who patiently took me through the entire process from preparation (by encouraging me to read and summarize at least thirty-five relevant journal articles, which I did delightedly) to the Conclusion and recommendation (on which he added useful ideas, sources and materials which contributed to the final draft of this project.) In the process, I learnt more than I anticipated.

I also wish to acknowledge Professor Ben Sihanya, Dr. Humphrey K. Njuguna and Dr. Nkatha Kabira for helping me to develop the research topic and to come up with the proposal. I received valuable knowledge on research and learnt beneficial drafting skills.

I acknowledge the moral support and legal advice from Mercy Gladwell, to whom, I will forever remain indebted.

Abstract

Although Kenya has enacted a law establishing an Ombudsman institution, nevertheless, the decisions of the said institution remain largely unenforceable. This could be caused by a number of factors including lack of clearly defined legal sanctions applicable to those entities which do not abide by the recommendations of the Ombudsman.

Enforcement of Ombudsman's decisions in the developed countries is quite different from that in developing and less developed countries in that the developed countries have established strong governance structures which ensure that their Ombudsmen's decisions are implemented as a matter of course based on the practice of moralsuation; the same does not and cannot apply to the developing and less developed countries. Given the weak governance structures in Kenya and its long history of abuse of human rights, the Kenyan state cannot be trusted to ensure compliance with the Ombudsman's decisions purely on the basis of moralsuation. It is for this reason that that this study proposes solutions to help in addressing the challenge of non-enforceability. These measures include legislative changes aimed at increasing the legal powers of the Ombudsman by making its decisions more effective, enforceable and/or binding.

This study reviews the relevant literature and legal frameworks of various jurisdictions within the world legal system and the extent to which governance structures and the law in different jurisdictions support or suppress enforcement of the decisions of the Ombudsman with emphasis on the two broad categorization of the countries as above mentioned. This is achieved through a mixed methodological approach incorporating both doctrinal and historical methodology.

The general ombudsprudence in the global legal system today is derived from the classical Swedish Ombudsman model in which the decision of the Parliamentary Ombudsman (*Justitieombudsman*) was made in form of recommendations to the executive (the King) and implementation was left to the goodwill of the King. The model was largely adopted by the global legal system. The classical model has been proposed to be used the world over. However, the model does not take into account realities of different jurisdictions especially those of countries with weak legal/governance systems. Every Government which adopted the idea had a unique

challenge that it sought to address. As different jurisdictions adopted the idea of Ombudsman institution and depending on their own unique circumstances, the institution was instituted differently and with differing mandates.

The study maintains that what is in existence in the name of Ombudsman in Kenya is not well placed to implement the right to fair administrative action in particular, and administrative justice in general. It proposes radical changes to the existing laws on Ombudsman institution and the system of governance in general. A time has come when an Ombudsman must stop being a linesman to become the referee, when Ombudsman must stop being a nurse to become a surgeon, when Ombudsman must stop sitting on the fence, to observe and report, but to actively engage in corrective surgery and to take sides by siding with justice. By so doing, the Ombudsman's decisions must be implemented, implying that the same must be either enforceable on their own weight or binding upon the entities against whom they are made and only the Court should exempt a public officer from implementing the Ombudsman's decisions.

This study confirms, affirmatively, the main hypothesis under chapter one: although Kenya has enacted a law establishing an Ombudsman institution, the decisions of the said institution remain largely unenforceable due to several factors including, but not limited to (i) lack of strong and stable governance structures in the country and (ii) various limiting provisions of the law.

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CHAPTER ONE
INTRODUCTION TO THE STUDY

1.0 Background to the study

Black's Law Dictionary defines Ombudsman as an official appointed to receive private citizens' complaints against the Government and to investigate and report the same.[1] An Ombudsman scheme may be constituted by an individual as the Ombudsman or as a collegiate institution as we shall see under chapter two. An Ombudsman is an alternative to the adversarial system of dispute resolution, especially between citizens of a given polity and Government agencies.[2] The court system is, in most cases, an effective dispute resolution mechanism. This could be due to the fact that the findings, judgments, orders and/or decrees of the Court are binding upon the relevant parties including the State. The court has a myriad of ways of enforcing its orders and decrees through processes such as attachment and sale of property, arrest and detention, commitment to civil jail and so on. This is what the Ombudsman lacks in Kenya as in most parts of the world.

Administrative law forms part of the administrative justice system which deals with the arena of legal mechanisms employed by law-administering agencies outside the realm of the courts, and the supervisory powers of the courts over such agencies.[3] Administrative law ensures that public officials do not abuse their powers.

The Kenyan Ombudsman compliments the court system in enforcing the right to fair administrative action.[4] However, the court process tends to have many shortcomings including costs, time-consumption, inaccessibility, technicality and adversarialism. The courts, on their own, cannot provide all the answers to administrative injustices occurring in any particular country. This explains the need for an Ombudsman institution in a country. Judy Achieng Kabillah posits that the rationale behind the Ombudsman scheme is that it should provide an alternative dispute

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[1] Black's Law Dictionary, 7th Edition, St. Paul Minn, 1999, 1115.
[2] Ibid.
[3] Felix Frankfurter, *The Task of Administrative Law*, (75 U. Pa. L. Rev. 614, 615, 1927) in Black's Law Dictionary 7th ed., p. 46.
[4] Article 47 of the Kenyan Constitution provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

settlement and lift pressure from the ordinary court system.[5] Quasi-judicial approach to resolving disputes arising from allegations of maladministration may be more effective in a cuntry. Various government offices and officials engage in a similar dispensation at different levels. These either play the role of Ombudsman or are directly or indirectly engaged in quasi-judicial processes. According to Richard Kirkham, an Ombudsman institution is one of the necessary components of a fully functional administrative justice system.[6]

The Commission on Administrative Justice, hereinafter referred to as 'CAJ' is the Kenyan Ombudsman institution. It is established under section 3(1) of the Commission on Administrative Justice Act[7] pursuant to the provisions of Article 59(4)[8] of the Kenyan Constitution. Consequently, CAJ enjoys the powers and privileges under chapter fifteen of the Constitution of Kenya.

CAJ has a very wide mandate, especially those which are provided for by section 8 of the Commission on Administrative Justice Act. Pursuant to section 8(a) of the Act, CAJ's mandate is to "investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice." The functions of the Commission as outlined under section 8(b) of the Commission on Administrative Justice Act include investigating complaints of "abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector." Section 8(d) of the Commission on Administrative Justice Act empowers the Commission to "inquire into all allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service."

[5] Judy Achieng Kabillah, 'The Office of the Ombudsman as an Advocate of Access to Administrative Justice: Lessons for Kenya' (LL.M Research Project, UON 2017) 18. <http://erepository.uonbi.ac.ke/bitstream/handle/11295/101617/Kabillah_The%20Office%20of%20the%20Ombudsman%20as%20an%20Advocate%20of%20Access%20to%20Administrative%20Justice%20Lessons%20for%20Kenya.pdf?sequence=1&isAllowed=y> accessed 08 May 2019.

[6] Richard Kirkham, 'Explaining the lack of enforcement power possessed by the ombudsman' (2010) 30/3 Journal of Social Welfare and Family Law <https://doi.org/10.1080/09649060802550733> accessed on 31 January 2019

[7] Chapter 102A of the Laws of Kenya, s. 3(1).

[8] Article 59(4) states that "Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate Commissions." The part referred to therein is Part 5 of Chapter Four of the Constitution which establishes the Kenya National Human Rights and Equality Commission.

The foregoing mandate is wide enough to ensure that the Commission oversights the public sector. What is not clear, both in law and in practice, is the power given to the Commission to ensure that it carries out its mandate effectively and successfully. As we shall see under chapter four, the only remedy which is expressly available to CAJ by law is forwarding its decisions to the National Assembly.[9] This robes the Commission of the very independence it purports to have as an Independent Constitutional Commission.[10] Independence of a constitutional commission is pillared on two non-negotiable imperatives namely financial autonomy[11] and functional independence.

The law does not provide for any action which the National Assembly should take after receiving the report of the Commission; Sections 8(C) and 42(4) of the Commission on Administrative Justice Act are silent on the same. The said sections do not provide for the structures and the limitations within which the National Assembly should operate.

It is clear from the foregoing that the Commission has powers to exercise its mandate but not to enforce its decisions, a function for which it may have to rely on the goodwill of the legislature[12] and the executive in order to succeed. Richard Kirkham comments on the shortcomings of a similar system practiced in England by the Local Government Ombudsman (LGO)[13] and postulates that right from the beginning, the requirement that LGO reports to Parliament presented a constitutional problem. He posits that whereas the institution reported failure by local authorities to implement its reports, the said authorities were elected by the people and were expected, under the constitution, to operate autonomously from the central Government.[14] It was not therefore appropriate for Parliament, to have powers that enable it to intervene in disputes arising between

[9]Section 8 (c) of the Commission on Administrative Justice Act, No. 23 of 2011 requires the Commission to report its decisions to the National Assembly as the ultimate action.
[10] Article 249(2)(b) of the Constitution provides that Constitutional Commissions are independent and not subject to direction or control by any person or authority.
[11] The Chairperson of the Commission in its Annual Report for the financial year ended 30th June 2018 lists limited resources and frequent downtime of the Integrated Financial Management Information System (IFMIS) as some of the challenges affecting optimal performance of the Commission's functions. This has been a challenge over the years going by the Annual Reports for the years 2012-2017.
[12] Ibid., n 9.
[13] Kirkham (n 6).
[14] Ibid.

LGO and local authorities.[15] This necessitated a change in law[16] and establishment of a Representative Body[17] which then received reports of LGO. The system still failed since the Representative Body was perceived by LGO to be protecting the interests of the local government. The body was dissolved in 1989.[18] Kirkham therefore explains how England managed to deal with the challenge caused by the reporting obligation of the Ombudsman.

The Constitution provides for the roles and mandate of constitutional commissions.[19] Under Article 252(3), the Ombudsman has "powers to issue summons to a witness to assist for the purposes of its investigations." The Commission has issued several Summonses since its inception which have been ignored by public officers and witnesses but it has not enforced any of the said Summonses. The Act also provides for general powers[20] which can be exercised by the Commission during investigations or inquiry into a complaint. Similarly, the powers granted are arguably limited and limiting.

It can be deduced therefore that for the Commission to succeed in realizing its mandate, it has to rely on the political goodwill of the executive and the legislature; and cooperation by government officers and offices.

CAJ can thus be likened to a baby who was intentionally dismembered at birth by the cutting of her four limbs, only. The baby, who was born alive and healthy, is now physically disabled and psychologically tortured, with the resultant effect of stunted growth and possible imminent death if sufficient, professional, urgent medical care is not provided to her. From where I sit, I see the tear stained face of *malnutritioned* baby Ombudsman and ask whether I should continue sitting.

It is to this end that this study seeks to find out the challenges facing enforceability of CAJ's decisions. The study seeks to establish this by determining how, or to what extent, lack of authority,

[15] Ibid.
[16] By enactment of the Local Government Act, 1974.
[17] This body was made up of appointed representatives from the elected local government community.
[18] Ibid., 257. The dissolution was occasioned by the Local Government and Housing Act, 1989.
[19] See Article 252 of the Constitution of the Republic of Kenya.
[20] See generally sections 26, 27, 28, 29 and 31 of the Commission on Administrative Justice Act, No. 23 of 2011.

political interference, cooperation by public entities and availability of resources affect enforceability of CAJ's decisions and its effectiveness.

1.1 Statement of the problem

Although Kenya has enacted a law establishing an Ombudsman institution, nevertheless, the decisions of the said institution remain largely unenforceable. This could be caused by a number of factors including lack of clearly defined legal sanctions applicable to those entities which do not abide by the recommendations of the Ombudsman. The various challenges negatively affect the institution's overall mandate of addressing maladministration within the public service.

1.2.0 Statement of Objectives

1.2.1 Central Objective

To examine, generally, the challenges facing implementation of Administrative Justice by the Kenyan Ombudsman.

1.2.2 Specific Objectives

1. To determine the best model of Ombudsman for Kenya.
2. To explore the place and role of Ombudsman in the global legal system in terms of enforcing the right to fair administrative justice.
3. To find out factors affecting enforcement of Ombudsman's decisions in Kenya.
4. To determine the necessary changes that will guarantee optimal operation of Ombudsman institution and enforcement of its decisions in Kenya.

1.3 Research questions

This study seeks to realize the foregoing specific objectives by providing answers to the questions below:

1. What would be the best Ombudsman model for Kenya?

2. What is the place and role of Ombudsman in the modern world in terms of enforcing the right to fair administrative justice?
3. What are factors affecting enforcement of Ombudsman's decisions in Kenya?
4. What necessary changes will ensure optimal operation of Ombudsman institution and enforcement of its decisions in Kenya?

1.4.0 Hypotheses

This research is based on two hypotheses:

1. Main hypothesis

Although Kenya has enacted a law establishing an Ombudsman institution, the decisions of the said institution remain largely unenforceable. This could be caused by a number of factors including lack of clearly defined legal sanctions applicable to those who do not abide by the recommendations of the Ombudsman coupled with lack of political good-will to ensure that the decisions of the Ombudsman are implemented by public entities.

2. Null hypothesis

The decisions of the Commission on Administrative Justice are largely enforceable and are not greatly affected by lack of authority, lack of political will, non-cooperation by public institutions/officers and/or limited resources.

1.5 Justification of the study

i. To contribute to the body of literature

The concept of Ombudsman is a recent phenomenon in Kenya having been officially introduced in 2007 through the creation of the Standing Committee on Public Complaints. The concept is however old in other jurisdictions such as Sweden where it was embraced in the early 19th century.

Given that the concept of Ombudsman is fairly new in Kenya, most stakeholders may not be well conversant with what an effective Ombudsman institution entails. Indeed, no research study has been specifically dedicated to examining enforceability of the decision of the Ombudsman in Kenya and as such this study provides an important academic reference regarding the same.

The gap in the existing literature is that none has recommended the change in powers of the Kenyan Ombudsman from the traditional reporting mandate borrowed from the Swedish Ombudsman model. The reality in Kenya is that the country has weak governance structures coupled with a history of abuse of human rights and the public service is not expected to welcome and to implement the decision of the Ombudsman.

Amelia Otono, for example, she proposes that, as a solution to the challenge of non-enforceability, the Kenyan Ombudsman should foster its relationship with the National Assembly and Government agencies to enhance compliance with its decisions.[21] The real remedy lies in vesting the institution with powers to implement its decisions. This study takes a unique approach in that it analyses the Ombudsprudence in the developed countries vis a vis that of the developing and less developed countries. Countries in the former category have strong, stable, effective and long established governance structures which are somewhat lacking in the developing and less developed countries, most of which can be said to be grappling with third world governance hitches.

This study demonstrates that the mandate associated with the classical Ombudsman cannot work effectively in the latter category of countries (third world countries). The Governments in the developing countries with weak governance systems such as Kenya cannot be trusted to ensure compliance with decisions of the Ombudsman on moral grounds alone. This leads to the demand for other measures to ensure compliance with the Ombudsman's decisions in the said category of countries. It is these measures that this study advocates for.

[21] Amelia J. A Otono, 'Public Complaints and the Ombudsman in Kenya' (LL.M Research Project, University of Nairobi 2018) 57-59.

ii. To influence policy in legal reform.

This study proposes a raft of legal reform proposals aimed at changing the structure and enhancing the powers of the Ombudsman in Kenya to ensure that its decisions are not only respected but are also enforceable. In so doing, the study seeks to influence policy in legal reform through its recommendations. This is done taking into account the difference between the realities of governance in developed countries on the one hand and those of developing and less developed countries. As has been stated, the former category has stronger governance structures as compared to the latter. This implies that whereas Governments in developing countries comply with the Ombudsman's decisions purely on the basis of moralsuation, those in developing and less developed countries cannot be trusted to do so. It is for this reason that that this study proposes a raft of measures to address the challenge of non-enforceability and its consequences. These include legislative changes aimed at increasing the legal powers of the Ombudsman by making its decisions enforceable and/or binding.

No study has been dedicated to analyzing and recommending changes which are aimed at tremendously increasing the powers of the Kenyan Ombudsman, through legal reforms, especially as regards enforcement of its decisions premised on the reality that the traditional practice of enforcing Ombudsman's decisions based on moral grounds alone cannot succeed in the country.

1.6.0 Theoretical Framework

The study is based on various legal theories including Legal Positivism, Human Rights Theory and Utilitarianism.

1.6.1 Positive Law Theory

Positivism is concerned with logical/methodological proof of data, facts or information.[22] Legal positivists view law as a social construction; as that which has been posited/ordered. John Austin

[22] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Third Edition, OUP, NY, 2012) 57.

believes in law as what it really is, not what it ought to be.[23] Traditional positive law proponents argue that law is a command by a sovereign, backed by a sanction; which is the punishment one receives for disobeying the order. This is what is commonly referred to as the command theory. Jeremy Bentham was an ardent proponent of the command theory. He believed that positivism require empirical elucidation of the law devoid of other abstract factors such as metaphysics.[24] In this study, the main challenge experienced by the Kenyan Ombudsman in enforcing its decisions is to be found in the law establishing it which limits the institution's powers regarding is decisions.

In answer to research question number four regarding necessary changes that will ensure optimal operation of Ombudsman institution and enforcement of its decisions in Kenya; and using the above propositions by positive law theorists, what ought to be done for the decision of the Ombudsman to be enforceable is that the existing law should be amended and/or a new law enacted which gives the Ombudsman express powers to execute its decisions and which prescribes sanctions for failure by public officers to comply with the decisions of the institution. Secondly, and given the ongoing debate on Constitutional amendment, it would be beneficial to have the Commission established in the Constitution with clear guidelines as to appointment and/or recruitment of its Commissioners to increase its efficacy.

Positive law theory is more practical in that it does not deal with abstracts. However, in the context of this study, it would be bad practice for public officers to wait for the law to be amended to provide for sanctions for disobedience before they can implement Ombudsman's decisions. It is good public practice and a show of good morals within a society if public officers comply with Ombudsman's decisions as a matter of practice as is the case in Sweden and other developed nations. Ronald Dworkin fiercely criticized positive law theory by arguing that law is not simply a set of rules backed by a sanctions; that law was more complicated and involved other standards.[25]

In conclusion and in spite of the above criticism of positive law theory, it remains the most relevant in the context of this study based on the existing reality of the governance system in Kenya.

[23] M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (Ninth Edn, Second impression, Sweet & Maxwell, London, 2016) 202-204.
[24] Ibid., 202.
[25] Ibid., 593-594.

1.6.2 Human Rights Theory

Human Rights are entitlements derived from nature and enjoyed by human beings. Today, rights are understood to mean legitimate entitlements that generate correlative duties or obligations. The theory of human rights asserts that individuals enter into society with certain basic rights and no government can take away these rights. These basic rights evolve out of nature because human beings are creatures of nature. Human rights are universal.

The Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights.[26] This also suggests that the rights are inalienable, meaning that they cannot be taken away or transferred without a person ceasing to be a human being. The fact that a right can be taken away or that certain rights are not absolute does not mean that those rights are alienable; those rights are overridden by weightier considerations. When a right is overridden, it is left unsatisfied so as to promote a morally weighty end, the person still has the right. If taken away, a person ceases to be a human being. It is worthy to note that claim to a right can be alienated in certain circumstances but entitlement to the right cannot be alienated.

John Rawls states that in a society, every person is equal in right and is entitled to the same without interfering with the rights of others.[27] Ronald Dworkin maintains that it is wrong for any Government to violate the rights to which an individual is entitled even if the violation is meant to protect the interest of the entire community.[28]

The Commission on Administrative Justice has a complementary jurisdictions on human rights issues.[29] It also serves to ensure compliance with rights of minority/marginalized groups. The Commission is the oversight agency of the constitutional right of access to information.[30] One of the objects of constitutional commissions is to secure the observance by all State organs of

[26] Article 1 of the Universal Declaration of Human Rights.
[27] M.D.A Freeman, (n 23) 527-540.
[28] Ibid., 547.
[29] In Kenya, the basic human rights and freedoms are entrenched under chapter four of the Constitution. The rights under chapter 4 are however not conclusive and this is recognized under Article 19(3)(b) of the Constitution.
[30] See long title and section 2 of the Access to Information Act No. 31 of 2016. See also Article 35 of the Constitution on the right of Access to Information.

democratic values and principles.[31] The Constitution recognizes human rights as part of the national values and principles of governance in Kenya.[32]

Observance of human rights by the Government and all public officers would make the work of the Kenyan Ombudsman much easier. The Commission would have an easy time oversighting the constitutional right to fair administrative action as well as the right of access to information. Consequently, observance of rule of law and constitutionalism would improve leading to better governance and development for the country. This will lead to improvement in the living standards of the citizens which is good for the health and welfare of the society.

This problem with the human rights theory is that it is individualistic in nature and does not take into account the welfare of the larger society. This leads to the need for a theory which considers the general good of the entire community which takes us to the next theory, utilitarianism.

1.6.3 Utilitarianism

The objective of this theory is maximization of happiness. An efficacious Ombudsman institution would ensure good governance hence increasing the happiness of a majority of the people. Jeremy Bentham opines that nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.[33] He further states that systems which attempt to question the principle of utility deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.[34]

Utilitarianism puts very little or no emphasis at all on individual rights, but portrays the general good of the majority as supreme. The essence of utilitarianism is its consequentialism.[35] It is concerned with maximization of happiness.

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[31] Article 249(1)(b) of the Kenyan Constitution.
[32] Article 10(2)(b) of the Kenyan Constitution.
[33] Ibid.
[34] Ibid.
[35] Wacks (n 22) differentiates consequentialist from deontological systems which he says are opposites. The latter, he opines, holds that rightness or wrongness of an action is logically independent of its consequences.

