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ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

**The Role of Ombudsman in the Protection and Promotion of Human Rights:
An Analysis of the Ethiopian Ombudsman**

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ADDIS ABABA UNIVERSITY, ETHIOPIA

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**The Role of Ombudsman in the Protection and Promotion of Human Rights:
An Analysis of the Ethiopian Ombudsman**

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**A Thesis Submitted to Addis Ababa University College of Law and Governance in Partial
Fulfillment of the Requirements for Masters of Laws Degree in Human Rights Law**

Addis Ababa University,

Addis Ababa, Ethiopia

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Declaration

I, Rahel Beyene, hereby declare that this thesis is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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The thesis entitled " The Role of Ombudsman in the Protection and Promotion of Human Rights: An Analysis of the Ethiopian Ombudsman" by Rahel Beyene is approved for the Degree of Master of Laws (LL.M) in Human Rights Law.

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Acronyms

Art	Article
ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
ESCRs	Economic Social and Cultural Rights
ECOSOC	Economic and Social Council
FDRE	Federal Democratic Republic of Ethiopia
HPR	House of Peoples Representative
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC SCA	International Coordinating Committee's Sub-Committee on Accreditation
NHRIS	National Human Right Institutions
NGO	Non-Governmental Organizations
No.	Number
OUA	Organization of African Unity
OHCHR	Office of the High Commissions Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nation Commission on Human Rights
WWII	Second World War

Abstract

The Institution of an Ombudsman is expected to be independent, neutral, and trustworthy that enables the Institution ensures the protection and promotion of human rights. Institution of Ombudsman is mandated to investigate mal-administration of government agencies that results in human rights violations. This study aims to analyze the new Amendment Proclamation No. 1142/2019 towards the protection and promotion of human rights pursuant to international and regional instruments that generally deals with NHRIs. This doctrinal research finds that although the Amendment Proclamation tries to ensure the human rights by giving the Institution a mandate to investigate mal-administration, there are normative loopholes which are obstacles for the effectiveness of the Institution. Thus, the Ethiopian Institution of Ombudsman and the HPR needs to reconsider the Amendment Proclamation regarding the mandate of the Institution i.e. towards the ESC Rights and limitation concerning decisions of the Police force, and immunity of the Institution.

Key Words: NHRIs, Ombudsman, Paris Principles, Immunity of the Ombudsman.

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CHAPTER ONE

1. INTRODUCTION

1.1. Background of the Study

The International community has increasingly recognized the important contribution of National Human Right Institutions (NHRIs) to ensure respect for and effective implementation of human rights at the domestic level since the 1990s.¹ However, at the national level, the first Ombudsman was established in Sweden in 1809 with a power to investigate complaints against government officials and report to the Parliament.² It then widespread to other Scandinavian countries like Finland, Denmark, Norway and joined the international arena.³ The word “Ombud” in Swedish means representative, agent, intermediary, delegate etc.⁴ The functions of the Swedish Parliamentary Ombudsman were to supervise the courts and other public authorities, to deal with complaints from citizens, and to prosecute officials and government ministers who behaved unlawfully.⁵ The Ombudsman was appointed as a public official by the legislature to receive and investigate complaints of citizens filed against acts of administrative power.⁶

The institution of Ombudsman is established to ensure that government agencies and officials discharge their duties honestly and in compliance with the law.⁷

¹ Anna E. Pohjolainen, “The Evolution of National Human Rights Institutions: The Role of the United Nation”, Danish Institute for Human Rights, 2006, 30; Available at <http://www.nhri.net/pdf/EvolutionofNHRIs.pdf>, December 20, 2019.

² Gernald E. Caiden (Ed.), “International Handbook of the Ombudsman: Country Survey, Greenwood Press, England, 1983, 179.

³ Walter Gellhorn, “Ombudsmen and Others: Citizens’ Protectors in Nine Countries”, Harvard University, Massachusetts, United States, 1996, 194.

⁴ Mirlinda Batalli, “Role of Ombudsman Institution over the Administration”, Academic Journal of Business, Administration, Law and Social Sciences, IIPCCL Publishing, Tirana-Albania, Vol. 1 No. 3, P.233.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

At the international level, the issue of NHRIs was first addressed by the Economic and Social Council (ECOSOC) in 1946⁸ two years before the General Assembly of the United Nations (UN) declared the Universal Declaration of Human Right (UDHR).⁹

Apart from the effort of the UN towards the development of NHRIs, the adoption of the Paris Principles highly inspired the development of NHRIs to deeply penetrate at regional levels.¹⁰ The role of NHRIs also got attention in the Organization of African Union (OAU) framework by which member States, during the adoption of African Charter on Human and Peoples' Rights (ACHPR), agreed to adhere to human rights principles incorporated under international instruments and any instruments adopted by OAU.¹¹

