GAPS IN THE LEGAL FRAMEWORK GOVERNING THE ETHIOPIAN INSTITUTION OF OMBUDSMAN

Democratic Institutions Working Group

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1. INTRODUCTION

1.1. BACKGROUND OF THE STUDY

Under international human right instruments, the state parties obligation to respect, promote and protect human rights by taking all appropriate measures is unequivocally stated. In this regard, National human rights institutions (NHRIs) have pivotal role in promoting and protecting international human right standards in the domestic arena. The important role of NHRIs in promotion and protection of human rights has been recognized by the UN from time when the international bills of human rights were being negotiated. However, it was after the approval of the 1991 Paris principles by the world conference on human rights and with the reaffirmation of the important roles of NHRIs by the Vienna declaration and program of action of 1993 that all UN member states committed to establish NHRIs.[1] Paris principles provide broad human rights mandates and responsibilities of NHRIs; inter alia, investigating and redressing human rights violation.[2] Over the past twenty years national human right commissions and human right ombudsmen have emerged in every continent and sub-region of the world, and in dozens of democratic and undemocratic states alike.[3] NHRIs are also one of the prominent national human rights protection mechanisms. They are peculiar because they do not resemble other branches of governments. As independent institutions, they are not under the direct authority of the executive, legislature or judiciary. They are however accountable to the legislature either directly or indirectly.[4]

The Paris principles identify a range of measures designed to enhance independence and pluralism, recommend methods of operation, identify functions and powers and emphasize the importance of effective cooperation with civil society organizations, parliament and government

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[1] *Ayalnesh Alayu, 'Enforcement of the Recommendation of Ethiopian Human Rights Commission: Accomplishment and Challenges', (Masters Thesis, Addis Ababa University, 2018). 1.*

[2] *Office of the UN High Commission for Human Rights (OHCHR), 'the Paris Principles on National Human Right Institutions' UN General Assembly Resolution 48/134, 20th December 1993, Section 3.*

[3] *Ryan Good and Thomas Pegram , 'Human Rights ,state compliance and social change', (2012) Cambridge University Press. 1*

[4] *OHCHR, 'National human rights institutions, history, principle, roles and responsibilities' (2010) OHCHR publications. 13*

departments.[5] NHRIs complying with the Paris principles are playing a crucial role in protecting, promoting and monitoring the effective implementation of international human rights standards at the national level. NHRIs perform core protection issues, such as human right education, awareness raising, reporting, the prevention of torture and ill treatment, arbitrary detention and disappearances, recommendations and so on.[6] NHRIs also play a role in advancing all aspects of the rule of law, including with regards to the judiciary, law making and enforcement agencies. Due to their broad human right mandates, they encourage all actors in the human rights system to create a universal human rights culture.[7]

Ethiopia had three written constitutions (in 1931, 1955 and 1987) prior to the 1995 FDRE constitution. The 1931 constitution does not have significant relevance for the human rights discourse as it was ultimately designed to reaffirm the absolute power of the then emperor. Although 1955 constitution recognized a handful of rights, their relevance was literally compromised due to absolutism of the emperor. The 1987 constitution highly incorporates economic, social and cultural rights due to the government inclination towards Marxism-Leninism thought, thus there was no fertile ground to strengthen the protection and promotion of human rights.

Unlike its predecessors, the 1995 constitution devotes more than one third of its content to provisions on fundamental human and people's rights. Moreover there are provisions that dictate the state to establish national institutions of protection of human rights. Here, the Ethiopian Human Rights Commission and the Institution of Ombudsman are notable. The constitution stipulates these institutions to be established by the House of Peoples' Representatives (HPR).[8] Accordingly, the Human Rights Commission and Institution of Ombudsman were established by the promulgation of proclamations no 210/2000 and 211/2000 respectively. Though both institutions have a stake in protecting human rights, the focus of the institution of Ombudsman is primarily on preventing maladministration and promoting good governance.

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[5] *Paris Principles , n-2*

[6] *Ertugrual Yazar , 'The Role of National Human Right Institutions Countering-Terrorism Measures', (2018) Human Rights and Equality Institution of Turkey. 2*

[7] *OHCHR, 'OHCHR and NHRI', available at https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx retrieved from OHCHR website on September 30,2019*

[8] *The Constitution of Federal Democratic Republic of Ethiopia,(adopted 21st August 1995), Proclamation No 1,1995, Addis Ababa ,Ethiopia, Article 55/14/*

In 2015 and 2018, political turmoil erupted all over Ethiopia against the then authoritarian regime. In April 2018, Abiy Ahmed was sworn in as Ethiopia's new Prime Minister. Since his inaugural speech, Prime Minister Abiy Ahmed's government took several steps of reform in different aspects of the Ethiopian polity. One of the government's reform agenda is the legislative revision. Accordingly the HPR amended institution of ombudsman establishment proclamation in 2019, the new proclamation no 1142/2019 aims to organize an institution that is indispensable in building the order of good governance, to check and control the executive organs so that they act within the constitutional parameter, and to remove legal impediments that hinder the implementation of the Institution's recommendations. However, this institution is still facing various hindrances that challenge the efficient and effective implementation of its mandate.

The diagnostic study examines how the legal framework constituting the Ethiopian Ombudsman Institution undermines its effective performance in protecting human rights and curbing maladministration from the perspective of international standards.

1.2. Statement of the Problem

The Paris principles are regarded as the first systematic effort to enumerate the role and functions of both Human Rights Commissions and Ombudsman Institutions. Under these principles effort have been made to ensure these institutions have as broad mandate as possible. There are internationally agreed minimum standards for the establishment, operation and assessment of these institutions which serve as a guide for states to establish such institutions or strengthen already existing national human rights institutions.[9] The Paris principles describe the mandate, the competency and responsibilities, the composition, the guarantees of independence and pluralism as well as the methods of operation of such institutions.[10] The failure to incorporate the basic principles of UN guideline concerning the organization of NHRIs in a national human right institutional framework directly affects the effective implementation of human right standards.

[9] *Veronika Haasz, 'the role of national human rights institutions in the implementation of the UN guiding principles' (2013) research gate publication .166-167*
[10] *Ibid*

This research will attempt to explore the adequacy or otherwise of the legal and institutional framework of the Ethiopian Ombudsman Institution pertaining to the protection of human rights in general and redressing administrative injustice in particular.

1.3. RESEARCH OBJECTIVE

The general objective of this study is to analyze the legal and institutional challenges that have undermined the effective performance and credibility of the Ethiopian ombudsman institution. The following could be listed as specific objectives of the study:

- To analyze the new legal framework of Ethiopian ombudsman institutions pertaining to the protection of human rights and tackling of administrative abuses from the perspectives of the UN guidelines;
- To analyze the new legal and institutional framework of Ethiopian ombudsman institution pertaining to the promotion and protection of human rights in light of best comparative experience.

1.4. RESEARCH QUESTIONS

It is often contended that Ethiopian institution of ombudsman is not doing enough in ensuring good governance and safeguarding human right partly because of the normative framework governing it. Investigating this requires a comprehensive and thorough research. This diagnostic study, accordingly, aims to answer the following questions:

- Are those international principles of NHRIs adequately incorporated in the legal and institutional underpinnings of the Ethiopian ombudsman institutions?
- If not, what could Ethiopia do to effectively incorporate these relevant principles?

1.5. RESEARCH METHODOLOGY

The research utilized a doctrinal research methodology, higher emphasis being given to the Ethiopian institution of ombudsman re-establishment proclamation 1142/2019 (Federal Negarit Gazeta 25th year No. 69,27th May 2019).This diagnostic study is meant to explore the legal and institutional framework of the Ethiopian human right institutions pertaining to good governance, and the promotion and protection of human right. Hence, the primary means of such exploration

is through a critical analysis of the legal framework of the ombudsman institution in Ethiopia. In this perspective, the relevant legal and secondary documents were consulted to substantiate the findings of the study. The study relied on the UN principles of NHRIs and lessons from comparative experience for a better insight.