N.S. Simmonds explains utilitarianism by giving the following illustration.[36] Two people are stranded in a desert island and one, who eventually dies, trusts the other with some money to give to her daughter if the latter survives. The latter, promises to do so, survives and eventually finds the deceased's daughter married to a millionaire and living in a mansion.[37] The money will therefore make little difference to her financial situation.[38] He asks, as a utilitarian, whether he should donate the money to charity instead.[39] He therefore has to weigh between the consequences of breaking the promise to the deceased comrade as against the benefit of giving the money to a charity organization.[40]

The consequence of applying this theory is that the happiness of the majority would hold supreme and since the majority of the people (the citizens) are so far happy with the decisions of the Ombudsman, based on Bentham's calculus of felicity,[41] it is therefore more beneficial to give more powers to the Ombudsman to enforce its decisions. According to Bentham, the more pleasure one has, the greater the good, and the more pain one has, the lesser the good. Calculation of measuring pleasure was aimed at the greatest absolute pleasure.

In the application and implementation of this theory, public participation by all stakeholders including beneficiaries[42] of administrative processes must be involved. Participation of the people is a constitutional principle.

The challenge that the country is likely to face by relying on this theory is that there is no proven objective and/or practical way of measuring happiness. This would lead to a legal or constitutional crisis depending on the manner in which the law provides for the standard.

[36] NE Simmonds, Central Issues in Jurisprudence, 3rd edn (London: Sweet & Maxwell, 2008), 26.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] This is a method of calculating the amount of pleasure which is likely to result from an action. It was formulated by Jeremy Bentham. Also referred to as felicific calculus, utility calculus or hedonistic calculus. Bentham gave variables of pleasure and pain as intensity (I), duration as (D), certainty as (C), Nearness as (N), Fecundity as (F), purity as (P) and lastly extent as €.
[42] Every person in Kenya, including non-citizens, fall under this category.

The first research question asked what would be the best Ombudsman model for Kenya. In answer to the said research question, based on this theory, the best Ombudsman model for Kenya is that which leads to the happiness of a majority of the Kenyan people.

1.7 Literature Review

According to Otiende Amollo[43], the Ombudsman in Africa continuously finds itself in a contradictory situation where it is regarded as the people's defender/watchman but is conferred with soft-power to ensure compliance with its recommendations and decisions. He adds that 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."[44] Amollo, however, fails to mention the exact powers or changes which are necessary to make the Kenyan Ombudsman's decisions enforceable, which is the main goal of this study.

The focus is on African Ombudsmen which is at the core of this study and the argument by Amollo that the powers of the African Ombudsman need to be enhanced is supported by this study. This study further draws a nexus between the Ombudsmen in developed countries with strong legal structures on the one hand and Ombudsmen in developing countries with weak legal structures on the other hand, and how implementation of their decisions on moral grounds alone can, and indeed works, in the former category of countries and not in the latter. That is the gap that this study seeks to fill.

Amelia J. A Otono cites the decision in *Republic v. Kenya Vision 2030 Delivery Board & 2 others Ex-parte Judah Abekah*,[45] where Justice Weldon Korir held that public bodies have no obligation to implement CAJ's reports, findings and recommendations.[46] She proposes that, as a solution, the

[43] Otiende Amollo was the inaugural Chairperson of the Commission.
[44] Otiende Amollo, 'Insights in Enforcing Ombudsman Decisions-The Case of Kenya,' (AOI II Colloquium, Nairobi, February 2015) 2.
[45] *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR.
[46] Amelia J. A Otono, 'Public Complaints and the Ombudsman in Kenya' (LL.M Research Project, University of Nairobi 2018) 57. See also Justice Weldon Korir ruling dated 18.06.2016 in *Republic v. Kenya Vision 2030 Delivery Board & 2 others Ex-parte Judah Abekah* [2015] eKLR, 1.

Ombudsman should foster its relationship with the National Assembly and Government agencies to enhance compliance with its decisions.[47] This, however, is not the best solution to the problem of non-enforceability which is the main challenge facing the Commission. The problem lies, not in the relationship between Ombudsman and Government agencies or Parliament, but in the limited authority given to the Ombudsman. The solution is to amend the law to ensure that the decisions of the Kenyan Ombudsman are enforceable and/or binding.

Amelia's study focused on handling of public complaints by the Ombudsman in a bid to implement the constitutional right to fair administrative action. It is her argument that the main challenge to the work of the Kenyan Ombudsman lies in what she views as a conflict between the Ombudsman and the judiciary in the process of resolution of public complaints, which has always been the role of the judiciary. Conversely, this study argues that it is the Kenyan Ombudsman that has not properly utilized the court system to help it through the process of implementation of its decisions.

The gap in Amelia's work lies in the fact that the same does not give the unique distinction between developed and third world countries and its implication on implementation of Ombudsman's decisions. This study takes a unique approach in that it analyses the Ombudsprudence in the developed countries vis a vis that of the developing and less developed countries. Countries in the former category have strong, stable, effective and long established governance structures which are somewhat lacking in the developing and less developed countries, most of which can be said to be grappling with third world governance hitches.

Judy Achieng Kabillah argues that the Kenyan Ombudsman should not have to seek courts intervention so as to secure compliance with its recommendations.[48] She recommends that government agencies should feel obliged to cooperate with the institution and should proceed to act as proposed by the institution. Kabillah seems to embrace the non-enforcement argument that decisions and recommendations of the Ombudsman lack any binding force and are complied with merely on the basis of moralsuation.[49] This study holds the view that the Kenyan Ombudsman

[47] Ibid., 58-59.
[48] Kabillah (n 5).
[49] Ibid., 115.

should actively engage the courts in a bid to ensure enforcement of its decisions. The study also proposes that decisions of the Kenyan Ombudsman can be more effective if binding upon public entities, not on moral grounds, but by express provisions of the law.

The gap in Kabillah's work is identified by analyzing the difference between the governance structure under which the Kenyan Ombudsman operates on the one hand and those of developed countries with strong and stable governance structures on the other hand. This study proceeds to analyze how implementation of the Ombudsman's decisions are approached in the said countries and it is realized that in countries with strong governance structures, the Ombudsman's decisions are implemented as a matter of course, sometimes based on moral grounds alone. This is not the case in Kenya and other countries which are still struggling with third world problems such as widespread abuse of human rights and lack of constitutionalism.

Kabillah's non-enforcement argument cannot work in a prebendal state such as Kenya and its ilk given their common practice of disregarding rule of law and democracy. There is a close-knit nexus between administrative law and the twin concepts of Rule of Law and democracy. True enforcement of the Kenyan Ombudsman's decisions cannot be achieved by placing mere moral obligation on government agencies and officers. What is needed is a legal obligation which is binding upon the agencies and officers on the basis of operation of the law and not on moral grounds. Morality cannot guide an increasingly capitalistic society such as the one constituting the Kenyan state.

According to Migai Akech, CAJ has effective sanctions and its decisions are largely implemented by public entities.[50] The sanction mentioned by Migai Akech is that of performance contracting. This study argues that CAJ's decisions are not largely implemented by public entities and that the converse is indeed true.[51] If it was true that performance contracting compels public entities to implement the Commission's decisions, Vision 2030 Delivery Board would have been constrained

[50] Migai Akech, *Administrative Law* (1st edn, Strathmore University Press, 2016) 392.
[51] The author comments on this as an officer in the Office of the Ombudsman with first-hand information as to the implementation of the decisions of CAJ.

to implement the Commission's decision in the Abekah case. The Abekah case is discussed at length under chapter four of this study.

Akech also argues that courts should assist the institution by having a willingness to compel public entities to implement CAJ's decisions and by so doing, the courts should require the said entities to give reasons as to why they have opted to reject CAJ's decision.[52] Whereas it is justified for public entities to justify their action of rejecting the Commission's decisions, the sanction proposed by Akech may lead to delay in delivery of justice. The more appropriate approach is for the law, and/or the courts to first declare the Ombudsman's decisions binding upon public entities against whom the decisions are made, but to give the agencies the right to apply to the Court to set aside the decision if, and when, they feel that the same cannot be implemented for one reason or another. It is at that stage that the entities should give their reasons, not for rejecting the decision, but of their intention not to implement the same. This would also help to save the Complainants from looking for the money required to file a court case in terms of court fees and legal costs which may be out of reach of the Complainants, most of whom are from poor backgrounds.

Eyram Adedevo[53] explores effectiveness of Ghana's hybrid[54] Ombudsman institution.[55] He recognizes that the inclusion of anti-corruption framework within the mandate of Ghana's Ombudsman institution is a necessary ingredient. In addition to the anti-corruption mandate, this study proposes that the Ombudsman institution should also have the mandate over the right of access to information. This study proposes that CAJ should be merged with the Commission responsible for preventing corruption and monitoring ethics, and the resultant institution to be established as one constitutional commission.[56]

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[52] Migai Akech, *Administrative Law* (1st edn, Strathmore University Press, 2016) 408-409.

[53] Eyram Adedevo, 'New wine in new wine skins: The anti-corruption framework of Ghana' (2014) 7/3 J World Energy Law Bus.
<https://vpn.uonbi.ac.ke/proxy/60fbd702/https/www.lexisnexis.com/uk/legal/auth/checkbrowser.do?rand=0.6494610352233909&ipcounter=1&cookieState=0&bhcp=1> accessed on 5 February 2019.

[54] Ghana's ombudsman institution has four functions including enforcement of administrative justice, Human Rights watchdog, prevention of corruption and enforcement of ethics in public offices.

[55] Article 216 of the Constitution of Ghana establishes the Commission on Human Rights and Administrative Justice comprising a Commissioner for Human Rights and Administrative Justice and two deputy commissioners for Human Rights and Administrative Justice.

[56] It is worthy to note that the current Ethics and Anti-Corruption Commission is not effective and is not established in the Constitution. It doesn't have the constitutional mandate to prevent corruption as this is within the mandate of the National Police Service under Article 244(b) of the Constitution. Conversely, the functions of CAJ under section

The gap in Adedevo's Article is that he fails to propose a remedy to the problem of ineffectiveness or non-enforcement of Ombudsman's decisions which he correctly identifies to be ailing Ghana's hybrid system. This study goes ahead to contradistinguish the approach given to Ombudsman's decisions in countries with stronger legal structures such as Sweden and those with weak governance structures such as Kenya. In Kenya, implementation of a court decision by public entities is not as easy as implementation of Ombudsman's decision in Sweden.

Syed Bukhari explores the prevailing ombudsprudence in India where the State Ombudsman (Lokayukta) has powers to punish a guilty public officer with a sentence of imprisonment and/or a fine commensurate to the offence.[57] Bukhari also reviews the situation in Pakistan in which the Mohtasib-e-Punjab (Ombudsman institution in Pakistan) has powers to investigate complaints regarding maladministration by Government agencies and has the power to punish like other High Courts in the country.[58] The two foregoing cases expose a sharp contrast with the situation in Kenya where the Ombudsman's recommendations are merely persuasive. The powers vested in the institution in India and Pakistan if applied to Kenya would likely ensure that public institutions take Ombudsman's decisions seriously. In addition to the powers enjoyed by the Ombudsman in India and Pakistan, this study proposes that the decisions of the Ombudsman in Kenya can be more effective if binding upon the public entities against whom it they are made.

Bukhari does not however provide the nexus between the binding nature of Ombudsman's decisions in India and Pakistan and the governance system in the said countries. The two countries are part of the Middle East countries, most of which share the same governance challenges as those in Africa. In this study, the countries are classified as either developing or less developed countries. They do not have strong, stable, effective and long established governance structures as do the developed countries. this explains why their laws have to provide for express sanctions for failure to implement Ombudsman's decisions.

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8 of the Act border on Ethics and Integrity. These include abuse of power, unfair treatment, oppressive or unresponsive official conduct, maladministration, delay, discourtesy and misbehavior.

[57] Syed Mussawar Hussain Bukhari & Muhammad Asif, 'Institutional analysis of Ombudsman: A comparative study of Pakistan, India, UK and USA' (2013) 5/2 IJCRB 709-726. <https://www.researchgate.net/publication /311535149> accessed on 31 January 2019.

[58] Ibid., 714.

1.8 Research Methodology

This study relies on doctrinal research methodology. Secondary data relied upon include constitutions of different countries, relevant statutes from different jurisdictions, international treaties & conventions, text books, scholarly journals & articles, theses, reports and newspaper articles. Several internet sources were also used.

The data collected from the various sources were analyzed for relevance taking into account the objectives and scope of the study. In the process of analyzing data from various jurisdictions, the author compared and contrasted the relevant literature, statutes, Constitutions, case laws, parliamentary reports and the existing international treaties and conventions.

1.9 Limitations and scope of the study

The Commission on Administrative Justice experiences many challenges. This study only focuses on those challenges that affect enforceability of its decisions. The author recognizes that resources, including time, are limited and may not be sufficient to enable him go to the field. There are however sufficient resources to enable the author to conduct a conclusive desktop research on the topic.

1.10 Chapter Breakdown

This study is divided into 5 chapters as follows.

1.10.1 Chapter One – Introduction to the Study

This is the introductory chapter illustrating the background of the study, statement of the problem, research questions, research objectives, hypothesis, justification, theoretical framework, literature review, research methodology employed, limitations & scope of the study and chapter breakdown.

1.10.2 Chapter Two – History of the concept of Ombudsman

Chapter two explains the concept of Administrative Justice in general and provides a historical perspective by analyzing the origin of the Ombudsman institution. It discusses the historical background of the concept of Ombudsman from ancient times, it's institutionalization in Sweden and spread of the idea across the world; to Africa, East Africa and finally to Kenya.

The chapter proceeds to detail the history of the institution in Kenya from 1963 when Kenya obtained its independence from British colonial rule to 2011 when CAJ was established. In so doing, it explores events that transpired prior to the enactment of the Act including policy directives, recommendations of Commissions of Inquiries and Government institutions, the Constitution and other relevant legal & regulatory frameworks.

The chapter also provides a link between the model of Ombudsman adopted by a country and the history of the institution in that jurisdiction. This chapter answers the question "what is the best model of Ombudsman for Kenya?"

The chapter concludes that a hybrid system is the most suitable for Kenya and that the history of the Ombudsman institution in a country informs the Ombudsman model in that country.

1.10.3 Chapter Three – The Place and Role of Ombudsman in the Global Legal System

This chapter looks at the general overview of the place of Ombudsman in the global legal system by examining the manner in which decisions of the institution are treated in various jurisdictions. In so doing, the chapter reviews the relevant literature and legal frameworks of various jurisdictions in the world legal system and the extent to which governance structures and the law in different jurisdictions support or suppress enforcement of the decision of the Ombudsman. The jurisdictions are divided in to two broad categories, namely developed and developing countries. This helps to clarify the prevailing circumstances and jurisprudence in different jurisdictions.

The chapter concludes by emphasizing and affirming the importance of the place and role of the Ombudsman institution in the modern day governance system and recommends that the structural

and functional mandate of the institution should be expanded to carter for issues which were hitherto not covered, and to provide for powers which historically fell outside the scope of the classical Swedish model. The chapter also concludes that the value attached to an Ombudsman's decisions differ from one jurisdiction to another, yet, the need to respect the same cuts across all jurisdictions

1.10.4 Chapter Four – Enforceability of the decision of Ombudsman in Kenya

This chapter examines the enforcement experience of the Ombudsman institution in Kenya. It reviews the challenges that have so far hindered enforceability of the decisions of the current Commission and its predecessor's. By so doing, the chapter offers a critique of the existing and previous functions; powers and limitations of the institution as regards its operations, as well as the specific factors affecting enforceability of its decisions. The prevailing jurisprudence in Kenya regarding enforceability of the Commission's decisions is also widely discussed under this chapter.

The chapter concludes that the main factors affecting enforcement and effectiveness of the decision of the Ombudsman in Kenya are the prevailing jurisprudence which points to lack of assistance by the judiciary, various limiting provisions of the law,[59] political interference/patronage, non-cooperation by public entities, lack of independence and limited resources.

1.10.5 Chapter Five – Conclusion and Recommendations

Chapter five communicates the findings of the research project, its conclusion and recommendations that if implemented would ensure optimum operation of the Ombudsman institution. The chapter is a culmination of the discussions under the preceding chapters: One, Two, Three and Four.

[59] Particularly section 8(c) of the Act which contains a blanket provision that the Commission shall "report to the National Assembly bi-annually on the complaints investigated … and the remedial action taken thereon."

CHAPTER TWO

HISTORY OF THE CONCEPT OF OMBUDSMAN

2.0 Introduction

This chapter explains the concept of Administrative Justice in general and provides a historical perspective by analyzing the origin of the Ombudsman institution. It discusses the historical background of the concept of Ombudsman from ancient times, it's institutionalization in Sweden and spread of the idea across the world; to Africa, East Africa and finally to Kenya.

The chapter proceeds to detail the history of the institution in Kenya from 1963 when Kenya obtained its independence from British colonial rule to 2011 when CAJ was established. In so doing, it explores events that transpired prior to the enactment of the Act including policy directives, recommendations of Commissions of Inquiries and Government institutions, the Constitution and other relevant legal & regulatory frameworks. The chapter also provides a link between the model of Ombudsman adopted by a country and the history of the institution in that jurisdiction.

According to Chike and Madumelu, the history of Ombudsman can be split in to three main eras.[60] This study looks at the history from three perspectives namely: its existence in ancient times; evolution in Sweden; and the spread across the world. The two scholars[61] aver that the institution was a creation of the executive but it's mode of establishment kept changing as various jurisdictions implemented the idea.[62] Currently, the institution is relatively autonomous in most jurisdictions.[63]

[60] Osegbue Chike and Madubueze Madumelu, 'The Ombudsman and Administration of Justice in Nigeria; A Study of Anambra State; 2010-2015'22/4 IOSR Journal of Humanities and Social Science 40-57 (2017) 40.
[61] Ibid.
[62] Ibid.
[63] Ibid.

This chapter concludes that a hybrid Ombudsman model is the most suitable for Kenya under the prevailing circumstances and that the history of the Ombudsman institution in a country informs the Ombudsman model in that country.

The next section discusses, generally, what administrate justice entails and its close nexus with Ombudsman institution, as well as the need for the two in an open and democratic society.

2.1 Administrative Justice

Administrative justice, in a broadest sense, refers to fair and proper administration of laws.[64] The idea is not as old as the concept of justice, both in the social and legal fields.[65] Scholars have not been able to articulate its meaning or conceptualization.[66] Administrative justice can also be defined as arbitrary application of justice against the employees of the Government.[67]

In a democratic state, the Government bears the duty of improving the living standards of its people, which duty is carried out by Government employees.[68] Public officers may misuse powers and discretion bestowed upon them hence the need for an institution to check their actions.[69] Constitutionalism demands that there be visible progress in a People's living standards and lifestyles. Ombudsman institution is therefore established within a jurisdiction to ensure good governance and constitutionalism, and where there's a dearth, to put in place necessary mechanisms to realize the same.

Ombudsman institution is set up by the Government as a potent and effective office that undertakes investigations in the name of the Government, though not part of the Government – and empowered to make recommendations for an expeditious resolution of a complaint without any expenses on the part of the Complainant.[70]

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[64] Ibid., (n 1) 869.
[65] Osegbue Chike and Madubueze Madumelu, (n 60) 43.
[66] Ibid.
[67] Ibid.
[68] <https://shodhganga.inflibnet.ac.in/bitstream/10603/208624/5/05_chapter1.pdf> accessed 12 June 2019.
[69] Ibid.
[70] Osegbue Chike and Madubueze Madumelu, (n 60) 43.

The following sections examines the historical origin of the concept of Ombudsman by tracing its roots from ancient times, it's institutionalization in Sweden and spread of the idea across the world; to Africa, East Africa and finally to Kenya.

2.2 Ombudsman in Ancient Times

Ombudsman is a Swedish word referring to a protector of public interest and/or resources.[71] It is an old Swedish word that has been used over the years to refer to any person who defends the interest of a group of people or an individual.[72] The Swedes borrowed it from Germany where the word was used to refer to an official who collected money for compensation on behalf of confirmed victims or their families.[73] Ombudsman, in its use, is therefore not inimitable to the Swedes.

Traces of the concept may be found in ancient history whereby the role currently played by modern day Ombudsman was performed by various officers in various capacities. Gerald E. Caiden notes that the concept existed way back in the biblical times of Moses who appointed grievance officers to deal with complaining Hebrews.[74]

Some Muslim scholars, for example, believe that the idea was conceptualized by Prophet Muhammad, by appointing administration officials including governors, judges and tax-collectors,

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[71] <https://www.ombudsman.org.mt/what-does-the-word-ombudsman-mean-2/> accessed 11 June 2019.

[72] David Peppiatt, 'Briefing Paper on the Ombudsman Project: pilot project to investigate the concept of an Ombudsman for humanitarian assistance' (November 1997) British Red Cross Society <https://odihpn.org/magazine/the-ombudsman-project-pilot-project-to-investigate-the-concept-of-an-ombudsman-for-humanitarian-assistance/> accessed 21 June 2019.

[73] Charles L. Howard, *The Organizational Ombudsman: Origins, Roles and Operations, a Legal Guide* (ABA Publishing 2010) 3.
<https://books.google.co.ke/books?id=djxNDS1PNnkC&pg=PA3&lpg=PA3&dq=The+word+was+originally+derived+from+medieval+Germanic+tribes+where+the+term+was+applied+to+a+third+party+whose+task+was+to+collect+fines+from+remorseful+culprit+families+and+give+them+to+the+aggrieved+families+of+victims&source=bl&ots=DGTW9w50oF&sig=ACfU3U1aqI7w9KVCV0DUjIOkBF2Ww_VLHg&hl=en&sa=X&ved=2ahUKEwicsO-c0friAhUK1BoKHbxdDSsQ6AEwAHoECAkQAQ#v=onepage&q=The%20word%20was%20originally%20derived%20from%20medieval%20Germanic%20tribes%20where%20the%20term%20was%20applied%20to%20a%20third%20party%20whose%20task%20was%20to%20collect%20fines%20from%20remorseful%20culprit%20families%20and%20give%20them%20to%20the%20aggrieved%20families%20of%20victims&f=false>.