1.6. Scope of the Study

This diagnostic study is primarily concerned with the assessment of the amended Ethiopian institution ombudsman establishment proclamation in light of international standards and comparative experience.

1.7. Organization of the Study

The study is divided in to four parts. The first part provides background of the study, states the problem, key research questions and methodology. In the second part the focus will be on discussing the historical development of the institution of ombudsman and its functions in general. The experience of Ombudsman in certain selected jurisdictions will also be examined. The third section of the study critically analyzes the amended Ethiopian ombudsman establishment proclamation in light of international and comparative standards. In the end, the study provides a conclusion and key recommendations in the fourth part.

2. THE INSTITUTION OF OMBUDSMAN: HISTORICAL AND COMPARATIVE PERSPECTIVES

2.1. ORIGIN OF THE OMBUDSMAN AND ITS FUNCTIONS

The word 'ombudsman' has its origin in Swedish language and it means 'agent or representative of the people'.[11] Historically, there have been several institutions in different parts of the globe entrusted with the task of preventing administrative injustice since the time of the ancient Greeks. However, many scholars trace the root of the current institution of ombudsman to the nineteenth century Sweden.[12] In 1709 there was a war between Russia and Sweden. Following a defeat by Russia, the Swedish king left his country and settled in Turkey for some time.[13] During this period there was a serious problem of maladministration and administrative injustice. This forced the king to appoint *Justitiekanslern* (Chancellor of Justice) as his representative to exercise control over the administration and the judiciary.[14] Here, it is important to note that the chancellor of justice was appointed by the king/executive and this practice continued in Sweden for some time. Later, the parliament took over the power of appointment from the king. Further, the 1809 constitution of Sweden constituted *justitieombudsman* an institution appointed by the parliament and mandated to check the activities of the administration and the judiciary.[15] This institution is believed to have laid the foundation for the modern conception of ombudsman.

Currently, more than 150 countries in the world have ombudsman.[16] This could be contrasted with the situation in mid 20th century where this institution is largely confined to few Scandinavian countries. Here, it is important to note that the name given for ombudsman is not uniform in all jurisdictions. For instance, the Ombudsman institution is known as the 'Public Protector' in South Africa, the 'Comptroller of the State' in Israel, the 'Supplier of Justice' in Portugal, the 'Mediator' in France, 'Civic Defender' in Italy, the 'Parliamentary Commissioner' in the United Kingdom and the 'Defender of the People' in Spain among others'.[17] Yet, their basic function is similar by and large.

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[11] *Republic of Kenya, 'the Commission On Administrative Justice Annual Report' (2014).1 Available at file:///C:/Users/ITG/Downloads/CAJ%20Annual%20Report%202014.pdfp, last accessed 11/04/2020*

[12] *Linda C. Reif, 'The Ombudsman, Good Governance and the International Human Rights System' (1st ed'n,Springer 2004)..4-6*

[13] *ibid*

[14] *ibid*

[15] *ibid*

[16] *The Commission On Administrative Justice , n-11 at .1*

[17] *ibid*

Concerning typology, there are two main types of ombudsman i.e. classical and hybrid.[18] The classical type precedes the latter in emergence. What makes this type of ombudsman peculiar is its narrow focus on controlling the abuse of power by the executive branch of the government.[19] Such ombudsman can oversee the conduct of state agencies, state employees and state organizations. In contrast to the classical type, the hybrid ombudsman performs several functions. This includes protection of human rights, environment and the prevention of corruption.[20] Ombudsmen with such broader mandates are becoming common in many jurisdictions. Further, in some countries this type of ombudsman are entrusted with the additional task of enforcing access to information laws, privacy laws and other laws concerning the protection of whistleblowers.[21] Part of the reason for such expansion could be the fact that the major threat to these rights and interests comes from the executive branch and various administrative agencies.

The core function of ombudsman is ensuring good governance and promoting accountability of state agencies and employees.[22] The term good governance does not have a precise definition. It is often identified in terms of its elements which includes 'transparency, objectivity, efficiency, and accountability' among others.[23] As such, institution of ombudsman holds the state administration against these standards. Here, it is important to note that ombudsman primarily exercises control on the executive branch. The legislative and judicial branches are out of its reach most of the time. This however has its own exceptions. For instance, Sweden and Finland ombudsman are unique 'as they were given full jurisdiction over all activities of the judiciary, including review of the substance of judgment'.[24] In these systems, the ombudsman exercise review over matters ranging from delay in rendering judgment up to checking the reasoning of the court and its judgments in decisions considered as manifestly wrong.

The most common means in which the ombudsman performs its task is through receiving complaints from the public and individual's alleging maladministration and abuse of power.[25] It

[18] *Linda,n-12 at 6-12*
[19] *ibid*
[20] *ibid*
[21] *ibid*
[22] *Linda,n-12 at 2*
[23] *The Commission on Administrative Justice, n-11 at.2*
[24] *ibid*
[25] *Linda, n-12 at 18-19*

has also the right to initiate investigations on its own initiative. What must be noted here is that most of the time the decisions the ombudsman renders are non-binding.[26] This is also partly what makes the ombudsman different from other institutions such as courts. Though this feature is often considered as a weakness it could also be seen as strength at the same time. To understand this it might be necessary to appreciate the particular tactic ombudsman use to ensure the enforcement of their decisions. Accordingly, 'the ombudsman generally uses reflexive control in reports and negotiations to try to persuade the administration to implement the institution's recommendations'.[27] This according to some scholars is more effective than courts which utilize a coercive strategy. For instance, Hertogh argues that 'Dutch administrative court decisions only had a limited effect on the policies and conduct of administrative agencies, while the recommendations and reports of the Ombudsman were relatively successful in influencing agency behavior over a longer period'.[28]

Yet, it is important to note that there are ombudsmen in some jurisdiction having a strong enforcement powers. To illustrate, Ombudsmen in 'Sweden and Finland were given the power to prosecute public officials, and the Mediateur of France can commence disciplinary proceedings against public officials. Also, the Austrian federal Ombudsmen (Volksanwaltschaft) and the Ombudsmen in the Austrian state (länd) of Vorartberg have the power to apply to Austria's Constitutional Court for a review of the legality of a federal (or state) law'.[29] Though the granting of such broader powers to the ombudsman is dictated by the circumstances prevailing in each jurisdiction, their experience might offer some lessons for other jurisdictions as well. It is with this intention that the next section focus on briefly discussing the experience of ombudsman in four African jurisdictions. Finally, it is accepted in most literature that ombudsman could only be successful if their establishment and operation meets certain international standards such as the Paris and Venice principles. This will be discussed in the third part of the study focusing on the Ethiopian ombudsman.

[26] *ibid*
[27] *ibid*
[28] *Linda,n-12 at.19*
[29] *ibid*

2.2. The Institution of Ombudsman: Comparative Perspectives

Since its origin in Sweden in the nineteen century, the institution of Ombudsman has got recognition in many jurisdictions. Today is difficult to find a country without some sort of institution that primarily checks on the exercise of power by the administrative wings of the state. In this section of the diagnostic study, an attempt will be made to discuss how institutions of ombudsman in selected jurisdictions operate with the objective to draw some lessons for improving the Ethiopian Ombudsman. What makes this task a bit challenging is picking few jurisdictions for comparison in the presence of numerous institutions in different parts of the world. For the purpose of this diagnostic study, the focus will primarily be on South Africa, Kenya, Uganda and Namibia. These jurisdictions were selected because they represent the basic modalities of concerning the operation of institutions of ombudsmen in Africa. They also differ in terms of mandates, powers and degree of independence.

2.2.1. South Africa

In South Africa an institution that resembles ombudsmen was first established during apartheid. Its mandate was narrow in scope and it used to focus on improper conducts concerning finance.[30] Both the interim and the final constitutions of South African gave important place for this institution. More specifically, the final constitution establishes the public protector as one of the institutions essential for supporting constitutional democracy in South Africa.[31] The constitution also spells out how the public protector discharges this responsibility by listing out some of its powers. These primarily includes investigating 'any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice'.[32] Here, it is important to note that the investigatory powers of the public protector are applicable to different organs of the federal, regional and local governments. Regarding the scope of its mandate, the public protector does not have the jurisdiction to review court decisions. Yet, it could receive complaints regarding undue delay of courts in a rendering decisions as well as exercise control over the prosecuting authority.

[30] *John C Mubangizi ,'The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: a comparative review of their roles in good governance and human rights protection' (2012) 45 (3) The Comparative and International Law Journal of Southern Africa. 304-323*
[31] *The Constitution of Republic of South Africa (CRSA) 1993, Art. 1102*
[32] *ibid*

According to the public protector act, investigation could be conducted on its own initiative or subsequent to submission of complaints.[33] Following investigation the institution is also given the mandate to take appropriate remedial actions. These remedial actions are further elaborated in the legislation that outlines the powers and functions of the public protector in a detailed manner. Among the available remedies, resolution of the case through mediation or negotiation and transferring the matter to the attorney general for prosecution are notable.[34] The public protector resorts to these measures on a case by case basis after duly evaluating the gravity of the violation of the law and extent of maladministration. Here, it is important to note that the decisions of the public protector are non-binding. While some scholars perceive this as a weakness, others consider it as strength. The argument of the second groups of scholars is that shaming and reporting act of the pubic protector is more impactful in stopping maladministration. [35]

It is also understood in South Africa that the public protector cannot accomplish its objective by operating solely without getting the support of other institutions of government. This is why government institutions are constitutionally obliged to provide the necessary assistance to the public protector to discharge its functions properly.[36] The other point worth noting is that the South African constitution has incorporated clear provisions intended to safeguard the independence of the public protector. Some of them are formulated in a form of duties requiring other branches of the government to refrain from interfering in the activities of the institution. The public protector for its part is expected to perform its duties in impartial manner by observing the constitution and other laws of South Africa. Yet, some scholars have expressed their concerns with the independence of the public protector noting its appointment by the president and its dependence on the executive for its budget.[37] Despite these concerns, the public protector of South Africa has played a meaningful role over the years in combating maladministration and promoting good governance. Some of its achievements include its

[33] *Republic of South Africa, Public Protector act 23 of 1994 as amended*
[34] *ibid art 4(b)*
[35] *Michael Bishop & Stuart Woolman, 'Public Protector', Research gate. 4*
[36] *CRSA , n-31 , Art.111(4)*
[37] *Mubangizi n-30 at*

investigation on improper use of public funds, corruption associated government lease contracts and improper procurement practices among others.[38]

2.2.2. Kenya

Compared to South Africa, the institution of ombudsman has a recent history in Kenya. It began in 2007 with the establishment of the public complaints standing committee.[39] The committee's main mandate was preventing and addressing maladministration by public institutions or their officials. When the 2010 Kenyan constitution was adopted it did not specifically establish a similar institution. Rather, it authorizes the parliament to enact a law that may further divide the Kenyan commission on human rights and equality.[40] The Kenyan Commission on Administrative Justice emerged from this authorization. The act that establishes the commission contains detailed provisions regarding the mandate of the institution, its investigative powers and remedial measures it might take.[41] The institution is 'empowered to, among other things, investigate complaints of delay, abuse of power, improper, unlawful or oppressive conduct, administrative injustice, unfair treatment, and manifest injustice or discourtesy.[42] It is also entrusted with the task of monitoring and enforcing the implementation of the Access to Information Act, 2016.

Like most ombudsmen across the globe the Kenyan commission on administrative justice has power to issue summon, compel production of documents, conduct search with court order and adjudicate issues pertaining to administrative justice and access to information.[43] The commission uses various strategies for executing its mandate complaint handling, ADR, issuing advisory opinions and creation of awareness. It also conducts public interest litigation [44]which is not common in other jurisdictions. In terms practical achievement, the Kenyan commission on administrative justice is doing well considering its young age. On a number of occasions it had helped many Kenyans in enforcing their various constitutional rights. Here, it might be good to note that in the first six years of its existence alone, the commission has handled around 286,059

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[38] *ibid*
[39] *The Commission on Administrative Justice of the Republic of Kenya, Available at* *https://www.ombudsman.go.ke/, Last Accessed 11/4/2020*
[40] *The Constitution of the Republic of Kenya of 2010, art 59 (4)*
[41] *Republic of Kenya, Commission on Administrative Justice Act No. 23 Of 2011*
[42] *ibid, art.8*
[43] *The Commission On Administrative Justice, n-40*
[44] *ibid*

complaints and provided various sort of remedies.[45] This is a big achievement by any standard. The commission has also participated in a number of public interest litigations. In doing so, the commission assisted in securing compensation for victims of human rights violations and declaring guidelines/directive issued by various agencies unconstitutional among others.[46]

2.2.3. Uganda

Like majority of African countries, maladministration is a serious problem in Uganda for most of its history. To deal with this problem the first ombudsman was established in 1987 with the adoption of the Inspector General of Government Act.[47] The core mandate of the institution includes promoting rule of law, good governance, human rights protection and fighting corruption. This institution was further recognized in the current constitution of Uganda adopted in 1995. The major change in the constitution was the transfer of its human rights protection mandate to Ugandan human rights commission.[48] This forced the Inspectorate of government to focus more on corruption and issues of maladministration. Concerning appointment, the inspectorate of government is appointed by the president after securing the consent of the parliament. The Ugandan constitution and IGG act also contain important provisions regarding the financial independence of the institution. Accordingly, the budget for IGG is directly allotted to it by the parliament and IGG controls of the budget is spent.[49] This is important to curb undue influence from the executive branch of the government. Compared to the ombudsman institutions mentioned so far, Ugandan IGG has more power to enforce its decisions on its own. As such, it 'can arrest, cause arrest, prosecute, cause prosecution in respect of cases involving corruption, abuse of authority or public'.[50] Thus, the financial independence of the Ugandan IGG and its special powers could be considered as its main areas of strength and can serve as a lesson for other jurisdictions.

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[45] *Hata mnyonge ana Haki ,' the Commission on Administrative Justice of Uganda (Office of Ombudsman) Laying the Foundation For Administrative Justice In Kenya Six Years Later'. 9*
[46] *Mnyonge, n-45 at 24*
[47] *Mubangizi n-30*
[48] *ibid*
[49] *The 1995 Constitution of the Republic of Uganda, art. 223 ff, 229 (1).*
[50] *An Act to Provide for the Establishment, Functions and Powers of the Office of the Inspector General of the Government of Uganda, 1988, Art. 7.*

2.2.4. Namibia

The ombudsman of Namibia is a typical example of a hybrid type. It mandates is not confined to monitoring maladministration. Rather, it also deals with human rights violations and environment related issues.[51] While most of its functions and powers are similar to the ombudsman institutions of other jurisdictions discussed above, it has also its own peculiar features. The most notable in this regard is the appointment procedure. Accordingly, the task of nominating ombudsman is given to the judicial service commission.[52] The president can only appoint candidate chosen by the commission. Further, candidates are required to have legal expertise for appointment. This process has its own contribution for ensuring the independence of the institution. Moreover, the term limit of ombudsman is also different from other jurisdictions. In most systems, ombudsman is appointed for fixed number of years.[53] Contrary to this widespread practice, the institution of ombudsman in Namibia is relatively permanent. As such, the ombudsman can stay in office until he/she is 65 years of age.[54] The permanency of tenure has its own contribution for ensuring the independence of the institution and could serve as a model for other jurisdictions.