[74] Syed Bokhari, *Ombudsman: An Introduction*, 2 <https://www.policy.hu/bokhari/Ombudsman An%20Introduction.doc> accessed 11 June 2019.

all of whom reported to him.[75] They aver that before then, such an organized system of accountability of public officials did not exist.[76] Professor Bukhari confirms this, which roots he traces to the Arab 'Mohtasib' institution and to the time of founder of Islamic religion in the 7th Century.[77]

Ancient Egyptian Kings had complaint officers in their courts.[78] An institution similar to the Arab Mohtasib, the Hisbah,[79] is reported to have been in place in Egypt up to mid-nineteenth century.[80] The practice and functions of Hisbah was emulated and practiced in Jerusalem who named their institution after the Arab name Mohtasib (supra) although they later changed it into 'Mathessep'.[81] Ombudsman institution can also be traced to Sparta and in Athens. In the said Greek states, the institution was referred to as "Eflore"[82] and "Euthynoi,"[83] correspondingly.[84] In Rome, a public official referred to as a 'tribune' was appointed with the mandate and function of protecting commoners against aristocrats.[85] In essence, the official oversighted government activities and received complaints on maladministration and abuse of human rights.

Prior to the Swedish model of Ombudsman, communities had prophets and respectable elders who had the ears of the rulers. Historically, Ombudsman was supposed to whisper to power, that is, to speak the truth to power and, literally, to tell the King that he is naked.

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[75] Ibid.
[76] Ibid.
[77] Syed Mussawar Hussain Bokhari and Muhammad Asif, 'Institutional analysis of Ombudsman: (A comparative study of Pakistan, India, UK and USA) (2013) 5/2 Interdisciplinary Journal of Contemporary Research in Business, 710 <https://www.researchgate.net/publication/311535149_Institutional_Analysis_of_Ombudsman_A_Comparative_Study_of_Pakistan_India_UK_and_USA> accessed 11 June 2019.
[78] Howard (n 73) 2
[79] Hisbah is an Islamic doctrine which means accountability.
[80] Bokhari (n 74)
[81] Quoted from Wafaqi Mohtasib (Ombudsman)'s Annual Report 1990 p.6-7
[82] Eflore oversighted the actions of government officials and institutions.
[83] Euthynoi oversighted municipal activities.
[84] Bokhari (n 74)
[85] Ibid.

Some scholars and stakeholders have equated the role of the Ombudsman to that of biblical Prophets. Edward Okello[86] likens the role of Ombudsman to that of God's Prophets in the old Testament. He narrates the parable of Prophet Nathan to David, in which a Jew of means with so many herds and flocks, took a lamb which was the only wealth of his plebian neighbor and slaughtered it in order to prepare a meal for his guest.[87] David swore to put to death the rich man who, according to him, had no pity.[88] It was only after the prophet revealed to him that he (David) was the man, since he had orchestrated the death of Uriah in order to inherit his wife, Bethsheba, that David became penitent.[89] Kings and rulers were always ready, and more inclined to listen to prophets whose wise counsel they would heed which was not the case with ordinary mortals who may not have been very lucky to get away with any advice against the King's administrative injustices.

2.3 Evolution of Ombudsman in Sweden

The Swedes were the first people across the globe to institutionalize the concept of Ombudsman. Several factors, conflicts and governance challenges faced by their country necessitated the creation of the Ombudsman institution.

For over one hundred years, between 1700 and 1809, Sweden had serious governance challenges.[90] During the period of the Great Northern War,[91] the people of Sweden experienced a lot of problems especially those deriving from bad governance. The same was also experienced during the Finnish War.[92]

[86] Edward Okello is an Advocate of the High Court of Kenya and a Director at the Commission on Administrative Justice.
[87] 2 Samuel 12:1-17, New International Version (NIV)
[88] Ibid.
[89] Ibid.
[90] Edward Okello, 'The Concept of Ombudsman', A presentation made during the MDA Regional Training on effective Public Complaints Management & Access to Information Act at Intercontinental Hotel, 29th & 30th May 2019.
[91] 1700 – 1721.
[92] 1808 – 1809.

In 1709, the King[93] was forced to go on exile in Turkey following the loss by his Army in a battle at Poltava in Russia.[94] He escaped with about 1,500 men out of an army of 44,000 men. It took half a decade for the King to return to his country in December 1715. While in exile in Turkey, the King learnt about the operations of *Dewan-i-Mazalim,*[95] an office established to ensure that public officers complied with sharia.[96] On restoration, established a similar institution[97] in Sweden[98] with a specific role of ensuring that public officers complied with legal and policy directives.[99] The official reported directly to the King.

On 13th March 1809, Gustav IV Adolf, King of Sweden, was dethroned after the Swedish Troops lost Finland territory to Russia in the Finnish War. Other than the two battles, Sweden was engaged in two other battles between 1721 and 1790.[100] During those hard times, the Swedes needed a person or people who were close to the King, who the King could listen to, and through whom they could relay their grievances to the King.[101] This led the two Kings[102] to establish two institutions, Office of the Chancellor Justice in 1709 and the *Justitieombudsman* in 1809, which laid the foundation-stone for the modern day Ombudsman institutions in the world.

The model of executive Ombudsman (Office of the Chancellor of Justice) started by King Charles XII in 1709 existed until he died in 1718. The hitherto Monarch was replaced by a parliament (Riksdag)[103] which changed the formation and structure of the institution.[104] In 1739, Riksdag[105] compelled the office of the Chancellor of Justice to report to it. The Riksdag[106] even appointed the Chancellor of Justice between 1766 and 1772 when it[107] was supplanted by an absolute monarchy.

[93] King Charles the twelfth.
[94] This was the time when Russians defeated Sweden in the battle of Poltava.
[95] Office of the Chief Justice
[96] Islamic law.
[97] Office of the Chancellor of Justice.
[98]Wafaqi Mohtasib Annual Report 1998.
[99] Ibid., 3.
[100] Russo-Swedish War (1741-1743) and Gustav III's Russian War (1788-1790.)
[101] Okello (n 84).
[102] King Charles XII in 1709 and King Gustav IV Adolf in 1809.
[103] Swedish Parliament.
[104] Okello (n 90).
[105] Ibid (n 103).
[106] Ibid.
[107] Ibid.

In 1809,[108] Sweden enacted a new Constitution[109] through which an institution called *Justitieombudsman*[110] was established. *Justitieombudsman's* main role was to oversee compliance and implementation of the law.[111]

In summary, the factors leading to the creation of the office of the Ombudsman[112] in Sweden include: the lessons learnt by their Kings while in exile in Turkey; public outcry by citizens demanding for good governance; need for lasting peace and the Kings' selfish need to retain their authority over the people. Gerald Caiden posits that the establishment of the office of the Ombudsman was also necessitated by the desire of the King to retain power over the Swedish kingdom.[113]

In order to draw a consensus between the People and the King, it was necessary to put in place an institution which could resolve or relay the People's grievances to the King. This idea of resolving the People's grievances, as has been seen above is as old as humanity.[114] Welfare of the People is actually more important than any Government policy and is only comparable to the voice of God.[115] The main function of any Government is to look after its People's welfare.

The first Swedish ombudsman, the first to be appointed formally and officially, was Lars Augustin Mannerheim[116] who was appointed in 1809 marking the beginning of a formal and institutionalized Ombudsman scheme in Sweden.

[108] This coincided with the defeat of Sweden by Russia and the consequent restoration of the parliamentary system of Government.
[109] 1809 Constitution.
[110] Meaning 'agent.'
[111] Howard (n 73) 3
[112] *Justitieombudsman*, modern day Ombudsman in Sweden.
[113] Howard (n 73) 2-3
[114] Please refer to the sub-topic 'Ombudsman in Ancient Times.'
[115] *Vox Populi, Vox Dei*.
[116] Bokhari (n 74) 4.

2.4 Spread of Ombudsman concept to the rest of the World

For a period of more than one hundred years, the Ombudsman institution was only formally constituted in Sweden.[117] Scandinavian countries were the first batch of countries to formally establish an Ombudsman institution starting with Finland,[118] followed by Denmark[119] and Norway[120] in 1919, 1955 and 1962 respectively.[121] From Scandinavia,[122] the concept was picked up by other countries and eventually spread to the other parts of Europe and to the rest of the world.

After the second world war,[123] there was widespread discussion and deliberation on the need for an institution, separate from the court system, to check and to oversight administrative actions by various countries across the world.[124] The first common law country to put in place an Ombudsman scheme was New Zealand.[125] One hundred and seventy-one years after the institutionalization of the first Ombudsman in Sweden, a total of twenty-five countries across the globe had institutionalized aspects of the inaugural institution's functions.[126]

Tanzania was the first to establish the institution in Africa. By late 1980s, five more African Countries had established the institution. These were Ghana, Zambia, Sudan, Nigeria and Zimbabwe. By 1995, four[127] other African countries had joined the bandwagon of African countries with Ombudsman institutions. Currently (2019), the regional Ombudsmen association, AOMA,[128] has forty six members, four of which are from South Africa.[129]

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[117] Ibid.
[118] In 1919.
[119] In 1955.
[120] Norway had earlier on created a military Ombudsman in 1952. In 1962, Norway created an additional office of a general Ombudsman.
[121] Bokhari (n 74) 4.
[122] Scandinavia is a region in Northern Europe comprised of the three kingdoms of Denmark, Norway and Sweden.
[123] The second world war last for approximately sixteen years; from 1st September 1939 to 2nd September 1945.
[124] Bokhari (n 74) 5.
[125] This was in 1962.
[126] This are the numbers as at 1980.
[127] These were Namibia, South Africa, Malawi and Senegal.
[128] African Ombudsman and Mediators Association.
[129] http://aoma.ukzn.ac.za/about-us/Members.aspx. The South African Ombudsmen in the Association are Public Protector of South Africa, Western Cape Police Ombudsman, South African Military Ombudsman and South Africa Banking Service Ombudsman.

A simple glance at the foregoing numbers show that most African countries have put in place Ombudsman institutions which is an accountability mechanism. The issue that remains unresolved is how these institutions have failed to improve governance and accountability in the said countries.

2.5 History of Ombudsman in Kenya

Kenya attained its independence in 1963. The period that followed independence saw a lot of amendments to the Independence Constitution most of which sought to increase the powers of the President and to entrench dictatorship. The amendments culminated to a revised version of the Independence Constitution in 1969, which has popularly been referred to as the 1969 Constitution.[130] At that time, constitutional amendments were pursued with a view to have an all-powerful authoritarian presidency without checks and balances at the expense of the common man and his grievances.[131]

The increase in presidential powers and the period of dictatorship that followed immediately after independence gave the President sweeping powers over people's freedoms and in particular the power to order, arbitrarily, the detention of individuals without trial.[132]

Due to inequities of the system and the general public outcry, a Commission of Inquiry,[133] hereinafter referred to as the Ndegwa Commission, was formed by President Kenyatta[134] which recommended that the office be established.[135] The said Commission was formed[136] pursuant to the Commissions of Inquiry Act[137] to examine and investigate administrative issues touching on

[130] This was further amended twenty times and revised severally; in 1974, 1975 (two times), 1977, 1979 (two times), 1982, 1984, 1985, 1986, 1987, 1988, 1990, 1991 (two times), 1992, 1997, 1999, 2006 and in 2008. The 1969 Constitution was finally replaced by the 2010 Constitution.
[131] Otono (n 21) 16.
[132] Ibid., 15-16.
[133] The Commission is popularly known as the Ndegwa Commission.
[134] Jomo Kenyatta was the first Kenyan President after independence. He ruled from 1963 when Kenya gained independence from the British colonial rule to 1978 when he died while still in office.
[135] Report of the Commission of Inquiry (Public Service Structure and Remuneration Commission) 1970-71. The reports is hereinafter referred to as the "Ndegwa Commission Report."
[136] See Gazette Notice number 131 of 9th January 1970, which established the Commission.
[137] Cap. 102, Laws of Kenya.

specific sectors and departments within the public service.[138] Part of the recommendations of the Commission was that an office should be established with a specific mandate to handle the prevalent cases touching on administrative injustices.[139]

Ndegwa Commission took cognizance of the increasing instances of maladministration within public service including ineptitude, delay and discourtesy.[140] It, therefore, recommended that an institution be created to deal with such issues.[141]

Between the period 1971 and 2007, the proposal to establish an Ombudsman institution in Kenya featured prominently in various policy documents and reports including the Economic Recovery Strategy Paper for Wealth and Employment Creation, the Constitution of Kenya Review Commission Final Report, the Bomas Draft Constitution, The Proposed Constitution of Kenya 2005, Kenya Vision 2030 and reports of the defunct Kenya Anti-Corruption Commission.
The Economic Recovery Strategy[142] proposed the creation of an institution to deal with issues of administrative injustices within the public service.[143] It demonstrated the centrality of the need to address maladministration and advocated for creation of the office to promote governance.[144]

Constitution of Kenya Review Commission[145] (CKRC) in 2005 recommended the establishment of specific Commissions including a "Commission on Human Rights and Administrative Justice" comprising of a People's Protector, Human Rights Commissioner and a Gender Commissioner.[146] CKRC found that there was need for an Ombudsman institution and the other two offices (Human Rights and gender) alongside the Judiciary.[147] The absence of these institutions was noted as a

[138] Ndegwa Commission Report (n 135) iii.
[139] Otono (n 21) 16.
[140] Commission on Administrative Justice, '*Submissions of the Commission on Administrative Justice to the Senate Standing Committee on Justice, Legal Affairs & Human Rights*,' 08 May 2018, p. 4.
[141] Ibid.
[142] Ministry of Planning and National Development, Economic Recovery Strategy for Wealth and Employment Creation 2003-2007.
[143] Final Report of the Constitution of Kenya Review Commission, 2005, 317 <http://www.katibainstitute.org/Archives/images/CKRC%20Final%20Report.pdf> Accessed on 10 January 2019. The report is hereinafter referred to as "CKRC Report."
[144] Otono (n 21) 16.
[145] See CKRC Report (n 143).
[146] Otono (n 21) 16.
[147] Ibid.

shortfall in the then Bill of Rights under the 1969 Constitution.[148] These three offices were finally established under the 2010 Constitution.[149] CKRC also noted that Ombudsman was one of the constitutional offices found in other jurisdictions.[150]

The Bomas[151] Draft Constitution[152] proposed creation of a hybrid Ombudsman institution[153] The Proposed Constitution of Kenya 2005[154] also proposed the establishment of an Ombudsman institution namely 'Commission on Human Rights and Administrative Justice'[155] with a mandate, *inter alia*, to deal with regarding administrative injustices.[156]

Sometime in the year 2005, the Kenyan Government adopted an advisory from National Economic and Social Council which led to the establishment of Kenya Vision 2030 which, generally captured provision of service to the People and the need for an Ombudsman office in Kenya.[157] Vision 2030 was, and still is, Kenya's long-term national planning strategy.[158] It is founded on 3 main pillars; Economic, Social and Political. Under the political pillar, one of the goals was to put in place relevant measures to fortify existing public administrative framework and service delivery.[159] True to this goal, the Commission, which is the current national oversight agency on matters regarding administrative justice was created in 2011.

Reports of the defunct Anti-Corruption,[160] for the years 2004/2005 and 2005/2006 pointed out that over 80% of complaints lodged with it were outside its mandate, with the majority of them relating

[148] Ibid.
[149] The three institutions are the Kenya National Commission on Human Rights, the Commission on Administrative Justice and the National Gender and Equality Commission.
[150] CKRC Report (n 143) 321.
[151] Named after the Bomas Hotel being the venue for the delegates of the National Constitutional Conference.
[152] The Draft Constitution of Kenya 2004 adopted by the National Constitutional Conference on 15th March 2004. <http://www.katibainstitute.org/Archives/images/3-Bomas_draft.pdf> Accessed 01 August 2019.
[153] The proposed institution was to be known as the 'Commission on Human Rights and Administrative Justice.'
[154] Popularly referred to as the Wako draft; named after the then Attorney General of the Republic of Kenya, Amos Wako.
[155] Clause 77(1) of the Proposed Constitution of Kenya 2005.
[156] Clause 77(2)(d) of the Proposed Constitution of Kenya 2005.
[157] Kenya Vision 2030: A Globally Competitive and Prosperous Kenya (2007) iii< https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf> accesses 12 June 2019
[158] Ibid.
[159] Ibid., 161.
[160] Kenya Anti-Corruption Commission (KACC); precursor to the current Ethics and Anti-Corruption Commission (EACC).

to maladministration.[161] Accordingly, the then Director of Kenya Anti-Corruption Commission (KACC), retired Justice Aaron Ringera, suggested that an office of the Ombudsman be established to address complaints regarding maladministration since KACC was not mandated to deal with the same.[162] Consequently, the Standing Committee on Public Complaints[163] was formed in 2007 and KACC transferred all the matters that related to maladministration to the said Committee.[164]

Kenya National Dialogue & Reconciliation process spearheaded by eminent African personalities also demonstrated the centrality of the need to address maladministration through a specialized institution.[165] Notably, redress of maladministration for the attainment of justice, stability and sustainable peace featured centrally in the discussion on Agenda Four of the Kofi Annan led reconciliation team. Among the actions contemplated was the full operationalization and capacity building of Standing Committee on Public Complaints to a full-fledged Ombudsman office.[166]

The foregoing history evidently demonstrates that maladministration has been one of the significant concerns of Kenyans over the years.[167] Indeed, it also demonstrates that it was the intention of Kenyans for a long time to have an independent Ombudsman institution to tackle maladministration.[168] This could only be realized if the Ombudsman office was independent and autonomous, not just from the Executive, but also from other human rights institutions.[169] To date, maladministration continues to be one of the significant challenges facing the country thereby making it necessary to have an office of the Ombudsman for redress.[170]

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[161] Commission on Administrative Justice, '*Submissions of the Commission on Administrative Justice to the Senate Standing Committee on Justice, Legal Affairs & Human Rights*,' 08 May 2018, p. 4. The document is hereinafter referred to as "CAJ Submissions."
[162] Ibid.
[163] Ibid. The Committee operated under the name and style of Public Complaints Standing Committee, abbreviated as PCSC.
[164] CAJ Submissions (n 161) 4.
[165] Ibid.
[166] Ibid., 4-5.
[167] CAJ Submissions (n 161) 5.
[168] Ibid.
[169] Ibid.
[170] Ibid.

2.6 World Ombudsman Models

Ombudsman institutions operate differently in different jurisdictions.[171] This is informed by the fact that different countries have peculiar circumstances and, therefore, model their Ombudsman institutions to suit their needs.[172] It is therefore difficult to come up with a generic Ombudsman.[173]

Every Government which adopted the idea had a unique challenge that it sought to address. As different jurisdictions adopted the idea of Ombudsman institution and depending on their own peculiar circumstances, the institution was instituted differently and with differing mandates. The institution, nonetheless, retained its core mandate of addressing maladministration within the public service. The scope of administrative justice and indeed maladministration has increased over time.

During the process of adoption of Ombudsman idea from Sweden to the rest of the world, various jurisdictions in the world adopted different schemes which define(d) the Ombudsman within their states. The Ombudsman has, however, retained its core mandate over the years irrespective of the scheme adopted by any jurisdiction. The various models however differ on their structure, power, mandate and enforcement of their decisions.

Ombudsman's role in one jurisdiction may differ tremendously from that of a similar institution in another jurisdiction hence the different Ombudsman Models. The most common Ombudsman models can be classified into the following:

[171] CAJ Submissions (n 161) 15.
[172] Ibid.
[173] Ibid.

i. Individual versus Collegiate Ombudsman Models

Whereas some countries have an individual constituting their Ombudsman scheme, some have adopted a collegiate approach. Kenya adopted a collegiate approach in establishing the institution as a Constitutional Commission.[174]

The adoption of the collegiate model by Kenya is largely based on the historical foundation of the institution. As already discussed, various policy & legal documents such as the Gazette Notice number 5826 of 2017[175] and Kenya Vision 2010; draft/proposed Constitutions,[176] findings of Commissions such as CKRC and the Ndegwa Commission of Inquiry; and reports by relevant public bodies such as KACC recommended the formation of an institution[177] to deal with complaints relating to maladministration.

Clause 298(1) of the Bomas Draft Constitution[178] proposed creation of an Ombudsman institution[179] with a fixed membership of ten commissioners. Similarly, Gazette Notice number 5826 of 2007 established a Standing Committee on Public Complaints comprising at least five members, all appointed by the President.[180]

The foregoing policies, findings, reports and proposed Constitutions all proposed a collegiate model. The 2010 Constitution adopted the same approach of a collegiate model under Article 59[181] and gave the legislature discretion create more than one Commission to perform the roles of the

[174] The minimum constitutional threshold for any Commission in Kenya is three commissioners. See Article 250(1) of the Kenyan Constitution.
[175] Kenya Gazette, Vol. CIX-No. 42, Gazette Notice No. 5826 of 29th June 2007 <http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109,> accessed 02 August 2019.
[176] Such as the Bomas Draft (Draft Constitution of Kenya, 2004) and the Wako Draft (Proposed New Constitution, 2005).
[177] As opposed to appointment of an individual or an independent office comprising of and occupied by one person.
[178] The Draft Constitution of Kenya 2004 adopted by the National Constitutional Conference on 15th March 2004. <http://www.katibainstitute.org/Archives/images/3-Bomas_draft.pdf> Accessed 01 August 2019.
[179] The 'Commission on Human Rights and Administrative Justice.'
[180] Clause 1 of Gazette Notice No. 5826 of 29th June 2007<http://www.kenyalaw. org/KenyaGazette/view_gazette.php?title=2109,> accessed 02 August 2019.
[181] Article 59(1) of the Constitution of Kenya.

Commission established thereunder.[182] The current Ombudsman institution in Kenya was established pursuant to the foregoing constitutional provision.[183]

ii. Parliamentary versus Presidential Ombudsman Models

The classical Ombudsman (Sweden model) was Parliamentary in nature, that is, a creature of the legislature. In such cases, Ombudsman is appointed by the legislature. In some cases, the Ombudsman is established by the executive, to which it becomes accountable. These are referred to as Executive or Presidential Ombudsmen.