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[51] *J. Malan, 'The office of the ombudsman in Namibia' in L. F. M. Besselink, Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World ', (Kluwer Law International 2001), .299-308*
[52] *ibid*
[53] *ibid*
[54] *J.Malan, n-51 at .301*

3. THE ETHIOPIAN INSTITUTION OF OMBUDSMAN: CRITICAL REVIEW OF ITS AMENDED ESTABLISHMENT PROCLAMATION

3.1. INTRODUCTION

In Ethiopia, the introduction of the ombudsman institution is relatively a recent development with the adoption of the 1991 Transitional Charter after the fall of the Marxist-Leninist oriented military regime in 1991.[55] Although the Emperor was kind enough to grant his faithful subjects with basic human and democratic rights, he was not ready to afford them the opportunity of establishing an institution that addresses complaints against his bureaucrats.[56] In 1974, at the verge of the imperial regime's demise, a draft constitution proposing establishment of an ombudsman institution was ready for adoption as part of constitutional reforms.[57] However, the prospects of establishing a democratic regime vanished with the Derg regime seizing up power in 1974.[58] The subsequent 1987 Constitution also failed to envisage any provision for the establishment of an institution of ombudsman.

The F.D.R.E. constitution mandated the House of People's Representatives (HPR) to establish the institution of ombudsman. The Constitution authorizes and at the same time imposes a constitutional duty on the house to establish the institution of ombudsman. Pursuant to its constitutional mandate, the HPR established the Federal Institution of Ombudsman by Proclamation No. 211/2000. According to Proclamation 211/2000, the objective of the Institution was to realize good governance that is of high quality, efficient and transparent through ensuring citizens' rights and benefits. Proclamation 211/2000 mandated the Ethiopian Institution of Ombudsman with a vision of strengthening good governance and ensuring efficient public service delivery, through investigating and redressing complaints of maladministration, raising the awareness of the public and the executive and overseeing the rules and administrative procedures of the executive.[59] The proclamation prescribed the role of the institution to ensure

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[55] *Abdi Jibril Ali, 'The Role of the Ethiopian Ombudsman Institution in Good Governance' (2014) Academia, P- 2, Available at: https://www.academia.edu/9359478/The_Role_of_the_Ethiopian_Ombudsman_Institution_in_Good_Governance*
[56] *Ibid*
[57] *Yemsrach Endale 'The roles and challenges of Ethiopian national human rights institutions in the protection of human rights in light of the Paris Principles' LLM Thesis, Central European University, (2010), p.15 (unpublished)*
[58] *Abdi Jibril, n-55*
[59] *Institution of the Ombudsman Establishment Proclamation No. 211/2000, Federal Negarit Gazetta, Year 6, No. 41, Preamble*

respect of laws by the executive organs based on the principles of rule of law. Despite the major objectives under Proclamation 211/2000, the Institution suffers from lack of independence, lack of financial resources, experiences political interference and lacks competence to enforce its decisions.

Following the change in administration in 2018, a legislative reform on the Ombudsman Establishment Proclamation 211/2000 was conducted with the objective to strengthen the institution to build good governance, to control the executive, and to improve its implementation capacity.[60] The Ethiopian Institution of the Ombudsman Establishment (Amendment) Proclamation No. 1142/2019 introduced provisions that aimed at ensuring independence of the institution with high institutional and functional autonomy. The Proclamation broadened the mandates of the institution, setting clear appointment and removal procedure of ombudsmen, financial independence of the institution, and compliant handling and investigation procedures. However, despite significant positive developments, Proclamation 1142/2019 failed to address major issues that need to be fulfilled to make the Ethiopian Institution of Ombudsman strong, and independent as aspired. In the following section Proclamation 1142/2019 is scrutinized in light of accepted international principles to identify areas of further reform.

3.2. STANDARDS OF ASSESSMENT

Different international institutions and experts developed comprehensive and internationally accepted standards for the proper functioning and independence of ombudsman institutions. The Venice Principles on the Protection and Promotion of the Ombudsman institutions[61], the Minimum Standards for Ombudsman Institutions in Africa[62], and the Paris Principles on National Institutions[63] are the major instruments used to assess the gaps in the Ethiopian legal and institutional framework governing the institution of ombudsman. The Paris Principles on the Status of National Institutions recommend ombudsman institutions, as part of national

[60] *The Ethiopian Institution of the Ombudsman Establishment (As Amended) Proclamation No 1142/2019, Federal Negarit Gazeta, 25th Year No. 69, Preamble*
[61] *Ibid*
[62] *African Ombudsman and Media Association, African Ombudsman Summit adopts pioneering declaration on minimum standards for ombudsman institutions , Media Release, 02 March 2014*
[63] *Paris Principles, n-2*

institutions, to be vested with competence to promote and protect human rights.[64] It recommends institutions of ombudsman to be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence. The Venice Commission also set minimum standards with which any institution of ombudsman must comply. Such standards include the mandate, resources, operations, accessibility, and conditions of service, impartiality and accountability of institutions of Ombudsman. While there are slight differences, most of the standards require national institutions of ombudsman to be legally established, functionally autonomous, external to the administration, operationally independent of both the executive and legislature, specialist, expert and non-partisan, normatively universalistic, client centered but not anti-administration, and popularly accessible. In addition to international accepted standards, best experience of other countries is also analyzed to forward working recommendations to improve the legal and institutional framework of the Ethiopian institution of ombudsman.

3.3. MANDATES AND POWERS OF THE ETHIOPIAN INSTITUTION OF OMBUDSMAN

Internationally accepted standards underline that Ombudsman Institutions, including their mandate, should be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.[65] Internationally accepted standards underscore the need to bestow a full mandate for institutions of ombudsman to work on the prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.[66] In this regard the Paris principles recommend national institutions including institutions of ombudsman to be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.[67] The Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation in the framework of monitoring and implementation of international human rights instruments and the harmonization of national legislation with these instruments.[68]

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[64] *Paris Principles, n-2, Para. 3.*
[65] *European Commission for Democracy through Law, Venice Principles on the Protection and Promotion of Ombudsman Institutions, (March 2019)*
[66] *Ibid*
[67] *Paris Principles, n-2 at Para.2*
[68] *Paris Principles, n-2 at Para. 3*

Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government is also another mandate of institutions of ombudsman. The institutional competence of the Ombudsman shall cover public administration at all levels, and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.[69] While its competence relating to the judiciary and the legislative shall be confined to ensuring procedural efficiency and administrative functioning of that system.

In the Ethiopian Case, Proclamation 1142/2019 mandated the Institution of ombudsman mainly to supervise regulations or administrative directives that are issued by executive organs or decisions given by executive organs and the practices thereof do not contravene the constitutional rights of citizens and a law as well. Article 7 of the Proclamation gives a broad mandate to the Ombudsman Institution. The Proclamation empowers the Institution to monitor not only constitutional rights but also other rights guaranteed by laws, which include international treaties in general and international human rights treaties in particular, according to Article 9(4) of the Constitution. The Institution also has the mandate to give recommendations relating to the revision of existing laws, practices or directives and to the enactment of new laws and formulation of policies, with a view to bringing about good governance.[70] The Proclamation does not qualify laws, practices, directives or policies to be modified or enacted, meaning it does limit the Institution's power to recommend to particular areas. That means, the Proclamation gives the Institution a broad mandate to recommend the revision or enactment of laws in any area, including those affecting the realization of human rights.

The mandate of the Institution of Ombudsman relating to supervision of the constitutionality of administrative directives and decisions should be considered in light of the Federal Administrative Procedure Proclamation No.1183/2020. Proclamation 1183/2020 empowered citizens to seek internal review of unconstitutional directives and in case there is no remedy they can submit their claim to the Federal High Court for a judicial review.[71] The Institution of

[69] *Venice Principles, n-65 at Para. 13*
[70] *Proclamation No 1142/2019, n- 6, Article 7(6)*
[71] *Federal Administrative Procedure Proclamation No.1183/2020, Federal Negarit Gazeta, 26th Year No.32 (April 2020)*

Ombudsman is another option for citizens through which they can seek remedy against unconstitutional directives in addition to seeking judicial review through court of law. However, there is no provision that regulates the interface between cases under the institution of ombudsman and cases seen under the administrative procedure proclamation. The Venice Principles advise the official filing of a request to the Ombudsman should have suspending effect on period of limitations to apply to the court, according to the law.[72] Proclamation 1142/2019 failed to expressly provide as to whether an application to the institution has a suspending effect on period of limitations. In order to implement proclamation 1142/2019 in a complementary fashion with the administrative procedure proclamation an application to the institution needs to have a suspending effect on period of limitations.

3.4. Nomination, Removal, and Term of Office

The Venice principles recommend the Ombudspersons to be appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution.[73] The Ombudsman shall be preferably appointed by a qualified majority of the Parliament, and the procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law. The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates.[74] The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.[75]

As per Proclamation 1142/2019 the Chief Ombudsman, the Deputy Chief Ombudsman, the Women, Children and persons with Disability and Elders ombudsman and branch office ombudsman are to be appointed by HPR for the terms of six years.[76] This could be contrasted with the permanent appointment of ombudsman in Namibia until they reach the age of 65. The appointees in Ethiopia should be first nominated by the "Nomination Committee" composed of individuals from different backgrounds and institutions. In our practical context, the parliament is highly dominated by one party and there could be high probability for the absence of any

[72] *Venice Principles, n- 65 at Para. 19*
[73] *Venice Principles, n-65 at Para.6*
[74] *Venice Principles, n-65 at Para 8*
[75] *Ibid*
[76] *Proclamation No.1142/2019 ,n-59 , Article, 20(1)*

opposing political party to have a seat at the HPR. Members of the nomination committee include: the Speaker of the HPR, the Speaker of the House of the Federation, five members to be elected by the HPR from among its members, two members of the HPR to be elected by joint agreement of opposition parties having seats in the HPR, and the President of the Federal Supreme Court.[77] The nominees will be appointed by the 2/3 majority vote of the HPR for a term of six years upon nomination by the committee.[78] However, the composition of the Committee is not enough to ensure the impartiality of the nomination process. At least seven members of the committee are government officials and party members which puts the entire process and the whole quest for an independent institution in question. Absence of any provision that requires public call for candidates, and lack of merit based objective criteria exacerbates the possibility of partiality in the appointment process. With no requirement of public call, the nomination committee can nominate candidates that may have affiliation. In addition, the civil society is not represented in the nomination committee and investigation tribunal.

Loyalty to the constitution is a precondition to be nominated for ombudsman[79]; however, such requirement is significantly vague. The requirement of loyalty to the constitution can be construed broadly to select candidates that support a particular political ideology at the expense of others. It can be abused to nominate individuals affiliated to the ruling political party.

According to the Venice Principles, removal from the office of the ombudsman should only be according to an exhaustive list of clear and reasonable conditions established by law.[80] However, when it comes to Proclamation 1142/2019, Article 22 (1) (c) makes corruption and commission of other unlawful act grounds for removal of appointees of the ombudsman. This provision is not clear and it might be open to unwarranted interpretation leading to unnecessary removal. This is because of the fact that it is not clear what the term ‘unlawful act’ entails and it is not also clear whether the appointee should be convicted by a court of law for the mentioned acts before the initiation of the removal process. This provision highly jeopardizes the tenure security of the appointees of the ombudsman. ‘’unlawful act’ is a highly fluid concept which is open to unwarranted interpretation that seriously affects the personal independence of the appointees of

[77] *Proclamation No.1142/2019 , n-59 , Article,18*
[78] *Proclamation No.1142/2019 , n-59, Article 17 (2/d)*
[79] *Proclamation No.1142/2019 , n-59, Article 19(2)*
[80] *Venice Principles, n-65 at Para. 11*

the institution. The other point that should be made in this regard is that both unlawful act and corruption should be made ground only when a decision to that effect is made by a court of law. However, the proclamation under the mentioned provision lacks clarity in this regard.

An appointee can be removed from his/her power, upon the grounds specified under Article 22 subsequent to investigation of the matter by a Special Inquiry Tribunal. After investigation, the special enquiry tribunal submits its recommendation to the HPR for approval upon endorsing the motion by a majority vote. The appointee will be removed where the House upholds such recommendation by a 2/3 majority vote.[81] The Special Inquiry Tribunal is comprised of Deputy Speaker of the HPR, Deputy Speaker of the HoF, three members to be elected by the HPR, a member of the HPR to be elected by joint agreement of opposition parties having seats in the parliament and vice-president of the Federal Supreme Court.[82] In a similar vain to the nomination committee, the inquiry tribunal is dominated by government officials, which in turn may negatively affect the independence of the institution. Civil society organizations are not represented in the nomination committee, and the special investigation tribunal. Civil Society organizations can play an active role to ensure independence of the institution and support its investigation roles if they are given roles under the proclamation.

Finally, Proclamation 1142/2019 does not adequately provide for the time when the post remains vacant. The post could become vacant because of death, resignation or inability to perform one's duties during the running of the term of Office. With no specific period provided, there might be cases where months pass before agreement was reached to appoint new ombudsman. It is clearly not right that this post remains vacant for a long time, thus depriving citizens of their right to resort to the Institution while the vacancy is held in abeyance.

3.5. INDEPENDENCE

An independent ombudsman institution has two aspects: personal and institutional independence.[83] The former requires that heads of ombudsman institutions have job security which can be guaranteed through providing a fixed long term of office, providing for reappointment, and allowing removal only for good cause. In order to ensure personal

[81] *Proclamation No.1142/2019 , n-59, Article 23(2)*
[82] *Proclamation No.1142/2019 , n-59, Article 24*
[83] *Abdi Jibril Ali, n-55 at 55*

independence of the ombudspersons the Ombudspersons shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall be elected by a qualified majority of the parliament upon a public call through transparent, merit based, objective criteria provided by the law.[84] The criteria for being appointed Ombudsman shall be sufficiently broad and clearly defined to include standards of high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms. The Ombudsman should be bound by self regulatory code of conduct and shall not engage in political, administrative or professional activities incompatible with his or her independence or impartiality. The term of office of the Ombudsman shall be longer than the mandate of the appointing body, which is in most cases the parliament. The term of office shall preferably be limited to a single term, with no option for reelection; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.

The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehavior" or "misconduct", which shall be narrowly interpreted.[85] The parliamentary majority required for removal by Parliament itself or by a court on request of Parliament shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law. Institutional Independence involves the independence and autonomy of the office of ombudsman from other governmental and non-governmental actors in its operation. Institutional independence necessitates the establishment of the institutions guaranteed in the constitutions of the individual states, ensuring financial autonomy, and bestowing full power in investigation and compliant handling process. The Ombudsman shall not be given nor follow any instruction from any authorities.[86] In Ethiopia, Proclamation 1142/2019 provided prerequisites that are necessary for institutional and personal independence of the institution of ombudsman including appointment, tenure security, and removal rules. The Proclamation established a

[84] *Venice Principles, n- 65. Para., 6-11*
[85] *Venice Principles, n-65, Para 11*
[86] *Venice Principles, n-65, Para-14*

nomination committee comprising of 9 members drawn from the Speaker of the House of Peoples Representatives, the Speaker of the House of Federation, five members to be elected from Members of the House, two members from competent political parties having seats in the House, and the President of the Federal Supreme Court. The nomination Committee nominates ombudspersons and presents them for the HPR for approval.[87] Ombudspersons can only be appointed by a 2/3 qualified majority vote of HPR upon nomination by the nomination committee.