During the time of King Charles XII (supra), the Swedish Ombudsman was appointed by and reported to the head of the executive, the King. This is a classic example of a Presidential Ombudsman.

The Standing Committee on Public Complaints (PCSC)[184] was an example of a Presidential Model of Ombudsman in Kenya. Clause 3(i) of the Gazette Notice[185] establishing the institution provided for the Committee's role of reporting to the President.

Countries that established their first Ombudsman institution through the legislative arm of the Government have/had Parliamentary Ombudsman models while those that established the institution through the executive arm have or are more inclined to have a Presidential Ombudsman Model.

[182] Article 59(4) of the Constitution.
[183] Ibid.
[184] The official name of the institution was "Standing Committee on Public Complaints" but the institution adopted the name "Public Complaints Standing Committee" through which name it was popularly known. The name was abbreviated as PCSC hence the abbreviation herein.
[185] Kenya Gazette, Vol. CIX-No. 42, Gazette Notice No. 5826 of 29th June 2007 <http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109,> accessed 02 August 2019.

iii. Centralized, Decentralized and Devolved Ombudsman Models

Most Ombudsman's schemes, especially in Africa, are concentrated at the headquarters with branch offices in some cases but their functions are not actually devolved.[186] The more democratically and economically advanced countries such as England have developed a trend of devolving and/or decentralizing the functions of the Ombudsman. Benny[187] refers to this trend, which he avers is universal, and adds that it provides for specialization of the institution in some cases.[188] United Kingdom for example, has the Parliamentary Ombudsman with general jurisdiction but the three countries have detached Ombudsman institutions.[189] Separate Ombudsman structures exist in Scotland, Wales and Northern Ireland.[190]

Whereas devolution implies transfer of power to lower levels, decentralization refers to the movement or spread of departments of an organization from a single administrative center to other locations - establishment of local branches. In decentralization, power is retained at the top of the organization. In India there exists the Financial Ombudsman which has 21 regional offices all over India.

The Kenyan Commission on Administrative Justice is, to a limited extent, decentralized in the sense that it has four branch offices and several stations with officers at Huduma Centers. The Commission on Administrative Justice (Amendment) Bill, 2019[191] seeks to change the situation by providing for a mandatory requirement that the Commission establishes a branch office in every county in Kenya.[192]

[186] This may be due to limited resources and/or poor governance.
[187] Benny Yiu Ting Tai, 'Models of Ombudsman and Human Rights Protection' (2010) International Journal of Politics and Good Governance <https://hub.hku.hk/handle/10722/137312#full_view> accessed on 30 January 2019.
[188] Ibid.
[189] House of Commons, *The Parliamentary Ombudsman: Role and Proposals for Reform*, Briefing Paper No. CBP7496 of 21.06.2018 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7496> accessed 20 June 2019.
[190] Ibid.
[191] Kenya Gazette Supplement No. 51, (Senate Bills No. 6).
[192] Ibid., Clause 6(2).

iv. All-Purpose versus Sector-Specific Ombudsman Schemes

Ombudsmen or similar institutions with general jurisdictions whose powers and functions cut across various sectors within a state or a community of nations are said to be all-purpose Ombudsmen while those whose jurisdictions are limited to a specific sector of the economy or department within a state would fall under the category of Sector-Specific Ombudsman Schemes. The latter category of Ombudsman schemes is found in the United Kingdom, South Africa, Nothern Ireland, Australia, India, United States of America and Scotland among others.

United Kingdom has a Financial Service Ombudsman;[193] Parliamentary[194] and Local Government Ombudsman which deals with, *inter alia*, organizations providing local public services;[195] the Housing Ombudsman; and the Independent Office for Police Conduct.

South Africa has the Banking Services Ombudsman,[196] the Military Ombudsman[197] and Police ombudsman in every state.[198] Northern Ireland also have a Police Ombudsman. Australia, Canada[199] and India all have specific-sector Ombudsmen dealing with financial services alone.

Scottish Public Services Ombudsman (SPSO) serves as an umbrella body for all the sectoral Ombudsmen. Chris Gill describes the Scottish ombudsman model as a one stop shop bringing together various multisector ombudsmen under the SPSO.[200] This notably differs with the Kenyan model in which many sectors are yet to develop internal complaint resolution mechanism which obliges the ombudsman to step in in almost all admissible complaints and to deal directly with accounting officers.

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[193] The financial services include banking, insurance, PPI, loans, mortgages, pensions and investments. <https://www.financial-ombudsman.org.uk/> accessed 20 June 2019.
[194] <https://www.ombudsman.org.uk/> accessed 20 June 2019.
[195] <https://www.lgo.org.uk/> accessed 08 July 2019.
[196] South Africa Banking Services Ombudsman.
[197] South African Military Ombudsman.
[198] The Western Cape Police Ombudsman is a member of the African Ombudsman and Mediators Association (AOMA).
[199] Canada has the Ombudsman for Business Services and Investment (OBSI).
[200] Scottish Public Services Ombudsman.

v. Hybrid Ombudsman Model versus Standalone Ombudsman Models

Some Ombudsmen deal purely with the traditional mandate on oversighting maladministration while others may have one or more functions in addition to the traditional mandate over public institutions on administrative issues. The former category is what we refer to herein as standalone Ombudsmen while the latter category are known as hybrid Ombudsmen.

In Africa, standalone Ombudsman models exist in Botswana, Angola, Ethiopia, Sudan, Malawi, Tunisia, Seychelles, Senegal, Lesotho, Mauritius, Nigeria, Zambia, Mali, Sierra-Leone and South Africa. Countries with standalone Ombudsman institutions outside Africa include Finland, Denmark, Sweden, Hong Kong, Ireland, Canada and New Zealand.

Benny Tai states that the jurisdiction and powers of Ombudsman keep increasing and have evolved from oversighting administrative actions to human-rights issues; and the role has been extended to private organizations, groups and individuals.[201]

Ghana's Ombudsman is hybrid in that it combines the functions of three institutions; it being the Ombudsman, the human rights institution and an anti-corruption agency.[202] In addition to these three functions, it also monitors ethics of public officers.[203] In Kenya, there are three constitutional Commissions in place which performs the foregoing four roles. These are CAJ, KNCHR[204] and EACC.[205] The Indian *Lokayukta*, (the Civil Commissioner) is also an anti-corruption Ombudsman.[206]

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[201] Benny Yiu Ting Tai, 'Models of Ombudsman and Human Rights Protection' (2010) International Journal of Politics and Good Governance <https://hub.hku.hk/handle/10722/137312#full_view> accessed on 30 January 2019.

[202] See generally Article 218 of the Constitution of the Republic of Ghana and s 7 of the Commission on Human Rights and Administrative Justice Act, No. 456 of 1993, available at <<http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh014en.pdf>, accessed 06 March 2019.

[203] Stephen Sondem, *National Human Rights Institutions- The Ghanaian Experience*, 245 <http://studiorum.org.mk/evrodijalog/16/pdf/Evrodijalog_br_16_7_S-Sondem_ENG.pdf> accessed 10 May 2019.

[204] Established under Article 59 of the Constitution and the Kenya National Commission on Human Rights Act, No. 14 of 2011.

[205] Established under section 3 of the Ethics and Anti-Corruption Act, 2011 pursuant to the provisions of Article 79 of the Constitution.

[206]<https://www.google.com/search?q=LOKAYUKTA&rlz=1C1GCEU_enKE836KE836&oq=LOKAYUKTA&aqs=chrome..69i57j69i59j69i60l2.3127j0j7&sourceid=chrome&ie=UTF-8> accessed 09 July 2019.

Some scholars root for the fusion of administrative justice oversight functions with those of human rights movements. The Kenyan Constitution seems to have adopted this approach when it combined the two functions under Article 59(2). David Peppiatt relates the increasing human rights function of the institution to growth and influence of Non-Governmental movements across the world which, he believes, has necessitated the increasing role of the Ombudsman institution on protection of human rights.[207] A number of jurisdictions have adopted this approach. They include Guatemala,[208] El Salvador, Mexico, Poland, Slovenia and Hungary.[209] In Russia, the institution is called 'Plenipotentiary for Human Rights.

The Australian Commonwealth Ombudsman is the oversight agency under the Public Disclosure Act, 2013. Kenyan Ombudsman scheme is also hybrid to the extent that it oversights the constitutional right of access to information.[210] This study proposes that the Commission responsible for administrative justice should be merged with that responsible for preventing corruption and monitoring ethics, and the proposed institution be established as a constitutional commission.[211]

In jurisdictions where the institution performs more than one role, it is said to be hybrid in nature, and the nature is largely determined by the historical background of the organization. A good example is in Rwanda where the Ombudsman has the mandate of fighting corruption in addition to its traditional mandate on fighting injustice/maladministration.

[207] David Peppiatt, 'Briefing Paper on the Ombudsman Project: pilot project to investigate the concept of an Ombudsman for humanitarian assistance' (November 1997) British Red Cross Society <https://odihpn.org/magazine/the-ombudsman-project-pilot-project-to-investigate-the-concept-of-an-ombudsman-for-humanitarian-assistance/> accessed 21 June 2019.
[208] Bokhari (n 74) 9.
[209] Ibid., 185-189.
[210] See generally Article 35 of the Constitution and Access to Information Act, No. 31 of 2016.
[211] It is worthy to note that the current Ethics and Anti-Corruption Commission is not effective and is not established in the Constitution. It doesn't have the constitutional mandate to prevent corruption as this is within the mandate of the National Police Service under Article 244(b) of the Constitution. Conversely, the functions of CAJ under section 8 of the Act border on Ethics and Integrity. These include abuse of power, unfair treatment, oppressive or unresponsive official conduct, maladministration, delay, discourtesy and misbehavior.

vi. Supranational, National and Sub-National Ombudsman Schemes

Most public and private sector ombudsmen have both national and sub-national jurisdictions[212] as has been seen above. The National Ombudsmen have jurisdiction cutting across the entire country and across its departments while the sub-National Ombudsmen's jurisdiction is limited to a specific region or county within a state. There are some Ombudsmen institutions whose jurisdiction traverse different countries. These are Supranational Ombudsmen.

European Community Ombudsman created under the Maastricht Treaty[213] is a good example of a supranational Ombudsman. World Bank also has a supranational Ombudsman in the form of an Inspection Panel.[214]

2.7 Conclusion

This chapter has given a historical perspective of the concept of Ombudsman from ancient times, it's institutionalization in Sweden and spread of the idea across the world to Africa, East Africa and finally to Kenya. From the discussion, it can be noted that at the initial stages of its evolution, the Ombudsman's role was limited to monitoring administrative conduct.[215] The Swedish Ombudsman's jurisdiction was strictly limited to administrative injustices and it could only make recommendations to be enforced or implemented by Parliament.[216] This is the model that this study seeks to contradistinguish with the new and/or proposed model[217] especially for the developing and under-developed countries.

The best model for Ombudsman institution in Kenya is a Hybrid Ombudsman system. It is proposed that the commission responsible for administrative justice should be merged with that

[212] This has been discussed under the sub-heading 'Centralized, Decentralized and Devolved Ombudsman Schemes' (Supra.)
[213] Treaty on European Union, 1995.
[214] http://www.inspectionpanel.org/
[215] Kabillah (n 5) 19.
[216] Ibid.
[217] As shall be discussed under Chapters Three and Five of this study, the new model of Ombudsman exhibits broad functions which go beyond the traditional mandate of investigating complaints on maladministration in the public sector.

responsible for preventing corruption and monitoring ethics,[218] and the proposed institution be established[219] as a constitutional commission.[220] It is also proposed, under this study, that the Commission retains its oversight role over the right to access to information. This implies that the resultant Commission will have four roles namely addressing maladministration, preventing and combating corruption, ethics and access to information. Maladministration in its strict sense encompasses corruption, ethics and access to information.

From the discussion on the various Ombudsman models in the world and specifically on Hybrid Ombudsman system and the finding that moving forward, the Commission responsible for administrative justice should be merged with that responsible for preventing corruption and monitoring ethics, it is hereby concluded that a hybrid Ombudsman model is the most suitable for Kenya.

The next chapter looks at the place of the Ombudsman within global legal systems by examining the manner in which decisions of the institution are treated in various jurisdictions. The chapter also discusses the need for Ombudsman institution, currently, the value of Ombudsman's decisions and their enforceability.

[218] Clause 298 of the Bomas Draft Constitution proposed the creation of a Commission on Human Rights and Administrative Justice whose functions would include: (f) to improve the standards of competence, honesty, integrity and transparency in the public services.

[219] This is used to mean entrenchment of the institution in the Constitution rather than being established by Parliament.

[220] The current Ethics and Anti-Corruption Commission is not effective and is not established in the Constitution. It doesn't have the constitutional mandate to prevent corruption as this is within the mandate of the National Police Service under Article 244(b) of the Constitution. Conversely, the functions of CAJ under section 8 of the Act border on Ethics and Integrity. These include abuse of power, unfair treatment, oppressive or unresponsive official conduct, maladministration, delay, discourtesy and misbehavior.

CHAPTER THREE

THE PLACE AND ROLE OF OMBUDSMAN IN THE GLOBAL LEGAL SYSTEMS

3.0 Introduction

The preceding chapter discussed the history of Ombudsman from ancient times, it's institutionalization in Sweden and spread of the idea across the world to Africa; East Africa and finally to Kenya.

This chapter gives the general overview of the place of Ombudsman in the global legal systems by examining how the decisions of the institution are treated in various jurisdictions. In so doing, the author reviews the relevant literature and legal framework of various jurisdictions across the world and the extent to which Governments and the Law in the selected jurisdictions support or suppress the institution.

This chapter also classifies the various jurisdictions in to two broad categories, namely developed and developing countries. It finds that enforceability is encouraged more in the latter category of countries in addition to those that have been classified as least developed.[221] This helps to clarify the prevailing circumstances and jurisprudence in different jurisdictions. The chapter also examines the decisions that have so far been made by various Ombudsmen and the extent to which they have been implemented and/or challenged.

The chapter has three main parts: the first part explores the need for Ombudsman institution in the modern world; the second part analyzes the value of Ombudsman's decisions while the third section discusses enforceability of Ombudsman's decision.

[221] Research has shown that there is a correlation between governance of a country and its development by international standards. Most of the countries which are considered not to observe constitutionalism and Rule of Law in their governance styles mostly fall under the so-called developing or least developed countries. These countries, in most cases, find themselves in perpetual breach of human rights and democratic principles.

The chapter concludes that Ombudsman plays a pivotal part in the modern day governance system and as such there's need to expand the structural and functional mandate of the institution beyond the classical Swedish model and to make its decisions binding and/or enforceable. The chapter also concludes that the value attached to an Ombudsman's decisions differ from one jurisdiction to another, yet, the need to respect the same cuts across all jurisdictions.

The following section explores the need for an Ombudsman as an oversight institution on administrative justice in the global legal system.

3.1 The need for Ombudsman

As discussed under chapter two, the idea of having an Ombudsman institution in a society has existed since time immemorial. Since the time of King Gustav IV Adolf[222] when the first formal Ombudsman institution was established, the idea has continued to spread to all the corners of the planet. The spread was catalyzed by the major global wars especially the first and second world wars. Global actors saw the need for good governance through a distinct means of resolution of complaints regarding governance.

There was need for special rules to govern the Governors. These rules would check on the integrity of public administration to ensure that public officers and institutions act fairly, are accountable and disciplined.[223] At the international level, various legal instruments were enacted to ensure

[222] King of Sweden between 1792 and 1809.
[223] Elisa D'Alterio, 'Integrity of the public sector and controls: A new challenge for global administrative law' (2017). 15/4 Int J Constitutional Law 1013 <https://vpn.uonbi.ac.ke/proxy/1f5eb8f2/https/www.lexisnexis. com/uk/legal/ results/enhdocview.do?docLinkInd=true&ersKey=23_T28396611561&format=GNBFULL&startDocNo=0 &results UrlKey=0_T28396611563&backKey=20_T28396611564&csi=316455&docNo=5> accessed on 05 February 2019.

compliance with the basic minimum standards of good governance. These global legal instruments included the UDHR,[224] ICESCR,[225] and ICCPR.[226]

UDHR provides that "everyone has the right to equal access to public service in his country."[227] ICESCR[228] has similar provisions under Article 25(C) while at the same time outlawing any form of discrimination.[229] This implies that provision of public services which is at the core of administrative justice had caught the attention of the international community as early as 1948. This was after the world witnessed two world wars which claimed millions of lives and most people felt that there was need for a long lasting solution to any form of conflict in world.

It is generally agreed that there is need for every Government to provide its citizens with a mechanism (an alternative institution) within the democratic framework for resolution of complaints regarding administrative injustices.[230] The institution should enjoy the confidence of the people and provide a better approach and structure for resolution of relevant complaints.[231] As shall be seen in the next section, the Ombudsman institution performs the role of checking excesses in governmental activities thereby improving public service delivery and ensuring observance of human rights.

[224] Universal Declaration of Human Rights, 1948. The declaration was adopted by the United Nations General Assembly at its 183rd session on 10th December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.<https://www.google.com/search?q=udhr&rlz=1C1GCEU_enKE836KE836&oq=udhr&aqs=chrome. 0.69i5 9j69i60.2304j0j7&sourceid=chrome&ie=UTF-8> accessed 02 August 2019.
[225] International Covenant on Economic, Social and Cultural Rights, 1966. It was adopted by the United Nations General Assembly on 16th December 1966 through General Assembly Resolution 2200A (XXI). It came in to force from 3 January 1976. <https://www.google.com/search? q=international+convention+on+economic+and+social+rig hts&rlz=1C1GCEU_enKE836KE836&oq=international+convention+on+economic+and+social+rights&aqs=chrom e..69i57.16616j0j7&sourceid=chrome&ie=UTF-8> accessed 02 August 2019.
[226] International Covenant on Civil and Political Rights, 1966. It was adopted by the United Nations General Assembly on 19th December 1966 <https://treaties.un.org/ doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> accessed 02 August 2019.
[227] Article 21(2).
[228] The Republic of Kenya ratified ICESCR on 1st May 1972. Article 2 of the Constitution lists as sources of law treaties or conventions ratified by Kenya.
[229] Article 2 proscribes discrimination on any ground including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[230] Subhash Chandar Gupta, *Ombudsman: An Indian Perspective* (Manak Publications (P) Ltd., 1995).
[231] Ibid.

During the Constitution making process in Kenya, the citizens clearly expressed their need for such an institution. CKRC[232] noted[233] that Kenyans specifically demanded that CHRAJ[234] be formed. In asking for the said Commission (an Ombudsman), Kenyans also proposed the functions which the Ombudsman was to perform including oversighting human rights issues and curbing prevalent abuse which was mostly alleged to be sanctioned by the executive; to address rampant killings which were politically motivated; to consider land issues including compensation of displaced persons; to address the problems of representation, socio-economic injustice, and looting of public resources pre-independence to-date.[235]

The people also made their observations on the minimum threshold for constitutional commissions generally and CHRAJ in particular. CKRC noted the importance of constitutional commissions in perpetuating democracy and rule of law in a country and in ensuring that the Constitution is fully implemented.[236] Independence of these constitutional bodies is important if only to ensure that they achieve the purpose for which they are constitutionally created.[237] These requirements, still hold, on the need for an Ombudsman institution in any legal system.

The Ombudsman institution still remains relevant in the modern world legal system, and particularly in Kenya as demonstrated by the people in the CKRC report, and its establishment in any governance system cannot be overlooked as it executes a crucial function within any modern day governance structure.

3.2 Value of Ombudsman's decisions

Ombudsman can be defined as an institutionalized watch-dog over the activities and modus operandi of the Government and the governed.[238] The institution has dual roles: to address citizens'

[232] Constitution of Kenya Review Commission.
[233] CKRC Report (n 143).
[234] Ibid., 314. CHRAJ is an abbreviation of the then proposed Commission which was to be known as "Commission for Human Rights and Administrative Justice."
[235] CKRC Report (n 143).
[236] Ibid., 311.
[237] Ibid.
[238] Osegbue Chike and Madubueze Madumelu, 'The Ombudsman and Administration of Justice in Nigeria; A Study of Anambra State; 2010-2015'22/4 IOSR Journal of Humanities and Social Science 40-57 (2017) 43.

complaints; and to ensure enhanced provision of service to the People,[239] sometimes extending its functions to the private sector as does the Kenyan Ombudsman through its oversight role on the constitutional right to Access to Information (ATI).[240] Section 4 of the ATI Act[241] recognizes that the right of access to information extends to and can be enforced against private entities and individuals. By investigating individual cases, Ombudsman does not merely oversight or recommend but may also in the process highpoint feebleness in law and policy.[242]

Alistair Mills, in her analysis of Clark's case,[243] addresses the issue on whether a complaint to the Ombudsman was (or could never be) a 'cause of action'; and whether the Ombudsman was a judicial tribunal.[244] In the said case,[245] the court found that the Ombudsman makes judicial decisions and that the legal principle of *Res Judicata* could apply even if legal principles were not being applied.[246] This however, the court stressed, was not to mean that future litigation would be barred by the decision.[247] The position in Kenya is not clear as the law does not provide any remedy other than reporting to the Respondent and the National Assembly. The Complainant may however choose to use the determination as an exhibit in court.[248] This study proposes that the decision of the Ombudsman be open for adoption as an order of the Court. This will ensure a clear remedy for Complainants as litigants.