The term of the ombudspersons is six years with a possibility of reelection upon expiry of the first term.[88] The House of Peoples' Representatives can remove them from office only on limited grounds: illness, commission of corrupt or unlawful act, and manifest incompetence.[89] Removal from office can take place only when the House of Peoples' Representatives decides to approve the recommendation of the Special Inquiry Tribunal to remove the ombudspersons by a two-third majority vote. In terms of remuneration and salary the Proclamation failed to provide a separate high fixed salary and other schemes of remuneration rather it left to be decided by a law issued to provide for the benefits of government appointees. The proclamation tried to ensure the financial independence of the institution as its budget is directly approved by the house and the budget is directly deposited in its account without the interference of the Ministry of Finance. The Institution is under obligation to keep complete and accurate books of accounts and such accounts of the Institution shall be audited annually.

Despite positive developments towards insuring personal and institutional independence of the institution of ombudsman under Proclamation 1142/2019, there are significant gaps that need to be addressed in order to ensure the complete independence of the ombudsman institution. The first gap in the proclamation is absence of any provision requiring for public call of potential candidates through accessible media. Public call and notification for potential candidates is key to select competent professionals without any external interference. In this regard, the Venice Principles recommend the procedure for selection of candidates to be clearly provided by law in such a manner that requires public call and be public, transparent, merit based, and objective.[90]

[87] *See n-23*
[88] *Ibid*
[89] *Proclamation No.1142/2019 , n-59, Article 17*
[90] *Venice Principles, n-65, Para.7*

Regarding the term of office, the terms of office should be clearly defined with longer non-renewable terms are a better guarantee of independence than renewable shorter terms. In the Ethiopian case, Proclamation 1142/2019 allowed a six year terms of office with a possibility of reelection. However, experience has shown that a short term of office along with a possibility of reappointment can give rise to a political maneuvering during the renewal period.[91] In an effort to ensure more transparency, many countries have opted for a single longer term of appointment of between seven or nine years. This would not only avoid any risk of undue influence but would afford the holder of such a high office adequate time to execute his vision and policies.

Lack of separate law, manual or guide that fixes the salary and benefits of the ombudspersons is another hurdle that compromises the personal independence of ombudspersons. Leaving the salary of ombudspersons to be determined by a general law governing the salary and benefits of other executive organs, erodes the personal independence of ombudspersons. The Venice principle states that the Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation. However, the Proclamation under Art. 21 (1) equates the remuneration of the appointees of the ombudsman with government appointees. This shows that the proclamation does not provide for the appropriate high rank to the ombudsman appointees which in turn seriously affect their personal independence. Thus, the special attention and reverence that should be given to the appointees of the ombudsman as contemplated in the Venice Principle is lacking under our law.

The proclamation failed to provide a general provision clearly stating the institution of ombudsman is free from any interference. There is no clear provision stating the institution shall not be given nor follow any instruction from any authorities. A clear provision declaring its independence is necessary to serve as a guide in its operation. International standards recommend the need to expressly provide a general provision declaring the independence of the institution of ombudsman.[92]

With regard to the budget of the institution, the Proclamation does not provide for a provision that protects its budget from arbitrary reduction. A clear provision prescribing the adopted budget for the institution shall not be reduced during the financial year, unless the reduction

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[91] *Office of the Parliamentary Ombudsman, 'On the strengthening of the Ombudsman Institution', (2014).15*
[92] *Venice Principles, n-,65 Para-14*

generally applies to other State institutions is necessary to realize its independence. Regarding auditing the Proclamation failed to restrict the power of the Auditor General only to the legality of financial proceedings and not the choice of priorities in the execution of the mandate. The Venice Principles underline the need to limit the power of the auditor only to audit of legality of financial proceedings in order to protect the institution from the intervention of the government in its internal operation affairs.

In order to ensure personal independence, ombudsmen should have certain privileges and immunities. Similar to government officials, Ombudsmen should have immunity from civil and criminal proceedings for acts performed in good faith in their official capacity.[93] Processes for lifting immunity should be well-defined "in accordance with fair and transparent procedures." Regardless of the procedures, immunity should not protect those who abused their official position and power or act in bad faith. Proclamation 1142/2019, however, failed to provide any immunity and privilege for the Ombudsmen.

3.6. Financial Autonomy

The Venice Principles require that the State has to ensure that the Ombudsman has sufficient human, material and financial resources to discharge his functions independently and efficiently.[94] A clear budgetary and non-budgetary source of finance must be prescribed by law for ombudsman institutions to operate effectively and independently.[95] The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions.[96] The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.

[93] *United Nations Office of High Commissioner for Human Rights, Handbook for National Human Rights Institution, (New York and Geneva, 2005) Para. 81.*
[94] *Venice Principles , n-65, Para.23*
[95] *Venice Principles, n- 65, Par.21*
[96] *Ibid*

Proclamation 1142/2019 tried to ensure the financial independence of the institution of ombudsman through empowering the institution to prepare its budget and present directly to the House for approval. The Proclamation limited the influence of the executive through reducing the involvement of the Ministry of Finance and Economic Cooperation from the financial issues of the institution. However, the Proclamation does not have a clear provision regarding the protection of the budget of the institution. In this regard, the Venice Principles states that the adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions.[97] This kind of protection which strengthens the independence of the institution is absent in the proclamation. Here, it Ethiopia could learn a lesson from the experience of Uganda discussed in the previous chapter. Moreover, the independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.[98] In this regard, Art. 39 (2) of the proclamation provides that the institution will be audited annually by the Auditor General. However, it says nothing as to how the Auditor General should audit the ombudsman. This is another very important principle of ensuring independence of the institution which was not captured in the proclamation.

3.7. Compliant Handling, Investigation and Accountability

Accountability is the processes by which actors provide reasons for their actions' under the pain of sanctions.[99] Institutions of ombudsman play critical role in ensuring accountability through investigation and disclosure of abuses by public agencies and branches of government. International standards including the Venice principles require institutions of ombudsman to have discretionary power, on its own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the cooperation of any individual or organization that may be able to assist in its investigations, and must have a power to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential.[100]

[97] *Ibid*
[98] *Ibid*
[99] *T. Schillemans 'Accountability in the shadow of hierarchy: the horizontal accountability of agencies', (2008) 8 Public Organization Review. 175 &177.*
[100] *Venice Principles, n-65, Para. 16*

This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty.[101] The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector. The Ombudsman shall have the power to address individual recommendations to any institution within the competence of the Institution. Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts.

In Ethiopia, any person who claims to have suffered from maladministration can lodge a complaint to the institution. However, any person Prior to lodging a complaint to the Institution, in respect of an act of maladministration from which he suffered shall be the one who submit his complaint before the relevant organs and get decision or unable to get decision within a specified time. Proclamation 1142/2019 obliges any individual, employees or officials to make necessary documents available upon the request of the investigator, appointee or any official of the Institution. In addition to the duty to cooperate in the investigation process, respondent institutions/officials are under obligation to take corrective measures, within 30 days from the date of delivery, on findings and remedies sent to them by the Institution. If the respondent is unable to take such measures, it shall inform the same and the good reasons thereof to the Institution with in the specified period. The Proclamation further penalizes persons who failed to appear after duly summoned, failed to bring documents of investigation or supervision upon the request of the Institution , obstructs the proper carrying out of the investigation or supervision of Institution, causes harm to witnesses, Complainants or any person that cooperates by any means with the Institution or fails to take corrective measures, based on the findings of investigation and recommendation or findings of supervision of the Institution without good reasons within 30 days.

Unlike many ombudsman institutions in civil law countries that are vested with 'prosecution powers, constitutional court litigation powers, or administrative court litigation powers[102], Proclamation 1142/2019 failed to mandate the Ethiopian Institution of Ombudsman with such powers. Such powers of the ombudsman institutions have been found workable and efficient for

[101] *Ibid*
[102] *L. C. Reif 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (2011) 31 Boston College Third World Law Journal..269 &. 306*

achieving timely decisions.[103] The Ethiopian Institution of the Ombudsman should have prosecution powers over crimes committed by those who fail to implement its recommendations in the discharge of its supervisory powers over the executive; it should not rely on the latter for the implementation of its decisions. Uganda could offer a good lesson in this regard. However, the Institution seems to have relinquished such power to the executive in the absence of clear legislative stipulations.[104]

The Proclamation allows any compliant or Executive Organ that is aggrieved by the finding of investigation and remedy or decision of the Official of the Institute or investigator to submit his claim at all levels from the Director up to Chief Ombudsman within 30 days from the time he is notified in writing of such finding or decision. However, the proclamation failed to provide a referral provision to an administrative tribunal or court of law in case a disagreement arises between government agencies and the Institution. In cases of conflict, disagreements should be resolved by an authoritative judicial pronouncement and that any final decision on the complaint should be suspended pending such procedures.[105] It is therefore recommended that the Ombudsman Proclamation should provide for such referral to a judicial authority, preferably to the Administrative Review Tribunal. Referral should be made within a short term established by law to run from the date of the Ombudsman's Final Opinion. Contrary to the Venice Principles that require a clear law that give particular attention and protection to whistle-blowers within the public sector, Proclamation 1142/2019 failed to provide witness protection provisions.

Apart from the accountability of government agencies, the institution of ombudsman should be answerable to its actions preferably for the parliament. In the Ethiopian case, the Chief Ombudsman is directly responsible to the house; whereas the deputy Chief Ombudsman, Women, Children, Persons with Disability and Elders Ombudsman and Branch office Ombudsmen are immediately accountable to the Chief ombudsman.[106] The Venice Principles advise the Ombudsman to report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees

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[103] *Ibid*

[104] *Abdi Jibril Ali, 'n-55 at 50 &51*

[105] *Malta Parliamentarian Ombudsman, "a White Paper on the Strengthening of the Office of the Ombudsman" (2014), Page-50*

[106] *Proclamation No 1142/2019, n- 59, Articles 13(1), 14(1) , 15(1) and 16(1))*

appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities. Proclamation 1142/2019 obliges the Institution to issue an Official report on investigation, supervision and research findings through Mass Media. The Institution is also duty bound to submit regular reports to the House. The proclamation empowered the institution with a mandate of naming and shaming to the parliament in case Executive Organ fails or refuses to implement the findings of investigation and recommendation of the Institution with in the specified time. However, apart from stating the institutions obligation to submit regular report, the Proclamation failed to specify the specific regular period of time within which the institution must submit its report.

3.8. PARTICIPATION

Participation is 'defined as a process whereby stakeholders exercise influence over public policy decisions, and share control over resources and institutions that affect their lives, thereby providing a check on the actions of government to both observe and contribute to policymaking.[107] Proclamation 1142/2019 tried to engage different actors in the institution through membership in deferent committees. The nomination committee and the special enquiry committee are some of the platforms through which members from governmental agencies and political parties participate. However, almost all members of the committees are drawn from the government agencies leaving little room for the participation of different civic and political organizations. Only two members from political parties are represented outside of the government. Accordingly, Civil Society Organizations should be represented in the committees.

3.9. ACCESSIBILITY

One of the basic reasons an ombudsman is advantageous over judicial control lies in the fact that it is simple, speedy and cheap. In other words its prime importance lies in its accessibility. Barriers that affect accessibility involve wide range of factors including procedural barriers, physical inaccessibility of offices, imposition of fee for filing compliant, the requirement of formal written complaint, language restrictions, lack of awareness and the requirement of exhaustion of 'local' remedies.[108]

[107] *Abdi Jibril, n-55 at 8.*
[108] *Abdi Jibril Ali, n-55 at 13.*

In the Ethiopian case Proclamation 1142/2019 tried to ensure accessibility through introducing a telephone based compliant filing mechanism. Apart from telephone, citizens can use their email to lodge complaints. Accordingly, the Proclamation has made it very easy for every citizen to lodge a complaint before the Institution. Any interested person may submit grievances orally, in writing or other means of communication such as e-mail and fax. If the complainant for any reason is unable to submit complaint personally he can access the office through his/her spouse, family members or representatives, while any complaint to the institution is free of charge.
However, lack of publicity about its jurisdiction and lack of public awareness with regard to its proper role are some of the factors affecting the accessibility of the institution. As per Proclamation 1142/2019, the Institution has no jurisdiction over 'cases pending in courts of law of any level.' Yet, several individuals had filed complaints with the Institution over the years while their cases were pending before courts of law.[109]

The requirement that a complainant should pursue other appeal channels and exhaust internal remedy before requesting an ombudsman's intervention is usually identified as another barrier to accessing ombudsman offices. Such requirement 'reduces their role to that of last resort, and denies or discourages access to citizens.' Nevertheless, the Ombudsman Proclamation requires any person to exhaust his case before the relevant organs' prior to lodging same with the Institution.[110]

The Institution should be physically accessible to ensure all sections of the society to be able to obtain remedy for maladministration. The Institution should be accessible ranging from opening branches within the physical reach of the people ton delivery of services in local languages.[111] Proclamation provides for Ombudsmen heading branch offices under article 10/5/ and head office and branch offices in other places as per article 5/1/. The jurisdiction of branch offices over states in which they situate is in line with the federal structure of the country although this does not necessarily produce optimum result in terms of increasing efficiency and accessibility of the institution which necessitates reconsideration of jurisdiction assignment to branch offices

[109] *Ibid*
[110] *Abdi Jibril Ali, n-55 at 14*
[111] *Ibid*

and the delegation of powers of the head office produce better result, and would be in line with the Institution's values, particularly in terms of economy and accessibility.[112]

3.10. SYNERGY BETWEEN THE OMBUDSMAN AND THE COURTS

The Ombudsman Institution is not a court of law and does not have a judicial. It does however perform the service of a mediator and while it does not determine and define rights and obligations, the Ombudsman's report delivers an authoritative opinion on whether complainant suffered an injustice as a result of an act of maladministration. However, the Ombudsman is rightly precluded from investigating a complaint if its merits are being contested before a court of law. On the other hand, it is often the case that when the Ombudsman's final opinion and recommendation are not accepted and implemented by the public administration, the dissatisfied complainant attempts to seek redress through judicial action. In such cases, the final opinion and the recommendations of the Ombudsman could be produced as evidence by either party in the suit. The court would be empowered to give that opinion the weight it considers is due to it in its deliberations, on the same lines as it considers the opinion of expert witnesses. The facts as reported in the opinion could be taken as prima facie evidence but the parties or the court itself would have the right to produce further evidence to supplement, support or contradict them. As a rule most of the facts and documentation on which the Ombudsman bases its opinion can be produced in court upon the request of the court or the parties. This would ensure transparency and openness in the process. Although the Ombudsman has very rarely recommended payments for moral damages because of the reluctance of the public administration to assume liability for any amount that was not quantifiable as actual damages suffered, even in such cases, Courts can play significant role in determining liquidated damages.

In the case of Ethiopia, Proclamation 1142/2019 does not provide provisions governing case referral to courts or administrative tribunals in case where the public authority agrees with the findings of the Ombudsman in his final opinion that a complaint is justified but fails to agree with his recommendation for redress; the public authority fails to accept the amount recommended by the Ombudsman, the public administration and the complainant fail to agree on

[112] *Ibid*

the amount due and/or the Ombudsman is of the opinion that the amount offered by the public administration, following his recommendation, was still unacceptable as adequate redress.