The value of Ombudsman's decisions depends not only on the existing legal provisions but also on how the Courts interpret them and on political will; all of which ensure success of the institution. In South Africa, for example, the binding nature of the Ombudsman's decisions is neither

[239] Ibid.
[240] See generally the provisions of the Access to Information Act, No. 31 of 2016, Laws of Kenya.
[241] No. 31 of 2016, Laws of Kenya.
[242] Osegbue (n 60)
[243] *Clark and Another v In Focus Asset Management and Tax Solutions Limited* [2014] EWCA Civ 118.
[244] Alistair Mills, 'Awards by the Financial Services Ombudsman and subsequent litigation' (2014) Journal of Professional Negligence 162–167.
<https://vpn.uonbi.ac.ke/proxy/3f6147f7/https/www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28408397083&format=GNBFULL&startDocNo=81&resultsUrlKey=0_T28408512146&backKey=20_T28408512147&csi=372210&docNo=119> accessed 4 February 2019
[245] See *Clark and Another v In Focus Asset Management and Tax Solutions Limited* [2014] EWCA Civ 118, in Alistair Mills, 'Awards by the Financial Services Ombudsman and subsequent litigation' (2014) Journal of Professional Negligence 162–167
[246] Ibid.
[247] Ibid.
[248] The Court has so far pronounced itself on a case which was, however, filed as a Judicial Review Case.

entrenched through legal provisions nor the Constitution[249] but throught judicial pronouncements as we shall see herein. Section 182 of South African Constitution[250] outlines Ombudsman's powers in terms which are materially similar to the provisions of the Kenyan Constitution and which include investigation, reporting and taking suitable remedial action.

The law establishing Ombudsman in South Africa,[251] just like the Kenyan law only provides for the institution's periodical reporting obligation to Parliament as the only remedy available to the institution after conducting investigations and making a decision. The South African Supreme Court of Appeal and the Constitutional Court[252] have gone ahead to purposively interpret the relevant legal provisions and have held that Ombudsman's decisions are not only persuasive or advisory but are binding upon the public office and/or officer against whom it is made.

In *South African Broadcasting Corporation and Others v Democratic Alliance and Others,*[253] hereinafter *SABC v. DA*, South Africa's constitutional Court had an opportunity to decide on the enforceability of the Ombudsman's decisions. The Public Protector initially received complaints against the state broadcasting agency, SABC[254] including wrongful appointment of Acting Chief Operations Officer (COO), Mr. Motsoeneng. After Ombudsman's investigations into the matter, it[255] compiled and released its decision against the broadcaster. National Department of Communications and the SABC however ignored the Ombudsman's decision and appointed the embattled officer. Democratic Alliance[256] filed a suit for an order confirming that the maladministration at SABC should be addressed and that the embattled officer should go on suspension as he awaits further disciplinary measures against him. The High Court consequently granted such an order. SABC appealed against the decision. The appellate Court[257] interpreted the

[249] See section 182 of the Constitution of the Republic of South Africa, 1996.
[250] Constitution of the Republic of South Africa, 1996 <http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf> Accessed 05 August 2019.
[251] See s. 8, Public Protector's Act No. 23 of 1994 Laws of South Africa, <http://www.justice.gov.za/legislation/acts/1994-023.pdf> Accessed 05 August 2019.
[252] This is the apex Court in South Africa.
[253] [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA); neutral citation: *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015).
[254] South African Broadcasting Corporation; the national public broadcaster. Pursuant to section 8A(2) of the Broadcasting Act No. 9 of 1999, the state is the sole shareholder in SABC.
[255] Public Protector. South Africa's Ombudsman is officially referred to as the "Public Protector."
[256] The official opposition party in the South African Parliament.
[257] The Supreme Court of Appeal receives and considers appeals from the High Court.

meaning and import of the constitutional requirement that the Ombudsman can take remedial action which is suitable under any given circumstance.[258] The appellate Court concluded that the word "take" implies that the Public Protector may choose some course of action and is not only empowered to provide advisory opinions. The appellate Court also found that the purport of the Constitution could not be realized if public entities were allowed the discretion to choose whether to implement the decisions of the Ombudsman or not.[259]

Thirdly, the Court pointed out that a person or an organ affected by a decision of the Public Protector have no discretion to disregard the recommendations of the Public Protector, but can apply to the Courts to have the decision set aside.[260] It was the Court's finding that if the law was to be interpreted to the effect that the Ombudsman's mandate was limited to making recommendations, it would be "neither fitting nor effective, it would denude the office of the Public Protector of any meaningful content, and defeats its purpose."[261]

The foregoing judgment, *SABC v. DA*, has considerably clarified the position regarding enforcement of the decision of the Ombudsman, has enhanced the value of the said decision in South Africa and has consequently strengthened the Public Protector's powers to a great extent.[262]

The powers of South Africa's Public Protector[263] are very similar to those of the Kenyan Ombudsman[264] which also provides for the obligation to report on remedial action taken. CAJ Act contains a similar provision regarding the mandate of the Commission.[265] It is noteworthy that the statutory and constitutional provisions touching on the mandate and powers of the Ombudsman

[258] Paragraph 42 of the judgement.
[259] This is a sharp contrast to the Kenyan jurisprudence as we shall see in the next chapter when we review the Abekah Case (*Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR).
[260] As we shall see in the Abekah Case (supra,) the jurisprudence in Kenya is to the effect that the Respondents (public institutions and officers against whom decisions are made by the Ombudsman) can ignore the findings and recommendations at will and the only remedy available to the Commission is to report the inaction to Parliament.
[261] Paragraph 53 of the judgement.
[262] Roxan Venter, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs (2016) 10/6 International Journal of Law and Political Sciences, 2052. <https://waset.org/publications /10004753/enforcement-of-decisions-of-ombudsmen-and-the-south-african-public-protector-muzzling-the-watch dogs> accessed 02 August 2019.
[263] Under section 182(2)(C) of the South African Constitution.
[264] Under Article 59(2)(j).
[265] S. 8(C), Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya.

institution were borrowed from those of South Africa almost word for word. The judgments of the South African Courts, and particularly the finding that the phrase "take appropriate remedial action" means that Ombudsman "may choose some course of action and is not only empowered to give advice" implies a functional mandate of the Ombudsman and the same ought to apply to the Kenyan Ombudsman *mutatis mutandis*.

The decision in *SABC v. DA*[266] was also confirmed by the apex Court in another case, *EFF v. Speaker*,[267] in which the Ombudsman carried out investigations on certain allegedly unlawful repairs at the South African President's Nkandla.[268] The Ombudsman, in its decision, directed that the cost of the repairs, which were wrongfully carried out in the Nkandla be borne by the President and not by tax payers. The Constitutional Court stated that it would be doubtful that such a substantial budget, staff and offices would be allocated to the Ombudsman if the "Public Protector's powers or decisions were meant to be inconsequential"[269] Secondly, the Court found it unintelligible to argue that the Ombudsman institution can contribute to the strengthening of the South African democracy if its powers were not binding and if public bodies could simply choose to disregard its decisions.[270] The judiciary effectively held, as was the case in *SABC v. DA*, that Ombudsman's decisions were binding upon the public entities against whom they are made.[271]

The value of the Ombudsman's decisions varies from one jurisdiction to another. In Denmark, the Ombudsman reports to Parliament annually on the Complaints it has investigated within the year. The difference in value between Danish Ombudsman's decisions and the Kenyan Ombudsman's decisions is that Denmark Ombudsman's recommendations are taken seriously by the Government and the same is acted upon by the public entities as though it has a binding force of law.[272] The Danish system, just like in most developed countries, can be said to have an indirect enforcement

[266] Ibid., (n 394).
[267] *Economic Freedom Fighters v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC).*
[268] South African President's private residence.
[269] Paragraph 49 of the judgement.
[270] Paragraphs 56 and 67 of the judgement.
[271] Roxan Venter, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs (2016) 10/6 International Journal of Law and Political Sciences, 2052 <https://waset.org/publications/10004753/enforcement-of-decisions-of-ombudsmen-and-the-south-african-public-protector-muzzling-the-watchdogs> accessed 02 August 2019.
[272] Ibid., 2053.

mechanism of Ombudsman's recommendations.[273] That is also the case with the Norwegian Parliamentary Ombudsman which can, additionally, inform the Public Prosecutor of steps that he or she thinks are necessary in the circumstances.[274] In Norway, the Ombudsman's function include ensuring that people are not mistreated by Government officials and that the latter respect and safeguard human rights.[275] New Zealand also relies on the robust governance structures and Government support to enforce its decisions and not on express provisions of the law.[276] In Northern Ireland, however, the recommendations of the Ombudsman are enforceable through the courts.[277]

In Australia, the Commonwealth Ombudsman investigates whether actions of an agency or department were unreasonable, unlawful, improper, discriminatory or otherwise wrong. The Commonwealth Ombudsman then reports its findings to the agency or department and recommends a remedial action.[278] If the agency/department does not implement that action, the Commonwealth Ombudsman can report to Parliament.[279] Commonwealth Ombudsman can compel a Government Agency or private contractor to produce documents as provided for under the law.[280]

From analysis of the foregoing different systems in Denmark, Norway, New Zealand and Australia, we can conclude that failure by the law to provide for express powers necessary for the Ombudsman to enforce its decision may not necessarily affect effectiveness of the Ombudsman in those jurisdictions. There may be various reasons for this, but it is submitted in this thesis, that the main reason is that those states had already established very effective public administration structures before adopting the Ombudsman institution.[281] The said countries were also some of the

[273] Ibid.
[274] W. Gellhorn, 'The Norwegian Ombudsman' (1966) 18 Stanford Law Review, 293-321.
[275] Section 3 of the *Stortingets Ombudsmann*, 1962.
[276] Roxan Venter, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs (2016) 10/6 International Journal of Law and Political Sciences, 2053. <https://waset.org/publications /10004753/enforcement-of-decisions-of-ombudsmen-and-the-south-african-public-protector-muzzling-the-watch dogs> accessed 02 August 2019.
[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] See generally the provisions of the Public Interest Disclosure Act, 2013 Laws of Australia.
[281] Roxan Venter, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs (2016) 10/6 International Journal of Law and Political Sciences, 2054 <https://waset.org/publications

first to establish Ombudsman institutions within their jurisdictions. One common factor among the said states is that they are all classified as developed countries by United Nations' standards.[282] Norway, Switzerland, Australia, Ireland and Germany led in the Human Development Index (HDI) ranking for 2018.[283] In which African Countries scored the least.[284] The former group of countries with the highest scores are developed while the latter are African.

The value attached to an Ombudsman's decisions differ from one jurisdiction to another, yet, the need to respect the same cuts across all jurisdictions. Whereas countries with very strong, stable and effective public administration systems easily and normally respect and enforce Ombudsman's decisions even in the absence of laws permitting enforcement, the same is not the case in countries which experience weak, unstable and ineffective public administration. During a meeting of African Ombudsmen at Safari Park Hotel, Nairobi, the Swedish Ombudsman was surprised to learn that in some countries (read Africa) the Ombudsman's decisions could be disregarded by public entities.

The following section looks at enforceability of the Ombudsman's decisions by analyzing both scholarly arguments and legal provisions from different jurisdictions. The section looks at both 'pro-enforcement' and 'non-enforcement' arguments and legal provisions; and proceeds to analyze the same in terms of the jurisprudence and Ombudsman's legal structures in countries with very strong and effective public administration systems (mainly developed countries) on the one hand and those with weak and ineffective public administration systems (mostly developing and least developed countries) on the other hand.

/10004753/enforcement-of-decisions-of-ombudsmen-and-the-south-african-public-protector-muzzling-the-watch dogs> accessed 02 August 2019.

[282] United Nations Development Programme, Human Development Reports 2018 <http://hdr.undp.org/en/2018-update> accessed 07 May 2019.

[283] Ibid.

[284] Ibid. The African countries include CAR, Niger and S. Sudan.

3.3 Enforceability of Ombudsman's decision

Richard Kirkham opines that the question on whether Ombudsman's decision should be binding or not remains unresolved to a very great extent.[285] The prevailing jurisprudence is that Ombudsmen's decisions are generally unenforceable. The practice in Europe and other developed countries, as has been discussed above, differ with that in Africa and Middle East which lean towards enforceability. Most of the developed countries have strong, stable and effective public administration systems. The Ombudsman's decisions in the said countries are not enforceable by law but by practice. The recommendations and decisions of the Ombudsman in the said countries are implemented as a matter of course.[286]

Modern legal jurisprudence on the enforceability of the decisions of an Ombudsman as reflected in a number of decisions from developed countries, however, shows a leaning towards enforceability, and it has generally been determined by the Court that the decisions are binding and must be implemented, where an ombudsman has acted within its statutory mandate to fulfill the scope of its powers, unless set aside by the Court.[287]

In *Ex Parte Bradley*[288] for example, the High Court decided, *inter alia*, that Ombudsman's findings were binding on a Government minister.[289] Similarly, in *British Banker's Association* case,[290] the Court declined to set aside Ombudsman's decision on the ground that they were considered rational.[291]

The foregoing two precedents are relevant to this study as they demonstrate how situations of non-compliance by governmental institutions with the recommendations of the Ombudsman have been dealt with in the developed countries where the reasons for such refusal are not justified. The

[285] Kirkham (n 6).
[286] Otiende (n 44) 6.
[287] Ibid.
[288] *Ex Parte Bradley and Others v Secretary of State for Pensions [2007] EWHC 242,* available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/242.html> accessed 25 June 2019.
[289] Ibid.
[290] *British Banker's Association v Financial Services Authority/Financial Ombudsman Service [2011] EWHC 999,* available at <http://www.bailii.org/ew/cases/EWHC/Admin/2011/999.html> accessed 25 June 2019.
[291] Ibid.

decisions have an almost similar effect with the South African decisions[292] even though the Courts, in the European cases[293] do not expressly pronounce themselves on the binding nature of the Ombudsman's decisions.

In the developing and/or least developed countries, the situation is completely different. In Uganda for instance, efforts to bring defiant agencies and individuals to book has at times been thwarted by the President of the said country.[294] In Ghana, non-cooperation is manifested in the form of attacks on the legitimacy of the institution when it pursues implementation of its recommendations; or even its authority to carry out investigations where a formal complaint has not been lodged.[295] Such attacks paralyze the institutions making it difficult for them to achieve their mandate and promote the rule of law and constitutionalism.[296]

This study aims to demystify the nature of governance in developing and underdeveloped countries *vis a vis* their developed counterparts, and the need for a different approach to administrative justice and the concept of Ombudsman in developing and underdeveloped countries, and the need to make binding/enforceable decisions by the Ombudsman.

3.3.1 Pro-enforcement Arguments

It is a clear distinction, flowing from the foregoing discussion on enforceability, between enforcement of Ombudsman's decisions in the developed countries vis a vis their developing and underdeveloped counterparts. Compulsion is necessary in the latter two categories which is not the case among the developed nations. The reporting obligation has not helped the African Ombudsmen on the enforceability front due to unstable and negative politics opposing the clamour for good governance.[297]

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[292] Refer to the decisions in '*South African Broadcasting Corporation and Others v Democratic Alliance and Others*' and '*Economic Freedom Fighters v Speaker of the National Assembly and Others.'*
[293] The England and Wales High Court precedents of *Ex Parte Bradley* and *British Banker's Association*.
[294] Kabillah (n 5) 101.
[295] Ibid.
[296] Ibid.
[297] Report of the 2nd colloquium of African Ombudsmen, *Securing the Ombudsman as an instrument of governance and accountability in Africa*, Nairobi (2015) 28.

In Rwanda, the Ombudsman can proceed with execution of a court order where the same has not been carried by the relevant officers against the laid down provisions of the law.[298] The Ombudsman can also take action against the malfeasant officer(s).[299]

James Ross opines that Ombudsman is gradually becoming an important avenue for resolution of complaints outside the traditional Court system.[300] He posits that an award by the Ombudsman creates a legal right which is binding and which should be treated as if the same was made by the Court.[301] The Kenyan Ombudsman's decision, as has been discussed above, can only be used as an exhibit in court and cannot be equated to a Court order or judgment in any way. This study however proposes, as one of the remedies, that the Complainant and/or the Ombudsman should be at liberty to apply to the judiciary to adopt the decision as an order of the court.

The Parliamentary Ombudsman of England cannot implement its findings and has no power to punish.[302] He refers the matter to court.[303] Bukhari and Asif however hold the opinion that developed countries' ombudsmen should be given more autonomy and powers.[304] This reflects the position of the courts in Europe as we saw in *Ex Parte Bradley case*[305] where it was decided, *inter alia*, that Ombudsman's decisions were binding on a Government minister; and in the *British Banker's Association case*[306] where the Court declined to set aside Ombudsman's decision on the ground that they were considered rational.[307]

Some scholars have also advocated for more powers for the Ombudsman in Denmark claiming that its act of enforcement through moralsuation based on existing governance structures is not

[298] Ibid., 20.
[299] Ibid.
[300] James Ross, 'FOS complaints and civil proceedings' (2014) Journal of Financial Law. < https://goughsq.co.uk/wp-content/uploads/2014/06/FOS-complaints1.pdf> accessed 6 February 2019.
[301] Ibid.
[302] Syed Mussawar Hussain Bukhari & Muhammad Asif, 'Institutional analysis of Ombudsman: A comparative study of Pakistan, India, UK and USA' 5/2 Interdisciplinary Journal of Contemporary Research in Business, 714. (2013). <https://www.researchgate.net/publication/311535149> accessed on 31 May 2019.
[303] See generally the powers of the Ombudsman under the Parliamentary Commissioner Act, 1967.
[304] Ibid., 724.
[305] *Ex Parte Bradley and Others v Secretary of State for Pensions [2007] EWHC 242,* available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/242.html> accessed 25 June 2019.
[306] *British Banker's Association v Financial Services Authority/Financial Ombudsman Service [2011] EWHC 999,* available at <http://www.bailii.org/ew/cases/EWHC/Admin/2011/999.html> accessed 25 June 2019.
[307] Ibid.

sufficient. They have called on the Government of Denmark to give the Ombudsman more teeth to enable it to bite.

Modern trend points towards the fact that the decisions of the Ombudsman should bind the Respondents against whom it is made and the same should be implemented by the latter unless it is set aside by the Court. The Ombudsman institution, however, still continues to grapple with the challenge of non-enforceability. Some scholars have however attempted to justify the need for non-enforceability as discussed below.

3.3.2 Non-enforcement Arguments

For decades since establishment of the first formal Ombudsman institution in Sweden, the prevailing ombudsprudence was that Ombudsmen's decisions were generally unenforceable. The practice kept changing with time and it has been observed that in some jurisdictions, the decision of the Ombudsman is binding, enforceable and/or treated as court judgement; and the Ombudsman has enforcement powers and powers to order compensation in other jurisdictions.

Some countries have however held on to the classical approach where the Ombudsman's decisions were not enforceable and the Ombudsman could only report to the President and /or the legislature. It is worthy to note, however, that the first formal Ombudsman institution was established by the executive[308] but the supervisory role over the institution was later on taken over by the legislature. The Kenyan practice is that the institution (the Commission) can only report cases of non-compliance to the legislature.[309] The implication of holding to the classical approach is that protection of citizens' rights depend on the executive and/or the legislature which are at the top of any administrative system, yet it is the same systems that were meant to be checked by the Ombudsman.

[308] The King of Sweden.

[309] See the decision of the Court of Appeal in *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others, Nairobi CACA No. 141 of 2015* (UR). Even though the Court of Appeal judgment is to the effect that the decision of the Ombudsman can be enforced by the Court, the same is yet to be implemented and the Ombudsman itself is yet to file any case seeking enforcement of any of its decisions.

Narcisa-Mihaela and Anca-Florina[310] are of the view that the Ombudsman should only be subject to parliament and to the Constitution.[311] As was discussed under sub-topic 3.3 herein on 'Enforceability of Ombudsman's decision,' this approach may not work in Africa and specifically in Kenya which is a developing country with a history of poor leadership, bad governance and abuse of human rights. The Mozambique Ombudsman has however tried to implement this approach based on the principle of moralsuation. The Ombudsman exercises a structure of persuasion based on moral grounds and on the basis of the said persuasion, public entities are expected to comply with its directives and to implement its decisions. The ultimate authority still lies with members of the executive and the legislature who are expected to intervene and to ensure that the decisions and directives are complied with whenever there is reluctance or resistance from public officers. This raises a challenge when it comes to complaints against the executive and the legislature where they would be required to enforce a decision against themselves. This goes against the natural law principle, *nemo judex in causa sua*.

H. Alpay Karasoy opines that the legal regime governing Ombudsman institutions aims at generating solutions by solving citizens' problems that may arise in their work with the state.[312] He however posits that public institutions can either comply or ignore the decisions of the ombudsman.[313]

Chen holds the view that use of persuasion based on moral grounds may be more effective as opposed to using the law to coerce public entities to act.[314] This line of argument has been found to be ineffective if applied to Kenya and the other developing and less developed countries with weak governance structures.

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[310] Narcisa-Mihaela Stoicu and Anca-Florina Moroșteș, 'The Parliament Control on Ombudsman Institution' (2017) Journal of Legal Studies. <https://content.sciendo.com/view/journals/jles/20/34/article-p85.xml> date accessed 6 February 2019.

[311] The Ombudsman's institution is an autonomous public authority, independent to any other public authority, under Parliament control.

[312] Dr. H. Alpay Karasoy, 'Ombudsman in Turkey: Its Contributions and Criticism' (2015) 11/22 European Scientific Journal. <https://eujournal.org/index.php/esj/article/viewFile/6043/5820> accessed 3 February 2019.

[313] Ibid.

[314] Mai Chen, 'New Zealand's Ombudsmen Legislation: The need for amendments after almost 50 years' (2010) 41 VUWLR. <https://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/vol41-4/chen.pdf> accessed 3 February 2019.

Naomi Creutzfeldt,[315] argues that Ombudsmen cannot issue legally enforceable decisions.[316] She harangues that the procedure used by the Ombudsman to arrive at its decisions is flexible and not subject to formalities as those of the court system and that the end product should be a recommendation.[317] This proposition cannot obtain in Kenya as in many African (developing) states given the poor governance structure that has been in place for the past six decades (since independence.) Governance in these countries is characterized by abuse of human rights, maladministration, administrative injustice and inconsistently weak public institutions.

Mark Elliott supports the proposal for non-enforcement of Ombudsman's decisions and states that public officers are not obliged to implement its decisions.[318] He reviews and supports the decision of the Court in *Equitable Members case*[319] where the Executive was allowed to compensate Complainants at a rate below that which was recommended by the Ombudsman.[320] Elliot seems to be speaking in the context of the developed world. His sentiments can thus not be applicable to the developing countries and especially a prebendal system such as Kenya. The sentiments reflect a sharp contrast from the recommendations supported by this study which is done in the context of the Kenyan State.

Richard Kirkham posits that whereas it is important to ensure that Ombudsman's decisions are implemented and/or enforced, the proposal to make its decisions lawfully binding upon public entities would unfavourably and materially alter the original intention of the institution.[321]

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[315] Naomi Creutzfeldt, 'What do we expect from an ombudsman? Narratives of everyday engagement with the informal justice system in Germany and the UK' (2016) 12 International Journal of Law in Context 437–452. <https://vpn.uonbi.ac.ke/proxy/60fbd702/https/www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28407363618&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T28407363620&backKey=20_T28407363621&csi=374840&docNo=5> accessed 5 February 2019.

[316] Ibid.

[317] Ibid.

[318] Mark Elliott, 'The government versus the ombudsman: what role for judicial review?' (2010) 69 The Cambridge Law Journal 1-3. <https://vpn.uonbi.ac.ke/proxy/40fdc0ce/https/www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28409542180&format=GNBFULL&startDocNo=121&resultsUrlKey=0_T28409547476&backKey=20_T28409547477&csi=374818&docNo=128> accessed 5 February 2019.

[319] *Equitable Members Action Group v. HM Treasury* [2009] EWHC 2495 (Admin).

[320] Ibid.

[321] Richard Kirkham, 'Implementing the recommendations of an ombudsman … again' (2011) 33/1 Journal of Social Welfare and Family Law 71-83. <https://doi.org/10.1080/09649069.2011.571472> accessed on 31 January 2019.

As has been observed earlier in this chapter, the solution to the challenge of non-enforceability lies not in maintaining the classical Ombudsman system where the decisions of the Ombudsman were mere recommendations to the current emerging position where the Ombudsman's decisions are binding upon public and private entities against whom they are made. Non-enforceability may have worked in developed countries with strong, stable and effective public administrations but cannot work in other jurisdictions especially in Africa and other related jurisdictions with weak, unstable and ineffective public administration.

3.4 Conclusion

It cannot be overemphasized that an Ombudsman institution plays a very important role in the modern day governance. The role of the institution differs from one jurisdiction to another, and in some instances, it departs sharply from the traditional role which the institution had in ancient times and at the time of its institution in Sweden.

The institution serves as a watchdog to the modern day governance system and proposes necessary changes to ensure good governance while at the same time raising a red flag whenever there is breach of human rights and deviation from the recommended standards of constitutionalism, rule of law and good governance. The institution also solves people's problems with those in authority, ensures proper service delivery, recommends remedies to breaches of citizen's rights, monitors ethics, enforces rights and monitors and prevents corruption.

Ombudsman institution still remains relevant in the modern global legal system, and in Kenya, and its establishment in any governance system has become a sine qua non. The institution plays a pivotal part in the modern day governance system and as such there's need to expand the structural and functional mandate of the institution beyond the classical Swedish model and to make its decisions binding and/or enforceable.

Roxan Venter, in his study on the need for an Ombudsman in a society concludes that the institution is an important legal mechanism which is put in place to protect society against

maladministration and misuse of governmental authority and it is therefore important to protect the institution against state influence and to ensure its decisions are enforced.[322]

The chapter also concludes that the value attached to an Ombudsman's decisions differ from one jurisdiction to another, yet, the need to respect the same cuts across all jurisdictions: whereas countries with very strong, stable and effective public administration systems easily and normally respect and enforce Ombudsman's decisions even in the absence of laws permitting enforcement, the same is not the case in countries which experience weak, unstable and ineffective public administration.

The next chapter examines the enforcement experience of the Ombudsman institution in Kenya including challenges affecting enforceability of its decisions. The chapter critiques the existing functions and powers of the Ombudsman, and discusses the limitations on its operations as well as the factors affecting enforceability of the decisions of the Commission on Administrative Justice.

[322] Roxan Venter, 'Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs (2016) 10/6 International Journal of Law and Political Sciences, 2051 & 2054. <https://waset.org/publications /10004753/enforcement-of-decisions-of-ombudsmen-and-the-south-african-public-protector-muzzling-the-watch dogs> accessed 02 August 2019.

CHAPTER 4

ENFORCEABILITY OF THE DECISIONS OF OMBUDSMAN IN KENYA

4.0 Introduction

In chapter three we discussed the place and role of the Ombudsman in the global legal systems by examining the manner in which decisions of the institution are treated in various jurisdictions. The chapter also discussed the need for Ombudsman institution in the modern legal system, the value of Ombudsman's decisions and their enforceability.

This chapter examines the enforcement experience of the Ombudsman institution in Kenya. The challenges that have so far hindered enforcement of the decisions of the Commission on Administrative Justice and its predecessor are also reviewed. By so doing, the chapter offers a critique of the existing and previous functions; powers and limitations of the institution as regards its operations, as well as the specific factors affecting enforceability of its decisions. The prevailing jurisprudence in Kenya regarding enforcement of the decision of the Commission on Administrative Justice is widely discussed under this chapter. The Chapter is divided in to four main parts namely: functions of the Commission on Administrative Justice; its powers; limitation on its jurisdiction; and challenges affecting enforceability on its decisions.

The chapter concludes that the main factors affecting enforcement and effectiveness of the decision of the Ombudsman in Kenya are lack of strong and stable governance structures, prevailing jurisprudence which points to lack of assistance by the judiciary, various limiting provisions of the law,[323] political patronage/lack of political goodwill, non-cooperation by public entities, lack of independence and limited resources.

[323] Particularly section 8(c) of the Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya, which contains a blanket provision that the Commission shall "report to the National Assembly bi-annually on the complaints investigated … and the remedial action taken thereon."

The Ombudsman in Kenya, and indeed in any part of the world, acts as an oversight agency for administrative actions especially in the public service. Article 47 of the Constitution provides for the right to fair administrative action. Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[324] There are corresponding institutional arrangements for safeguarding this right in addition to the court.[325] Administrative action is widely defined[326] as any act which relates to administration and includes all decisions made or actions done within the public service.[327]

From the foregoing it can be seen that the concept of Administrative Justice is wide and far reaching. It touches on every aspect of private and public life including licensing of institutions, provision of services such as water, education, health, sanitation, transport, construction and also those that directly affect the citizens such as citizenship, demolition of houses and evictions.[328] Most of these services are offered to the citizens by the Government and on behalf of the same citizens. The citizens therefore expect fairness in the process. Administrative process must be expeditious, efficient, lawful, reasonable and procedurally fair. In addition to these requirements under Article 47 of the Constitution, the process should also be legal and must respect the Constitutional values and principles under Article 10 of the Constitution.[329] If the person who serves the People is not right or lacks the powers to act then the decision must be reversed.[330]

The Government of Kenya has often been criticized for poor service delivery since independence. This has been characterized by delay in delivery of crucial services, corruption, loss of files,

[324] Article 47(1) of the Constitution of the Republic of Kenya.
[325] Chaloka Beyani, 'High Court Ignored Constitution on Powers and duties of Ombudsman' *Daily Nation* (Nairobi, 23 March 2015) <https://mobile.nation.co.ke/blogs/-High-Court-Constitution-Ombudsman-Beyani/1949942-2665506-format-xhtml-wwpgdcz/index.html> accessed 28 August 2019.
[326] Under section 2 of CAJ Act, Cap. 102A Laws of Kenya, No. 23 of 2011.
[327] See section 2 of CAJ Act, Cap. 102A Laws of Kenya, No. 23 of 2011. Administrative action is also defined under section 2 of the Fair Administrative Action Act, No. 4 of 2015, to include (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
[328] Katiba Institute, *Fair Administrative Action under Article 47 of the Constitution: A Guide for the Administrator with some guidance to the public on what to expect and how to complain* (Colour Print Printers 2018) <http://www.katibainstitute.org/wp-content/uploads/2018/06/Fair-Administrative-Action-1_441.pdf> accessed 01 September 2019.
[329] Jill Ghai, 'Fair Administrative Action: Does it Matter-especially for service delivery?' BTS Presentation (2017) <https://www.kara.or.ke/Fair%20Administrative%20Action%20BTS%20Presentation%20by%20Prof.%20Jill%20Ghai.pdf> accessed 28 July 2019.
[330] Ibid.

discourtesy, unfair treatment and ineptitude. These are instances of unfair administrative actions. Unfair Administrative Action has threatened Kenya's democracy for a long period of time.[331] The State has in turn tried to put in place measures to curb the problem in a bid to ensure that citizens are satisfied with the service provided by public officials.[332] The measures include RBM[333] and signing of performance contracts by Government officials. The challenges still remain entrenched within the Kenyan public service despite the foregoing efforts by the Government.

4.1 Functions of the Commission on Administrative Justice

These can be broadly categorized into two:

1. Addressing maladministration, and
2. Oversight and implementation of the right to access to information.

1. Maladministration

The mandate, role and/or functions of the Commission as regards maladministration are expressly defined by the Constitution.[334] The mandate as expressed in the Commission on Administrative Justice Act[335] are derived from the Constitution, even though the Act seems to have expounded the same.[336]

The Kenyan Constitution expressly provides for the mandate of CAJ as including investigation of actions of public officials and offices regarding maladministration; reporting on the same and taking remedial action.[337]

[331] Mutia Mamu Mutinda, 'Strategic role of Huduma Center Initiatives on Public Service Delivery Among Residents of Nakuru County, Kenya' (MBA Research Project, JKUAT 2017). <http://ir.jkuat.ac.ke/bitstream/handle/123456789/4456/MUTIA%20MUTINDA%20FINAL%20%284%29.pdf?sequence=1&isAllowed=y> accessed 17 May 2019.
[332] Ibid., 1.
[333] Rapid Based Management framework which includes service charters.
[334] See Article 59(2)(h), (i) and (j) of the Constitution as read together with subsections 4 and 5 of the said Article.
[335] Cap. 102A Laws of Kenya, (No. 23 of 2011.)
[336] Ibid., section 8.
[337] Please refer to Article 59(2)(h), (i) and (j)

The Act establishing the Kenyan Ombudsman draws from the Constitution[338] and provides for the Ombudsman's roles as: (i) investigative,[339] (ii) reporting,[340] (iii) complaint handling capacity building within public institutions,[341] (iv) promoting Alternative Dispute Resolution,[342] (v) recommending compensation/remedies[343] and (vi) promoting human rights.[344] The reporting obligation of the Commission has been the subject of Court interpretation as discussed below under part 4.4.1 of this chapter. The same was interpreted by the High Court of Kenya as the only remedy available to the Commission in the event that its decisions are ignored by public entities.

The said law[345] basically provides for the mandate of the Ombudsman over public entities regarding complaints on maladministration. The obligation of the Commission is to investigate the admissible complaints against public entities, to report their findings, to promote and protect human rights, to recommend compensation or any other suitable remedy, to build and to promote complaint handling by public institutions and to promote Alternative Dispute Resolution.[346]

From the foregoing provisions, the Commission performs the classical role of an Ombudsman institution but is also transformatively required to take remedial action.[347] The current functions of the Commission on Administrative Justice are materially similar to the functions of the defunct Standing Committee on Public Complaints;[348] the predecessor to the current Commission on Administrative Justice. The Gazette Notice establishing the Committee provided for the functions of the Committee as, *inter alia*, investigating complaints on maladministration, promoting

[338] Ibid.
[339] See section 8(c) and (i) of the Commission on Administrative Justice Act Cap. 102A Laws of Kenya.
[340] Please refer to section 8(a), (b) and (d) of the Commission on Administrative Justice Act Cap. 102A Laws of Kenya.
[341] Kindly refer to section 8(e) of the Commission on Administrative Justice Act Cap. 102A Laws of Kenya.
[342] See section 8(f) of the Commission on Administrative Justice Act Cap. 102A Laws of Kenya.
[343] Please read section 8(g) of the Act.
[344] See section 8(k) of the Commission on Administrative Justice Act Cap. 102A Laws of Kenya.
[345] Refer to section 8 of the Commission on Administrative Justice Act Cap. 102A Laws of Kenya.
[346] Ibid.
[347] See section 8(c) of the Commission on Administrative Justice Act on the power to take remedial action. The implication of the said power has been discussed under chapter three and shall also be discussed later on in this chapter under the subtopics 'Kenyan Ombudsprudence on Remedial Action' and 'Legal provisions.' See also:- Chaloka Beyani, 'High Court Ignored Constitution on Powers and duties of Ombudsman' *Daily Nation* (Nairobi, 23 March 2015) <https://mobile.nation.co.ke/blogs/-High-Court-Constitution-Ombudsman-Beyani/1949942-2665506-format-xhtml-wwpgdcz/index.html> accessed 28 August 2019.
[348] Refer to Article 59(4) of the Constitution, section 8 of the Commission on Administrative Justice Act Chapter 102A of the Laws of Kenya and Gazette Notice No. 5826 of 29th June 2007; Kenya Gazette, Vol. CIX-No. 42.

complaint handling by public institutions, promoting Alternative Dispute Resolution through mediation,[349] recommending compensation or other remedies and reporting its findings.[350]

The material difference can be seen under the reporting obligation as the current institution is required by law to report to the National Assembly while its predecessor was only required to "publish quarterly reports for public information on the number and nature of complaints received and the action taken by the Committee."

The institution however remains ineffective just as its predecessor, the Standing Committee on Public Complaints (PCSC). Migai Akech, in his book titled Administrative Law, comments that PCSC was largely ineffective.[351]

Before the Committee[352] was established, the people of Kenya had given their views on the system of public administration that they desired. This was captured by the defunct Constitution of Kenya Review Commission (CKRC.) In its final report,[353] CKRC recommended establishment of a commission which would have effectively performed the classical role of an Ombudsman institution in addition to having the oversight role on human rights issues. The recommended powers of the proposed institution would include investigation, issuing summons, oversighting access to information, powers to order for compensation/other remedies, recommend disciplinary action against police officers and to monitor integrity and transperancy.[354]

The proposed powers of the Ombudsman under the CKRC report were much wider than the current powers of the Commission on Administrative Justice or its predecessor, the Standing Committee on Public Complaints. They included powers to cite public entities for contempt. Some of the powers were not reflected in the 2010 Constitution.

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[349] The current role of the Ombudsman regarding Alternative Dispute Resolution is however not limited to mediation alone but encompases all forms of Alternative Dispute Resolution.

[350] Kenya Gazette, Vol. CIX-No. 42, Gazette Notice No. 5826 of 29th June 2007 <http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109,> accessed 02 August 2019.

[351] Migai Akech, *Administrative Law* (1st edn, Strathmore University Press, 2016) 399.

[352] Standing Committee on Public Complaints.

[353] CKRC Report (n 143).

[354] Ibid., 312.

2. Access to Information

The Kenyan Ombudsman is the oversight and implementing authority on the right to Access to Information in Kenya.[355] The right to Access to Information is guaranteed under Article 35 of the Constitution of the Republic of Kenya. Article 35(1) of the Constitution states that "every citizen has the right of access to information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom."

The Commission has powers under Access to Information Act[356] to review a decision of a public or private entity in relation to matters access to information. The Act[357] bestows powers of oversight and enforcement regarding the right to Access to Information in Kenya upon the Commission on Administrative Justice.[358]

The Commission's functions include investigation, implementation, public education, promotion of the right of access to information, monitoring of state compliance and data protection.[359] The Commission is empowered to issue summons and orders including orders for release of any information withheld unlawfully and for compensation .[360] parties to the complaint have the option of appealing against the orders of the Commission to the High Court.[361] If no appeal is filed, the Ombudsman's findings can be executed as an order of the High Court.[362]

4.2 Powers of the Commission on Administrative Justice

From the above discussion on the Commission's powers under the Access to Information Act, it is evident that the Commission has enforcement powers, makes binding decisions and orders which can be implemented as an order of the High Court. The Commission also has a mandate

[355] See generally the provisions of the Access to Information Act, No. 31 of 2016 Laws of Kenya.
[356] See section 14 of the Access to Information Act, No. 31 of 2016 Laws of Kenya.
[357] Access to Information Act, No. 31 of 2016 Laws of Kenya.
[358] Ibid., section 20(1).
[359] See section 21 of the Access to Information Act, No. 31 of 2016 Laws of Kenya.
[360] Access to Information Act, section 23(1) and (2).
[361] Ibid., section 23(3).
[362] Ibid., section 23(5).

over private entities in matters Access to Information.[363] This is not the case with the mandate relating to maladministration under the Commission on Administrative Justice Act where, as we shall see herein, the Commission's decisions are not binding upon the Respondents and its mandate is limited to public entities only.

The powers of the Commission on Administrative Justice under the Act[364] issuing summons and questioning suspected malfeasant public officers.[365] The Ombudsman may also rely on and use the services of any public official and/or investigative agency.[366] The foregoing powers of the Commission under sections 27 and 28 of the Commission on Administrative Justice Act are substantially similar to those under sections 23 and 24 of the Access to Information Act.

4.3 Limitation of Jurisdiction of the Commission on Administrative Justice

The powers bestowed upon the Kneyan Ombudsman are not unlimited. The law limits the powers of the said institution and as such, it may not investigate specific matters listed under section 30 of the Act including affairs of the cabinet, crimes, matters pending before the Court or any other public institution or constitutional Commission.[367]

4.4 Factors affecting enforceability of CAJ's decisions

The challenge of non-enforcement of the decisions of the current Ombudsman Institution in Kenya, the Commission on Administrative Justice, were similarly faced by its predecessor, PCSC, whose decisions were more often disregarded by public officers and institutions than the decisions of its successor. In fact, some of the decisions of the Committee have not been implemented more than ten years after they were made.

[363] See generally sections 6, 9, 10, 11, 13 and 14 of the Access to Information Act, No. 31 of 2016 f the Laws of Kenya.
[364] Commission on Administrative Justice Act, Cap. 102A Laws of Kenya, No. 23 of 2011.
[365] Ibid., section 27.
[366] Ibid., section 28.
[367] See generally the provisions of section 30 of the Act.

The Constitution of Kenya Review Commission outlined broad and general principles which ought to apply to any constitutional commissions[368] including independence[369] of the Commission and it's powers and functions.[370] Independence of a commission is determined by several factors including:[371] mode of establishment, financial autonomy, appointment and dismissal procedure. CKRC also observed that the legislation establishing a Commission must also ensure that it can effectively perform its functions.[372] The requirement for independence of constitutional commissions was adopted by the current Constitution of Kenya, 2010.

There are many factors affecting enforceability, enforcement and validity of the decisions of the Ombudsman. Some of the factors include the prevailing jurisprudence, various provisions of the law, politics, non-cooperation by public officers and institutions, invalid decisions, lack of independence, the sunset clause and limited resources. The foregoing factors are discussed in details hereinafter.

4.4.1 Kenyan Ombudsprudence on Remedial action

The Abekah Case

In *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah*,[373] hereinafter 'the Abekah case', the High Court of Kenya, sitting at Nairobi, held that public bodies have no obligation to implement the reports, findings and recommendations of the Commission on Administrative Justice. The Court ruled that whereas it is important for public organizations to implement the recommendations of the Ombudsman, they cannot be forced by the courts to do so.[374] The decision was, and for that matter still remains a major set-back to the Commission which has, since its establishment, faced disregard and contempt from public officers and institutions.

[368] Including CHRAJ.
[369] Article 249(2) provides that all constitutional commissions are independent and not subject to direction or control by any person or authority.
[370] Ibid.
[371] CKRC Report (n 143) 312.
[372] Ibid.
[373] *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR
[374] *Ibid.*, 14.

The Commission on Administrative Justice preferred an appeal against the said decision.[375] In its decision, the Court of Appeal allowed the *ex-parte* Applicant's[376] application for a judicial review order of mandamus which sought to compel the Respondent[377] to comply with the recommendations of the Ombudsman.[378] The Court of Appeal also allowed the prayer for compensation and awarded Eng. Abekah Kshs. 700,000 as damages for infringement on his constitutional right to fair administrative action. The Court, however, fell short of declaring that the decisions of the Kenyan Ombudsman are binding upon public entities against whom they are made. This failure could be attributed to the nature of the application that was made to the Court and the reliefs sought by both the ex-parte Applicant and the Commission on Administrative Justice at the High Court and Court of Appeal respectively.

The Court of Appeal in its decision also mentioned that CAJ's decisions have the force of law and are therefore open to enforcement by the Court.[379] It is trite law that decisions which are made by a public body in accordance with the relevant provisions of the law have the force of law. By comparison, and to demonstrate that this pronouncement is just a repetition of common knowledge, it can be noted that even contracts between private parties have the force of law and can be enforced by the Court.

Facts of the Abekah Case

The Complainant, Eng. Judah Abekah, joined Vision 2030 Delivery Secretariat as a Director, Enablers and Macro, on a three year' contract commencing on 16th March 2009.[380] He alleged that towards the end of his contract, the Board[381] poorly appraised him on his performance which and declined to renew his contract. He appealed to then then Minister[382], Planning, National

[375] *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR (Nairobi CACA No. 141 of 2015*).
[376] As he was in the High Court case.
[377] Kenya Vision 2030 Delivery Board.
[378] Commission on Administrative Justice.
[379] *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR.*
[380] Commission on Administrative Justice, 'Determination in the Matter of complaint by Eng. Judah Abekah against the Vision 2030 Delivery Secretariat,' 10th October 2013.
[381] Vision 2030 Delivery Board.
[382] Vision 2030 Delivery Board fell under the defunct Ministry of Planning, National Development & Vision 2030.

Development & Vision 2030 who allowed his appeal and renewed his contract for a period of one year.[383] He continued working at the Secretariat until the Director General, Vision 2030 Delivery Secretariat locked his office. His salary was stopped with effect from 16th March 2018 and the new contract withheld. He complained to the Ombudsman on 21st August 2012.

On 10th October 2013, the Commission made a determination in his favour, *inter alia*, that he be paid an equivalent of twelve months' salary and allowances in compensation for the one-year period of the renewed contract, and that he be facilitated to access his personal effects from his former office.[384] The Respondent facilitated access to his personal effects from the office but declined to compensate him as determined by the Commission stating that the alleged one-year new contract issued by the Minister was irregular and illegal since the Board neither requested nor recommended its renewal and therefore the same was invalid.