4. Recommendations

The Ethiopian Institution of the Ombudsman Establishment (Amendment) Proclamation No. 1142/2019 achieved a significant millstone in introducing provisions that aimed to ensure independence of the institution with high institutional and functional autonomy. However, as identified in the aforementioned sections, Proclamation No 1142/2019 is entangled with legal and practical loopholes that compromise the overall objective of building strong and independent institutions. The following specific recommendations are forwarded as measures that must be taken in order to reform the gaps:

4.1. Regarding the Mandate of the Institution:

- Articles 7/1/ and 7/6/ of Proclamation 1142/2019 should be redesigned in a way that empower the institution to be involved in a legislative process to guarantee that all laws are in accordance with the constitution, in this process its duties should be clearly stated.
- Article 9 of Proclamation 1142/2019 prohibits the institution from entertaining matters that are already handled by the legislative organ, courts or other legally established institutions. However, such limitation should not compromise procedural due process of law, which is the most important pillar for the very establishment of ombudsman institution. Thus, an express provision empowering the institution to entertain any procedural irregularities or procedural due process of law review on the decree or decision rendered by other organs is necessary.

4.2. Regarding Appointment, Removal, and Term of Office

- The requirement of "loyalty to the constitution" to be nominated as an ombudsman under article 19 (2) is significantly vague. It can be abused to nominate individuals

affiliated to the ruling party. Accordingly, it will be better if such requirement is left-out.

- The Nomination and Inquiry Committees are dominated by government representatives. The proclamation failed to introduce participatory framework for the civil society and other actors. International practice dictates that members of nomination and Inquiry committees should not be members of political party, rather the committees should include people of diverse backgrounds to ensure participation. Accordingly, the Proclamation needs to be reformed in such a manner that ensures the participation of civil society organizations in the decision-making process.
- Internationally accepted standards require a public call for potential candidates as part of the nomination process. The Proclamation, however, does not provide for the duty to make a public call for potential candidates in order to avoid potential abuse. Accordingly, the Proclamation should be reformed with an express provision stating the duty to make a public call part of the nomination process.
- The Proclamation does not recognize the role of the public because it does not give the public the opportunity to make comments on the nominees. It is very important to have the public comment to identify the right person for the position.
- It is recommended that ground of removal must be exhaustive and just grounds. However, Proclamation 1142/2019 under article 22 (1) (c) makes corruption and commission of other unlawful act grounds for removal. This provision jeopardizes the tenure security of the appointee as it is not clear what “other unlawful’ act entails. The term “other unlawful act” is a highly fluid concept which is open to unwarranted interpretation that seriously affects the personal independence of the appointees of the institution. It is not clear what the term entails and it is not also clear whether the appointee should be convicted by a court of law for the mentioned acts before the initiation of the removal process. Accordingly, the Proclamation should be reformed in such a manner that it contains specific exhaustive grounds of removal. In addition, a clear provision, which states that both unlawful act and corruption should be made grounds of removal only when a decision to that effect is made by a court of law, is necessary.

- Proclamation 1142/2019 does not adequately provide for the time when the post remains vacant because of death, resignation or inability to perform one's duties during the running of the term of Office. Thus, an express provision stating the period of time within which an election should be conducted must be provided.
- Proclamation 1142/2019 allowed a six year terms of office with a possibility of reelection. However, experience has shown that a short term of office along with a possibility of reappointment can give rise to a political maneuvering during the renewal period. In an effort to ensure more transparency and give adequate time to execute ombudsman's vision, many countries have opted for a single longer term of appointment of between seven or nine years.

4.3. Regarding Independence of the Institution

- Unlike the recommendations of accepted principles, the Proclamation failed to provide a general provision clearly stating that the institution of ombudsman shall not be given nor follow any instruction from any authorities. A clear provision declaring its independence is necessary to serve as a guide in its operation.
- Proclamation 1142/2019 failed to provide any immunity and privilege for the Ombudsmen for acts they performed in good faith. In order to ensure personal independence, Ombudsmen should have immunity from civil and criminal proceedings for acts performed in good faith in their official capacity.
- Accepted standards recommend that Institutions of Ombudsman should be given an appropriately high rank, which is reflected in the remuneration of the Ombudsman and in the retirement compensation. However, the proclamation, under Art. 21 (1) equates the remuneration of the appointees of the ombudsman with government appointees. Thus, special attention should be given to the ombudsmen in relation to their rank and remuneration.
- It is necessary to include a clear provision prescribing that the budget of the institution shall not be reduced during the financial year unless the reduction generally applies to other State institutions and is necessary to realize its independence. Regarding auditing, the Proclamation failed to restrict the power of the Auditor General only to the legality of financial proceedings and not the choice of priorities in the execution of the mandate.

Accordingly, an express provision that protects the budget of the institution and limit the intervention of the Auditor General is necessary.

4.4. REGARDING COMPLIANT HANDLING, INVESTIGATION AND ACCOUNTABILITY

- Proclamation 1142/2019 failed to mandate the Ethiopian Institution of Ombudsman with prosecution powers, constitutional court litigation powers, or administrative court litigation powers in case administrative organs fail to implement its recommendations. Such powers of the ombudsman institutions have been found workable and efficient for achieving timely decisions. The Ethiopian Institution of the Ombudsman should have prosecution powers over crimes committed by those who fail to implement its recommendations in the discharge of its supervisory powers over the executive; it should not rely on the executive for the implementation of its decisions.
- Proclamation 1142/2019 failed to provide a referral provision to an administrative tribunal or court of law in case a disagreement arises between government agencies and the Institution. The remedies provided under article 29 can be properly enforced only if the Institution is mandated to prosecute its cases before court of law or administrative tribunals in case administrative agencies are not willing to implement its recommendations. In cases of conflict, disagreements should be resolved by an authoritative judicial pronouncement and that any final decision on the complaint should be suspended pending such procedures. It is therefore recommended that the Ombudsman Proclamation should provide for such referral to a judicial authority or Administrative Review Tribunal.
- Contrary to the Accepted Principles that require a clear law that give particular attention and protection to whistle-blowers within the public sector, Proclamation 1142/2019 failed to provide witness protection provisions. Accordingly, a clear provision protecting whistle-blowers is necessary.
- Arts 26, 27 and 28 of the Proclamation failed to provide exhaustive procedures of data collection and evidence presentation. The Paris Principles recommend that the Institutions of Ombudsman to be vested with a power to make search and seizure, and power to employ the service of the Police and Attorney General. Accordingly, the

Proclamation should be revised to include elaborative provisions on the process of investigation and the relationship of the Institution with Police and the Attorney General.

- Apart from stating the institution's obligation to submit regular report, the Proclamation failed to specify the specific regular period of time within which the institution must submit its report to the HPR. Accordingly, a provision that sets a period within which the Institution shall submit its report must be included.
- The Proclamation made the Deputy and other Ombudsmen accountable to the Chief Ombudsman, while they are appointed by the HPR. It is contradictory to make Ombudsmen, who are appointed by the parliament, accountable to the chief ombudsman who does not appointed them in the first place. Accordingly the Proclamation needs to be reformed either by making them accountable to the HPR like their appointment or leaving the mandate of appointing these Ombudsmen to the Chief Ombudsman.

4.5. Regarding Accessibility of the Institution

- The jurisdiction of branch offices over states in which they situate is in line with the federal structure of the country although this does not necessarily produce optimum result in terms of increasing efficiency and accessibility of the institution which necessitates reconsideration of jurisdiction assignment to branch offices and the delegation of powers of the head office produce better result, and would be in line with the Institution's values, particularly in terms of economy and accessibility.