Being aggrieved by the decision of the Board, the Complainant filed a judicial review case[385] in the High Court seeking an order of mandamus to compel the Board to implement the recommendation of the Commission.[386] The Court concluded that the Commission on Administrative Act does not give the Commission coercive powers over the organizations it investigates and held that "where an organization refuses to implement the recommendations of the Commission, the only action the Commission can take is to make a report to the National Assembly detailing the failure. Thereafter, the National Assembly shall take appropriate action."[387] The Commission on Administrative Justice appealed against the High Court's decision.[388]

[383] Commission on Administrative Justice, 'Determination in the Matter of complaint by Eng. Judah Abekah against the Vision 2030 Delivery Secretariat,' 10th October 2013.
[384] *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR, 2.
[385] Nairobi High Court Judicial Review Case Number 223 of 2014.
[386] *Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR, 2.
[387] Ibid., 13. The Court further stated that "as the Commission cannot compel a state agency to implement its recommendations, it follows that the Court cannot compel a government agency to implement such recommendations. Government agencies have no statutory duty to implement the recommendations of the Commission."
[388] Please see the decision in *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR* 16.

Critique of the Abekah Case

The decision of Justice Weldon Korir in the Abekah case[389] can be said to be correct to the extent that it employs a positivist interpretation of the provisions of the Commission on Administrative Justice Act[390] especially sections 8,[391] 41[392] and 42.[393] The Court however failed to give a wide and purposive interpretation and/or to 'read into the law;' an approach taken by the South African Constitutional Court, and especially on to the meaning and purpose of the phrase "take remedial action."

In chapter three, we analyzed the two decisions of the South African Supreme Court in *SABC v. DA*[394] and *EFF v Speaker*[395] where the Court found that the decisions of the Ombudsman are not mere recommendations but are binding upon the public officers and institutions against whom they are made. As was correctly observed in the said chapter, provisions of section 182(2)(C) of the

[389] The High Court decision.
[390] Cap. 102A Laws of Kenya, No. 23 of 2011.
[391] Section 8 provides for the mandate of the Commission which include, *inter alia*, to "(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice; (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector; (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon."
[392] Section 41 provides for the action to be taken by the Commission after inquiry and states that "[t]he Commission may, upon inquiry into a complaint under this Act take any of the following steps; (a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons; (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution; (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief; (d) provide a copy of the inquiry report to all interested parties; and (e) submit summonses as it deems necessary in fulfilment of its mandate."
[393] Section 42 states that "(1) [a]fter concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates. (2) The report shall include: (a) the findings of the investigation and any recommendations made by the Commission; (b) the action the Commission considers should be taken and the reasons for the action; and (c) any recommendation the Commission considers appropriate. (3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission. (4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action."
[394] *South African Broadcasting Corporation and Others v Democratic Alliance and Others,* [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA); neutral citation: *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015).
[395] *Economic Freedom Fighters v Speaker of the National Assembly and Others*: Democratic Alliance v Speaker of the National Assembly & Others 2016 (5) BCLR 618 (CC).

South African Constitution mirror those of Article 59(2)(j) of the Kenyan Constitution which provides that the Commission shall report on complaints investigated and remedial action taken. Section 8(c) of the Commission on Administrative Justice Act[396] contains a similar provision. Flowing from this similarity and analysis, it would have been wiser for the Court to adopt the approach by the South African Supreme Court in *SABC v. DA*[397] and *EFF v Speaker*[398]and to arrive at the conclusion that the Kenyan Ombudsman's decisions are binding upon the public entities against whom they are made.

Based on the above analysis of the two decisions emerging from the South African Constitutional Court, it can be safely concluded that the Abekah case is a bad precedent. The Court ought to have interpreted the provisions of Article 59(2)(j) of the Constitution as read together with section 8(c) of the Commission on Administrative Justice Act purposively as did the South African Constitutional Court.

In *EFF v Speaker*[399] the Court held that the remedial action taken by the Public Protector against the then sitting President Jacob Gedleyihlekisa Zuma was binding.[400] The Court concluded that failure by the President to comply with the remedial action taken against him by the public protector was unconstitutional and, was therefore invalid.[401] Similarly, the resolution passed by the National Assembly absolving the President from compliance with the remedial action was found to be invalid and was consequently set aside by the Court.[402]

Chaloka Beyani commenting on the Court's decision in the Abekah Case states that "the court lost sight of the transformative effect of the Constitution and role of the Commission,[403]" adding that the provisions of the Constitution cannot be given meaning by first referring to the provisions of

[396] Chapter 102A of the Laws of Kenya.
[397] *South African Broadcasting Corporation and Others v Democratic Alliance and Others,* [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA); neutral citation: *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015).
[398] *Economic Freedom Fighters v Speaker of the National Assembly and Others*: Democratic Alliance v Speaker of the National Assembly & Others 2016 (5) BCLR 618 (CC).
[399] Ibid.
[400] Ibid., 2 and 51.
[401] Ibid.
[402] Ibid., 3 and 52. The resolution was found to be inconsistent with sections 42(3), 55(2)(a) & (b) and 181(3) of the Constitution of the Republic of South Africa, 1996.
[403] Commission on Administrative Justice.

an Act of Parliament which is made under, and is subordinate to, the Constitution, and then to the Constitution itself.[404] He portends that the posture of the Constitution is for the Commission to take remedial action in the context of ensuring administrative action.[405] That the Constitution does not require the Commission to "recommend;" the requirement being an addition of the Act.[406]

The proposition that a provision of the Constitution could be watered down by the provisions of an Act of Parliament is irreconcilable with the supremacy[407] of the Constitution which is the primary source of those powers.

Joshua Malidzo Nyawa referred to the Abekah case as a misplaced precedent which seeks to place the first and long nails to the coffin of the office of the Commission on Administrative Justice.[408] He correctly avers that the decision seeks to perpetuate maladministration and is a betrayal of the intent of the drafters of the Constitution and the legislation.[409] To hold that the decision of the Commission on Administrative Justice are not binding will amount to the perpetuation of impunity and also declaring that the commission is powerless.[410]

Isaac Nyoike case

In *Republic Versus Commission on Administrative Justice ex parte Nyoike Isaac*,[411] hereinafter referred to as 'Isaac Nyoike case,' the Commission on Administration Justice recommended that the *ex parte* applicant, Nyoike Isaac, be removed as the Chief Valuer of the County Government

[404] Chaloka Beyani, 'High Court Ignored Constitution on Powers and duties of Ombudsman' *Daily Nation* (Nairobi, 23 March 2015) <https://mobile.nation.co.ke/blogs/-High-Court-Constitution-Ombudsman-Beyani/1949942-2665506-format-xhtml-wwpgdcz/index.html> accessed 28 August 2019.
[405] Ibid.
[406] Ibid.
[407] Article 2(4) of the Constitution states that "[a]ny law, including customary law, that is inconsistent with [the] Constitution is void to the extent of the inconsistency, and any act or omission in contravention of [the] Constitution is invalid."
[408] Joshua Malidzo Nyawa, 'Republic V Kenya Vision 2030 Delivery Board And Another Ex-Parte Eng. Judah Abekah; A Kalashnikov Bullet to the Role And Importance of the Commission on Administrative Justice' <https://joshuamalidzonyawa.wordpress.com/2017/12/02/republic-v-kenya-vision-2030-delivery-board-and-another-ex-parte-eng-judah-abekah-a-kalashnikov-bullet-to-the-role-and-importance-of-the-commission-on-administrative-justice/> accessed 28 August 2019.
[409] Ibid.
[410] Ibid.
[411] *Republic v Commission on Administrative Justice ex parte Nyoike Isaac [2017] eKLR.*

of Nairobi.[412] The Commission concluded that the Governor, Nairobi City County, should remove from office the ex parte Applicant for gross abuse of power and breach of public trust.[413] Being dissatisfied with the findings of the Ombudsman, he filed a judicial review case[414] seeking an order of certiorari to "quash all the findings and recommendations in the investigation report of the Commission on Administrative Justice" touching on the *ex parte* Applicant.[415]

The Court allowed the application for review and consequently quashed "all the findings and recommendations in the investigation report of the Commission on Administrative Justice." This was yet another instance where the Court disagreed with the Ombudsman based on a technicality.

In order to make the Kenyan Ombudsman effective and to ensure compliance with its decisions and recommendations, the Commission[416] needs the backing of the Court.[417] This study proposes that the Kenyan Ombudsman needs to take urgent and active steps to ensure implementations of its decisions by moving the Court as, and whenever, it is necessary to do so in a bid to ensure that most, if not all, its decisions are adequately implemented.

4.4.2 Limiting provisions of the Law

There are various provisions of the law that limit the functional independence of the Ombudsman in Kenya. The action to be taken by the Commission after conducting an Investigation is to be found under section 8(c) of the Act which provides that the Commission shall "report to the National Assembly bi-annually on the complaints investigated … and the remedial action taken thereon." According to the decision of the High Court, in the Abekah case, the Commission has no power to enforce its own decisions as regards complaints on maladministration. As we have seen, the Commission's decisions on enforcement of the right to access to information are binding, unless and until they are set aside by the High Court.[418]

[412] Ibid., 3.
[413] Ibid., 11.
[414] High Court of Kenya at Nairobi, Judicial Review Case No. 436 of 2016 *R v Commission on Administrative Justice ex parte Nyoike Isaac.*
[415] Ibid., 2.
[416] Commission on Administrative Justice.
[417] Otono (n 21) 44.
[418] See section 22 of the Access to Information Act, No. 31 of 2016 Laws of Kenya.

The Commission has however tried to remedy the challenge on non-enforceability through the Commission on Administrative Justice Regulations, 2013.[419] Regulation 32(2)[420] states that "Orders of the Commission shall be enforced in similar manner as Orders of Court." The challenge is that this is not derived from the Act and can be successfully challenged as being ultra vires. It is not surprising that the Commission did not rely on this provision of its own regulations in the Abekah Case to support the Order made against Vision 2030 Delivery Board. The same was also not applied in the Isaac Nyoike case as we have seen above.

Regulation 21[421] provides that in determining a complaint, the Commission may "recommend the removal of the Respondent from State or Public office"[422] or "issue a formal citation or warning to the respondent."[423] In Isaac Nyoike case, even though the Commission recommended the removal of the *ex parte* Applicant as the Chief Valuer, Nairobi City County, it[424] did not rely on the provisions of Regulation 21(c) as the enabling provision of the law in the subsequent suit that was filed by the Respondent.[425] The reason for this is obvious, the power to recommend removal of a Respondent is only provided for in the Regulations[426] but not in the Act[427] and/or the Constitution.[428]

In addition to the requirement that the Ombudsman reports to the National Assembly without any other enforcement powers, section 53[429] of the Commission on Administrative Justice Act, 2011[430] places the Commission under the control of the Government. The said section is purportedly made pursuant to Article 153(4)(b) of the Constitution. The said Article however states that "Cabinet Secretaries shall provide Parliament with full and regular reports concerning matters under their

[419] Legal Notice No. 64 of 2013.
[420] Commission on Administrative Justice Regulations, 2013; Legal Notice No. 64 of 2013.
[421] Ibid.
[422] Ibid., 21(c).
[423] Ibid., 21(d).
[424] Commission on Administrative Justice.
[425] *Ex Parte* Applicant, Nyoike Isaac.
[426] Commission on Administrative Justice Regulations, 2013; Legal Notice No. 64 of 2013.
[427] Commission on Administrative Justice Act, Cap. 102A Laws of Kenya, No. 23 of 2011.
[428] Constitution of the Republic of Kenya.
[429] Section 53 provides that the Cabinet Secretary shall prepare an annual report and submit the report to Parliament in accordance with Article 153(4)(b) of the Constitution of the Republic of Kenya.
[430] Cap. 102A Laws of Kenya, No. 23 of 2011.

control."[431] Constitutional Commissions are meant to be independent[432] and ought not to be under the control of Cabinet Secretaries. The intention of Article 153(4)(b) was not to place independent Commissions under the control of Cabinet Secretaries.[433] Executive Order number 1 of 2018[434] indeed places the Commission[435] under the State Law Office and Department of Justice, confirming the Executive's intention to control the Commission.[436]

The fact that the Kenyan Ombudsman's decision cannot be enforced but can only be forwarded to the National Assembly, coupled with the fact that the National Assembly has never acted on any of the reports or reported back to the Ombudsman on the action taken, serves to deny the Ombudsman the seriousness with which the public, complainants, public officers, institutions and other stakeholders ought to treat its decisions.

According to Emily O'Reilly,[437] the right to fair administrative justice includes the rights to be taken seriously. She opines that the EU[438] administration has to make an effort to make citizens feel that their concerns, questions and requests are taken seriously. She cites an example of a complaint lodged by a citizen where the relevant state department changed some information in its complaint form to make it clearer despite the fact that the complaint was not admissible.[439] This is not the situation in Kenya as Government and public entities do not take seriously complaints from citizens, inquiries from the Ombudsman and even its[440] decisions. The proposal to make binding and/or enforceable the decisions of the Ombudsman would indeed ensure that this right is enjoyed by the Kenyan citizens and institutions including the Ombudsman. Amelia Otono states that that the Kenyan Ombudsman lacks enforcement powers and is therefore unable to secure compliance with its recommendations.[441]

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[431] Article 153(4)(b) of the Constitution of the Republic of Kenya.
[432] Ibid., n 10.
[433] See note 10. See also Article 254(1) of the Constitution which provides for submission of annual reports to President and to Parliament. There is therefore no need for a report by a Cabinet Secretary which only amounts to duplicity.
[434] Organization of the Government of the Republic of Kenya, June 2018.
[435] Commission on Administrative Justice.
[436] Ibid.
[437] *Emily* O'Reilly, 'Good administration in Practice: The European Ombudsman's decisions in 2013' (2014) <https://www.ombudsman.europa.eu/en/Emily-oreilly.> accessed on 4 February 2019
[438] European Union.
[439] Ibid.
[440] Kenyan Ombudsman; formally known as the Commission on Administrative Justice.
[441] Otono (n 21) 55.

Since the law is made for man and not the other way round, the same should be changed as and when it is realized that it is not serving the intended purpose and especially where it does a disservice to the People. This study proposes that the various legal restrictions be removed and that the Ombudsman be given powers to be able to enforce its decisions.

4.4.3 Political interference

In addressing the challenge on non-cooperation by public officers and institutions, John Hatchard argues that the solution lies in the attitude of the executive.[442] The executive has maintained a negative political attitude and have, and on various occasions, interfered with the functioning and independence of constitutional commissions in Kenya. The country witnessed incidences of disbandment of constitutional commissions whenever the Government disagrees with their decisions and the positions taken by the existing office holders. Section 55, which we shall discuss under 4.4.7: the sunset clause, is a recipe for repetition of such incidences. The Commission is bound to respect the Legislature and the Executive failure to which the term of the Commission cannot be extended beyond 5 years as stipulated under section 55 of the Act.[443] Holding a position which is contrary to those of the Executive and/or the Legislature would lead to instant dissolution of the Commission.

The Executive has on several occasions ignored the decisions and advisory opinions of the Ombudsman. The Legislature on the other hand has not acted on any report from the Commission on Administrative Justice since its formation. The Legislature has also failed to support proposals by the Commission regarding necessary amendments to the existing law, especially those seeking to enhance the powers of the Commission.

Appointment of Commissioners to the Commission on Administrative Justice has largely been influenced by politics and is neither based on merit nor technical know-how. This study

[442] John Hatchard, 'Governmental Accountability, National Development and the Ombudsman: A Commonwealth Perspective,' (1991) 53 Denning Law Journal 61. <http://ubplj.org/index.php/dlj/article/view/203> accessed on 10 January 2019.
[443] Commission on Administrative Justice Act, Cap. 102A Laws of Kenya, No. 23 of 2011.

recommends that the appointment of Commissioners should be based on necessary qualifications including ability; integrity and experience, not on political patronage.

Chike and Osegbue have proposed, in relation to the Ombudsman of Nigeria, a total zero tolerance of governments' interference in the administration of Ombudsman.[444] In their study, they found that undue government interference constitutes over 50% of the challenges facing the Ombudsman institution in Nigeria.[445]

According to Janet McLean, politics decides what is constitutional; and enforces it.[446] She posits that constitutional politics should be performed by politicians and not judges acting politically;[447] that Courts are not the ultimate enforcers of the Constitution, which role is left to politics.[448]

4.4.4 Cooperation by public entities

The Commission has on its annual reports cited widespread lack of cooperation by public officers and institutions. Kabillah holds the opinion that non-cooperation by government institutions and agencies with the *Commission* while discharging its mandate have a drawback effect on the promotion of access to administrative justice.[449]

In the Abekah case for example, Kenya Vision 2030 Delivery Secretariat and its Director General blatantly refused to implement the decision of the Ombudsman forcing the Complainant to file a case in Court to implement the same. Despite several correspondences and findings of the Commission, the Respondent declined to implement the decision of the Ombudsman on the basis that the Commission has no power to enforce its decisions. This is a clear case of lack of good faith by public entities in dealing with the Ombudsman.

[444] Osegbue Chike and Madubueze Madumelu, 'The Ombudsman and Administration of Justice in Nigeria; A Study of Anambra State; 2010-2015'22/4 IOSR Journal of Humanities and Social Science 40-57 (2017) 57.
[445] Ibid
[446] Janet McLean, 'The unwritten political constitution and its enemies' (2016) 14/1 International Journal of Constitutional Law 119, 3.
[447] Ibid.
[448] Ibid., 2.
[449] Kabillah (n 5) 9.

4.5.5 Invalid decisions

For a period of two years, the Commission made decisions with far reaching consequences despite the fact that it lacked capacity to do so. The composition of the Commission between 2016 and 2018 raises a number of constitutional questions. Article 250(1) of the Constitution of Kenya states that "[e]ach commission shall consist of at least three, but not more than nine, members." Section 9 of the Act provides for membership of the Commission which "shall consist of a chairperson and two other members." The former inaugural chairperson of the Commission resigned with effect from 1st December 2016, one year before the end of his tenure and after the end of the tenure of the two commissioners,[450] the Commission existed[451] on without any commissioner for a period of about seven months before appointment of new commissioners.

The question that then arises is whether the Commission was properly constituted or at all, to make any decision and if not, then the decisions made by the Commission during the said period remain invalid.[452] The legal implication of the said resignation and exit of the former Commissioners is that the Commission was not properly constituted between 01.12.2016 and 01.08.2018 when the new/current Commissioners were appointed. This has the effect of rendering invalid the decisions made by the Commission during the said period.

In *Eng. Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 Others,*[453] the Kenyan Court of Appeal held that a Constitutional Commission cannot be properly constituted without commissioners. Article 2(4) of the Constitution, which the Court relied upon in the case[454] provides that any act or omission in contravention of the Constitution is invalid.

[450] The pioneer Commissioners' six-year tenure expired on 8th November 2017.
[451] With effect from 1st December 2017.
[452] Courts have held that there can be no Commission without commissioners.
[453] *Eng. Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 Others [2017] eKLR.*
[454] Ibid.

4.4.6 Independence

One of the objects of constitutional commissions is to secure the observance by all state organs of democratic values and principles.[455] Article 249(2)(b) of the Constitution of Kenya provides that Commissions are independent and not subject to direction or control by any person[456] or authority.

Marten Oosting identifies lack of independence as one of the challenges to an effective Ombudsman institution.[457] He emphasizes that the public must have confidence in the institution, which confidence is generated when the Ombudsman has high profile and his work yields results.[458] Oosting maintains that confidence in the ombudsman also presupposes independence and impartiality—not only of the office, but also of the person holding it.[459] The continued disregard of the decisions of the Ombudsman coupled with lack of support from the Kenyan Judiciary and the Executive has led to erosion of public confidence on the institution hence lack of independence; going by Oosting's analysis.

Even worse is the fact the Executive and the Legislature have played a big role in ensuring that Constitutional and other statutory institutions of justice do not succeed in performance of their mandate/objectives as envisioned by the people and the law. Parliament, for example, has not acted on any report from the Commission on Administrative Justice since its formation. The Presidency on the other hand has failed to reign in on its appointees in order to help enforce the Ombudsman's decisions. The Executive has also disregarded Advisories made by the Commission on Administrative Justice.

Political patronage, as discussed above, has also greatly contributed to the perceived decline in public confidence and lack of independence. This is a problem which not only affects the

[455] See Article 10 of the Constitution of the Republic of Kenya for a list of all the Kenyan constitutional values and principles.
[456] 'Person' is widely defined under Article 260 of the Kenyan Constitution to include a company, association or other body of persons whether incorporated or unincorporated.
[457] Marten Oosting, *The concept and role of the ombudsman throughout the world*, (May 1999) International Ombudsman Institute, Occasional Paper number 70. <www.theioi.org/.../IOI%20Canada_Occasional%20paper %2070_Marten%20Oosting_The%20Concept%20and%20Role%20of%20the%20Ombudsman%20Throughout%20the%20World_1999.pdf.> accessed 21 February 2019.
[458] Ibid.
[459] Ibid.

independence and effectiveness of the Commission on Administrative Justice but also other Commissions and statutory public bodies.

4.4.7 Sunset Clause

The law provides for a mandatory review of the Kenyan Ombudsman's mandate by merging it with the human rights commission.[460] This was to be done upon expiry of five years from the date of commencement[461] of the Act which lapsed on 5th September 2016. Parliament has not reviewed the mandate of the Commission on Administrative Justice which leaves in limbo the operation of the Commission since the said date.

The Senate has however commenced the process of rectifying the anomaly. Clause 4 of the Commission on Administrative Justice (Amendment) Bill, 2019[462] seeks to amend the Commission on Administrative Justice Act by deleting section 55, the sunset clause. The Bill was taken through the first reading on 21st May 2019 but still has a long way to go since it has to go through the second reading, the committee stage and the third reading before it is referred to the President for Assent. The Bill may also be challenged for having been originated in the Senate instead of the National Assembly yet it has financial implications and it seeks to amend a law which was passed by the National Assembly.[463]

4.4.8 Resources

The Constitution makes provision for funding of Commissions including the Commission on Administrative Justice. Article 249(3) of the Commission directs Parliament to allocate adequate funds to every Commission to necessitate performance of its functions. This provision is yet to be realized, in the opinion of the Commission despite increased and increasing mandate.

[460] Please refer to section 55 of the Act.
[461] Date of commencement as stated in the Act was 5th September, 2011.
[462] Senate Bill No. 6 of 2019; Kenya Gazette Supplement No. 51 of 15th April 2019.
[463] The Bill also seeks to devolve the Ombudsman by establishing offices in all the 47 counties within the Republic of Kenya.

Since its inception in 2011, the Commission's role was addressing maladministration within the public service. However, in 2016, the mandate was increased to include oversight over the right to access to information. The Government's budgetary allocation to CAJ was not increased in tandem with the increased mandate. In fact, in 2016/2017, there was a decline in the exchequer releases. This conclusively indicate that the institution may be under budgetary constraint to execute its mandate.[464]

Constrained budget and increased request is likely to reduce performance. In its annual report for the year 2016, the Commission decried the problem of "low budgetary ceiling" which it avers, is not in tandem with its wide mandate.[465] The Commission listed the effects of the limited financial resources as including "overstretched human resource capacity," "infrastructure," and "inhibited decentralization" of the institution in line with the constitutional principle on devolution.[466] The challenge of budgetary constraint was reiterated by the Commission in its 2017 first end of tenure report[467] which came at the end of the tenure of office of the first commissioners.

In its annual report for the year 2017/2018, the Commission highlighted a number of challenges relating to the problem of limited and limiting resources.[468] In the said report, the Commission listed some of the related problems as including delayed release of funds, haphazard budgetary cuts,[469] prolonged IFMIS[470] platform down-time and very few advocacy and outreach activities.[471]

[464] Commission on Administrative Justice Annual Reports for 2012-2018. The Commission's exchequer releases for the period between 2012 and 2017 were as follows: 2012/2013 (216,241,303.00), 2013/2014 (297,300,000.00), 2014/2015 (362,420,000.00), 2015/2016 (443,900,000.00) and 2016/2017 (427,300,000.00).
[465] The Commission on Administrative Justice, Annual Report, 2016, 58.
[466] Ibid.
[467] Commission on Administrative Justice, 'Laying the Foundation for Administrative Justice in Kenya: Six Years Later' (first end of tenure report, 2017).
[468] Commission on Administrative Justice, Annual Report FY 2017/2018, 89.
[469] The report states that this delay resulted in pending bills since the reduction affected allocations relating to some contracts which were running at the time of the reduction.
[470] Integrated Financial Management Information System.
[471] Commission on Administrative Justice, Annual Report FY 2017/2018, 89.

4.5 Conclusion

The main factors affecting enforcement and effectiveness of the decision of the Ombudsman in Kenya are lack of strong and stable governance structures, prevailing jurisprudence which points to lack of assistance by the judiciary, various limiting provisions of the law,[472] political patronage/lack of political goodwill, non-cooperation by public entities, lack of independence and limited resources.

The challenge posed by the current position held by the judiciary that the only remedy available to the Ombudsman is to report its findings to the National Assembly is that even section 8(c)[473] which provides for the said remedy[474] does not define the strictures within which the National Assembly is to operate in its endeavour to fulfill its obligation. In fact, the National Assembly has the discretion to deal with the reports/decisions/findings of the Ombudsman in any manner in which it deems suitable which includes failure to act on the same. This study has found out that the National Assembly has never acted on any of the biannual reports submitted to it by the Commission since its inception in 2012. Moreover, the Act does not provide for the manner in which the National Assembly should intervene/deal with urgent matters arising from the report of the Ombudsman. As shall be seen in the next chapter, an overhaul of the law relating to the Ombudsman institution in Kenya is recommended.

The next chapter deals with the findings of the study, its conclusion and the necessary recommendations based on the research undertaken. The said chapter is a culmination of the discussions under the preceding chapters: One, Two, Three and Four.

[472] Particularly section 8(c) of the Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya, which contains a blanket provision that the Commission shall "report to the National Assembly bi-annually on the complaints investigated … and the remedial action taken thereon."
[473] Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya.
[474] Please note that this remedy is provided for by the Act and not the Constitution. See also Chaloka Beyani's comments on the same under the subtopic "Kenyan Ombudsprudence on Remedial action: Critique of the Abekah Case."

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

In chapter four, we discussed the enforcement experience of the Ombudsman institution in Kenya; the challenges that have so far hindered enforcement of the decisions of the Commission on Administrative Justice and its predecessor; a critique of the existing and previous functions; powers and limitations of the institution as regards its operations as well as the specific factors affecting enforceability of its decisions. The chapter also discussed prevailing jurisprudence in Kenya regarding enforcement of the decision of the Commission on Administrative Justice.

This chapter deals with the findings of the study, its conclusion and the necessary recommendations based on the research undertaken. It is a culmination of the discussions under the preceding chapters: One, Two, Three and Four. The chapter is divided into two main parts namely; findings of the study and recommendations.

From the discussion we have so far had, Ombudsman can be defined as an institutionalized watch-dog over the activities and modus operandi of the Government and the governed.[475] It provides redress for individual grievances and ensures improvement of service delivery to the People. Ombudsman may highlight weaknesses in practices, rules and attitudes which, if addressed, may greatly improve the governance of a country in terms of service delivery, rule of law and constitutionalism.

A distinction though, needs to, and has been made regarding the mandate of modern Ombudsman *vis a vis* the classical Ombudsman. A distinction was made, under chapter three of this study, between the governance structures and Ombudsman in the developed countries and those of the developing and/or less developed countries. Emphasis was made that the Ombudsmen in the

[475] Osegbue Chike and Madubueze Madumelu, 'The Ombudsman and Administration of Justice in Nigeria; A Study of Anambra State; 2010-2015'22/4 IOSR Journal of Humanities and Social Science 40-57 (2017) 43.

former category of countries can and always enforce their decisions even though the enforcement is not provided for by law. This is due to the fact that the said countries have strong, stable, effective and long established governance structures which are somewhat lacking in most of the developing countries which can be said to be grappling with third world governance problems. This study has maintained that the mandate of the classical Ombudsman cannot work effectively in the latter category of (third-world) countries.

The other challenge faced by the classical Ombudsman's approach is that the idea of Ombudsman was conceived differently by different countries and the institution was given different mandates. In most countries, the Ombudsman performs other functions other than addressing maladministration within the public service which is the traditional function of the classical Ombudsman. One of the most outstanding features of the modern day ombudsmen is the expansion of their functions 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.[476] In Rwanda for example, the Ombudsman can call for a court decision and review it.[477] In Kenya, the Ombudsman has oversight role on the constitutional right on access to information. In Ghana, the Ombudsman doubles up as the human rights watch-dog and has the role of preventing and combating corruption. The implication of the different functions by different Ombudsmen is that the traditional role of the classical Ombudsman cannot be maintained and/or applied in the said jurisdictions. In the next section, we discuss the findings of the study.

5.1 Findings of the Study

5.1.1 Best Ombudsman Model for Kenya

In answer to the first research question, it is concluded that the best model for Ombudsman institution in Kenya is a Hybrid Ombudsman system. This study proposes that the Ombudsman

[476] Linda C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (2004) Leiden: Martinus Nijhoff Publishers, 218-19.
[477] See Chapter VII of The Constitution of the Republic of Rwanda, 2003. The Rwandan Ombudsman also has the mandate of fighting corruption. {Article 182(2)}.

institution in Kenya should retain its traditional role on addressing maladministration within the public service and its oversight role over the right to access to information. The institution should then be merged with the commission which is currently responsible for preventing corruption and monitoring ethics.[478] This implies that the resultant Commission will have four roles namely addressing maladministration, preventing[479] and combating corruption, ethics and access to information. The rationale for this proposal is that the four roles are interdependent and cannot be said to be mutually exclusive. Maladministration in its strict sense encompasses corruption, ethics and access to information.

5.1.2 Place and Role of Ombudsman in the Global Legal System

It cannot be overemphasized that an Ombudsman institution plays a very important role in the modern day governance. The role of the institution differs from one jurisdiction to another, and in some instances, it departs sharply from the traditional role which the institution had in ancient times and at the time of its institution in Sweden.

The institution serves as a watchdog to the modern day governance system and proposes necessary changes to ensure good governance while at the same time raising a red flag whenever there is breach of human rights and deviation from the recommended standards of constitutionalism, rule of law and good governance. The institution also solves people's problems with those in authority, ensures proper service delivery, recommends remedies to breaches of citizen's rights, monitors ethics, enforces rights and monitors and prevents corruption.

5.1.3 Value of Ombudsman's decisions

In answer to research question number two, the study concludes that the Ombudsman institution still remains relevant in the modern world, and particularly in Kenya; and its establishment in any

[478] This is the Ethics and Anti-Corruption Commission established under section 3 of the Ethics and Anti-Corruption Act, 2011 pursuant to the provisions of Article 79 of the Constitution of the Republic of Kenya.
[479] This role, which is currently bestowed upon the National Police Service under Article 244(b) of the Constitution should be given to the proposed Ombudsman institution. It is noteworthy that complaints against police are the most rampant both from the Ombudsman's reports and those of the Ethics and Anti-Corruption Commission.

governance system has become a sine qua non. The institution has an important role to play in the modern day governance system and as such there's need to expand the structural and functional mandate of the institution beyond the classical Swedish model and to make its decisions binding and/or enforceable.

The study also concludes that the value attached to an Ombudsman's decisions differ from one jurisdiction to another, yet, the need to respect the same cuts across all jurisdictions

5.1.4 Factors affecting enforcement of Ombudsman's decisions

This study confirms, affirmatively, the main hypothesis under chapter one that "although Kenya has enacted a law establishing an Ombudsman institution, the decisions of the said institution remain largely unenforceable."

In answer to research question number three, the study concludes that the main factors affecting enforcement and effectiveness of the decision of the Ombudsman in Kenya include lack of strong and stable governance structures, prevailing jurisprudence which points to lack of assistance by the judiciary, various limiting provisions of the law,[480] political patronage/lack of political goodwill, non-cooperation by public entities, lack of independence and limited resources.

5.2 Recommendations

It cannot be overemphasized that given the weak governance structures and systems in Kenya, there is need for enforcement powers since the classical Ombudsman system and philosophy cannot apply to Kenya as discussed under chapter three of this thesis. This study makes several recommendations which are necessary to ensure that the decisions made by the Ombudsman are effectively implemented.

[480] Particularly section 8(c) of the Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya, which contains a blanket provision that the Commission shall "report to the National Assembly bi-annually on the complaints investigated … and the remedial action taken thereon."

In answer to research question number four, the following recommendations are hereby made following the findings and conclusion of the study:

1. Merger of functions.
2. Entrenchment in the Constitution.
3. Appointment of commissioners.
4. Binding decisions.
5. Enforcement through the Court.
6. Need to seek advisory opinion from Supreme Court.
7. Increased cooperation between public entities and Ombudsman
8. CAJ to lead by example.

5.2.1 Merger of functions

It has been proposed herein that the commission responsible for administrative justice should be merged with that responsible for preventing corruption and monitoring ethics,[481] and the proposed institution be entrenched in the Constitution[482] as one of the constitutional commissions in Kenya.[483] One of the findings of this study is that the best model of Ombudsman institution in Kenya is a hybrid model.

This study recommends that the Ombudsman institution in Kenya should retain its traditional role on addressing maladministration within the public service and its oversight role over the right to access to information. The institution should then be merged with that responsible for preventing corruption and monitoring ethics. This implies that the resultant Commission will have four roles namely addressing maladministration, preventing[484] and combating corruption, ethics and access

[481] See note 205.
[482] The emphasis is on entrenchment of the institution in the Constitution rather than being established by Parliament.
[483] The current Ethics and Anti-Corruption Commission is not effective and is not established in the Constitution. It doesn't have the constitutional mandate to prevent corruption as this is within the mandate of the National Police Service under Article 244(b) of the Constitution. Conversely, the functions of CAJ under section 8 of the Act border on Ethics and Integrity. These include abuse of power, unfair treatment, oppressive or unresponsive official conduct, maladministration, delay, discourtesy and misbehavior.
[484] This role, which is currently bestowed upon the National Police Service under Article 244(b) of the Constitution should be given to the proposed Ombudsman institution. It is noteworthy that complaints against police are the most rampant both from the Ombudsman's reports and those of the Ethics and Anti-Corruption Commission.

to information. The rationale for this proposal is that the four roles are interdependent and cannot be said to be mutually exclusive.

Maladministration in its strict sense encompasses corruption, ethics and access to information. In 2005, the people of Kenya specifically asked for the creation of an Ombudsman institution with powers, *inter alia*, to deal with the vice of corruption and those who have looted public funds.[485]

5.2.2 Entrenchment in the Constitution

The study recommends that the new commission, following the aforesaid merger of functions, be entrenched in the Constitution. The study further recommends that the appointment of Commissioners to the proposed Ombudsman institution should be based on necessary qualifications including ability; integrity and experience on matters ethics, anti-corruption and administrative justice and not on political patronage. According to Gerald E. Caiden, the original Swedish Ombudsmen were required to be people of known legal and outstanding ability.[486]

5.2.3 Appointment of commissioners

Appointment of Commissioners should be dictated by the Constitution and the same be structured along professional lines guided by relevant professional and religious bodies: for example; a clergy nominated by the umbrella body for all religious groups, an Advocate of the High Court elected by members of the statutory body responsible for the professional regulation of Advocates e.t.c. Commissioners should not be appointed on the basis of political patronage and such other grounds which would disparage the stature of the Commission.

The Draft Constitution of Kenya, 2004,[487] went ahead to provide for the mandatory professional qualifications required of four out of six Commissioners who were required to constitute the office of the Commission on Human Rights and Administrative Justice.[488]

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[485] CKRC Report (n 143) 314.
[486] Bokhari (n 74) 4.
[487] The Draft Constitution of Kenya 2004 adopted by the National Constitutional Conference on 15th March 2004, Clause 298. <http://www.katibainstitute.org/Archives/images/3-Bomas_draft.pdf> Accessed 01 August 2019.
[488] Ibid. These requirements included professional knowledge and experience in matters relating to children; disability; basic needs; and rights of the aged.

This study recommends that the appointment of Commissioners should be based on necessary qualifications including ability; integrity and experience, not on political patronage.

5.2.4 Binding decisions

It is recommended that Ombudsman's decisions, recommendations, findings and/or Orders should be binding upon the Respondents against whom they are made. Alternatively, the decisions be open for adoption as judgments of the court. This will ensure a clear remedy for Complainants as litigants, as opposed to the current situation in which the Ombudsman's decisions[489] have no real value, both to the Respondents and to the Court. It is not logical to establish an institution and to fund it massively using taxpayers' money only for it to make decisions which are neither binding nor enforceable.

In Ghana, if the decision of CRHAJ is not implemented within three months, it can seek appropriate remedy for enforcement from any court.[490] In an ideal situation, the Ombudsman's decisions should have the status of a judgment of the High Court. This is reflected under the Access to Information Act in Kenya[491] pursuant to which the Commission's order may be filed in the High Court by any party thereto.[492] If no appeal is filed, the Ombudsman's findings can be executed as an order of the High Court.[493]

The African Ombudsman Institution has proposed that the powers of the Ombudsmen in Africa be enhanced and that the same should not be limited to making recommendations as that will lead to ineffective Ombudsmen in Africa.[494]

[489] On matters relating to maladministration.
[490] Stephen Sondem, *National Human Rights Institutions- The Ghanaian Experience*, 251. <http://studiorum .org.mk/evrodijalog/16/pdf/Evrodijalog_br_16_7_S-Sondem_ENG.pdf> accessed 10 May 2019.
[491] See section 21 of the Access to Information Act, No. 31 of 2016 Laws of Kenya.
[492] Ibid., section 23(4).
[493] Ibid., section 23(5).
[494] Otiende (n 44) 28.

In the Court of Appeal judgment of the Abekah Case, the Court fell short of declaring the Commission on Administrative Justice as binding upon the public entities against whom they are made.[495]

5.2.5 Enforcement through the Court

Since its establishment, the Kenyan Ombudsman has not taken active steps to ensure that its decisions are enforced by the Courts. The Commission has not filed any single case aimed at enforcing a decision made by it. The Commission has only participated in cases in which it is included as an interested party or a Respondent but has not adequately advanced its case on the need to have its decisions implemented by public entities.

One remedy which is available to the Ghanaian Ombudsman and which makes it more effective is the option of enforcing its decisions through the Court. In Ghana, if the Ombudsman finds that the complaint against a Respondent amounts to a breach of the provisions of the Commission on Human Rights and Administrative Justice Act,[496] the Ombudsman reports its decision to the appropriate person, Minister, department or authority concerned.[497] The Ombudsman does not however stop at that. If the Respondent fails to adequately implement her decision within three months, the Commissioner may bring an action before any Court and seek such remedy as may be appropriate for the enforcement of the Ombudsman's recommendations.[498]

This study recommends that the Kenyan Ombudsman needs to take urgent active steps to ensure implementation of its decisions by moving the Court as, and whenever, it is necessary to do so in a bid to ensure that most, if not all, its decisions are adequately implemented. From the analysis of the relevant law, the Kenyan Ombudsman has more than enough powers under the existing law to ensure implementation of its decisions. What is required is for the Commission on Administrative Justice to wake up and seek court intervention towards implementation of its decisions. It is

[495] Refer to the Kenyan Court of Appeal case; *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others, Nairobi CACA No. 141 of 2015 (UR)* 17-18.
[496] Act No. 456 of 1993, Laws of Ghana.
[497] Stephen Sondem, *National Human Rights Institutions- The Ghanaian Experience*, 251. <http://studiorum.org.mk/evrodijalog/16/pdf/Evrodijalog_br_16_7_S-Sondem_ENG.pdf> accessed 10 May 2019.
[498] Ibid., 251-252.

worrying that the Commission has never filed any single case in Court in an attempt to enforce its decisions,[499] yet, there is no law in force which bars the Commission from so doing.

It is also recommended that the Commission on Administrative Justice should have the power to cite a malfeasant Respondent for contempt of Court for failure to obey its decisions and/or to cooperate with the Commission in the process of its investigations/inquiries. The 2005 CKRC report recommended creation of a Commission for Human Rights and Administrative Justice with powers to cite a person, group or individual before a court for contempt for failure to attend, produce relevant information or make full disclosure of information.[500] The report, and the foregoing proposal, reflect the wishes and aspirations of the people of the Republic of Kenya.

5.2.6 Need to seek Advisory Opinion from Supreme Court

The need for a pronouncement on the binding nature of the Ombudsman's decisions in Kenya has increased following the decision of the Court of Appeal in *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others.*[501]

As stated above, the Court fell short of determining whether the Ombudsman's decisions are binding upon public entities against whom they are made. This study recommends that the Commission or any other person should seek an advisory opinion from the Supreme Court to the effect that the recommendations/decisions/findings/determinations of the Commission on Administrative Justice are not just mere recommendations/decisions/findings/determinations but the same are binding and must be enforced by the Respondents unless and until the same is set aside by the Court.

5.2.7 Increased cooperation between public entities and Ombudsman

[499] The author is privy to this information given that he is an officer at the Commission on Administrative Justice.
[500] CKRC Report (n 143) 318.
[501] *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others, 2019 eKLR (Nairobi CACA No. 141 of 2015).*

One of the factors affecting enforcement and effectiveness of the decision of the Ombudsman in Kenya is non-cooperation by public entities.[502] This study recommends that public entities should change their attitude and approach towards the process of investigations, inquiries and decision making by the Ombudsman with a view to fostering cooperation between them and the Commission. This would go a long way in implementation and enforcement of the Ombudsman's decisions and would make the institution more effective.

5.2.8 CAJ to lead by example

It is said that Caesar's wife should be beyond reproach. The Commission, being the institution responsible for implementing the right to fair administrative action and access to information, should ensure that its administrative processes are top notch and that it takes the lead in proactive disclosure of information. This way, it will not give room for public officers to point fingers at CAJ whenever they are reprimanded by the Commission for an administrative injustice. There will be no opportunity for the officers to remind CAJ that it has a log in its eyes.

In the case of *Owino Kojo v. CAJ*,[503] an officer of the Commission obtained an order from the Employment and Labour Relations Court against CAJ barring the employer[504] from proceeding with disciplinary action against him for changing his sitting position within the office. As trivial as it may sound, CAJ did not see the need to resolve the dispute but instead chose to defend itself in the face of overwhelming evidence pointing towards administrative injustice on its part. In the said case, the Claimant also alleges unfair treatment, discrimination, abuse of power and administrative injustice by CAJ and that he was transferred three times in a span of two months, an action which is out rightly unfair.[505] These allegations fall under the umbrella of maladministration[506] which CAJ ideally ought to fight and to lead by showing the example of best practice to be emulated by other agencies.

[502] Refer of the findings of the study under part 5.1.3.
[503] *Owino Kojo v. Commission on Administrative Justice, Nairobi ELRCC No. 2355 of 2017* (UR).
[504] Commission on Administrative Justice.
[505] The case had not been fully heard and determined substantively at the time of presentation of this research project.
[506] See generally the provisions of section 8 of the Commission on Administrative Justice Act, Cap. 102A of the Laws of Kenya.

In another dispute which was reported to parliament, Miss. Linda Syomiti Mwanza alleged that she was unfairly treated by CAJ by being blatantly deprived of her rightfully earned legal officer's position in the institution despite emerging position one in the interview with a score of 80.2%.[507] The Commission has generally been accused of unfairness and nepotism in its recruitment processes.

These allegations only serve to lower the credibility of the institution in the eyes of the members of the public and public officers against whom CAJ makes its decisions. This study recommends that CAJ, or its successor in the future, should lead by example through its administrative processes and by proactive disclosure of information.

[507] Kenya National Assembly, Parliamentary question No. 138 of 2015.

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