Most of NHRIs that exist in various countries, even though there is also a hybrid system, can be mainly grouped into two common categories i.e. Human Rights Commission and Ombudsman.¹² Ombudsman, the focus of this paper, is one category of NHRIs which controls government officials and protect the rights of individuals who alleged to be victims of maladministration.¹³

At the regional level, the Charter of Fundamental Rights of the EU, under its Art 41, recognized Good-Administration, which is the mandate of the institution of Ombudsman, as a fundamental right stating that;

“Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time.”¹⁴

Principles of Good-Administration include the principles of lawfulness, equality, impartiality, proportionality, legal certainty, participation, respect for privacy, and transparency.¹⁵ By virtue of this, the institution of Ombudsman plays a vital role in maintaining democratic accountability.

⁸ Linda C. Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection”, *Harvard Human Rights Journal*, Vol. 13, 2000, 3.

⁹ Center for Human Rights (UN), “A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights”, Professional Training Series #4, Geneva, 1995, 4.

¹⁰ Pohjola (n 1), 55.

¹¹ See the Preamble of African Charter on Human and Peoples' Rights, adopted in the 18th conference of Heads of States and Government, Nairobi, Kenya, June 1981.

¹² Pohjola (n 1), 30.

¹³ *Ibid*, 4.

¹⁴ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C326/02, Art 41.

¹⁵ Recommendation CM/ Rec (2007) 7 of the Committee of Ministers to member states on good administration, adopted 20 June 2007; and European Ombudsman, The European Code of Good Administrative Behavior, European Ombudsman, 2015.

As many administrative decisions of government agencies are highly linked with human rights, a decision that violates human rights due to mal-administration has a negative impact on the rights of individuals. Therefore, the measure taken by the institution of Ombudsman to ensure good governance by avoiding mal-administration is a great help to promote and protect human rights.

In Ethiopia, the notion of NHRIs was introduced in the draft Constitution of 1974.¹⁶ The Constitution, like Sweden, adopted the Classical Scandinavian Ombudsman model which makes the institution accountable to the National Assembly.¹⁷ The second attempt to establish NHRIs is made in the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution which stipulates these institutions to be established by the House of Peoples' Representative (HPR).¹⁸ Although the Institution of Ombudsman was established in 2000 by Proclamation No. 211/2000 (hereinafter the establishment Proclamation), it began operation in 1997 with the objective of ensuring good governance through respecting rule of law and protecting human rights. However, the Establishment Proclamation is amended and repealed by the new amendment Proclamation No. 1142/2019 (hereinafter the new proclamation). So this paper will examine whether the Amendment Proclamation is effective in protecting and promoting human rights.

1.2. Statement of the Problem

The new proclamation amending the institution of Ombudsman establishment legislation has many shortcomings that hinder the protection and promotion of human rights whereby its reconsideration is necessary.

Like the Establishment Proclamation, the Amendment Proclamation does not specifically indicate whether the mandate of the institute embraces Economic, Social and Cultural Rights. These categories of rights are administrative matters which include the right to education, right to work, the right to a healthy environment and so on.

The proclamation, like the Establishment Proclamation, totally limits the institution not to investigate decisions given by police forces. A decision of the police force is related to human rights by which any

¹⁶ The 1974 Draft Constitution of Ethiopia: Chapter Nine, Addis Ababa, Ethiopia, 1974.

¹⁷ Yihewew Tsegaye, Reading Material for Administrative Law, (Unpublished, AAU, Faculty of Law), 2006, 133.

¹⁸ The Federal Democratic Republic of Ethiopia Constitution, Establishment Proclamation No. 1, 1995, Addis Ababa, Ethiopia, Article 54, 55 (14) and (15).

decision could violate human rights. So preventing the institution from investigating decisions of the police force increases the violation of human rights in prisons and detention centres as many human rights are frequently violated by police forces.

With regard to the independence of the institution through the appointment of the ombudsman, the composition of the nomination committee is limited to members of the HPR and House of Federation as well as the president of the Federal Supreme Court. So an appointment procedure that does not involve other stakeholders like civil society would fail to comply with the Paris Principles and it undermines the institution not to protect and promote human rights effectively.

Even though the establishment proclamation granted immunity to the appointee and investigator subject to the exceptions provided, the amendment proclamation excludes this provision. So such exclusion would be an obstacle for those persons not to discharge their duties independent of any fear from government officials so that the victim whose right has violated never get the appropriate remedy and mal-administration continues.

In addition, the proclamation only grants the institution an authority to recommend and refer the case. However, limiting the power of the institution not to issue an order of interim injunctions and legally enforceable orders would be an obstacle for the institution in ensuring the rights of the complainant during the investigation and the process never obstructed by subsequent events. By virtue of this, such limitation weakens the institution's authority with regard to complaints of human rights violations.

1.3. Research Questions

This thesis addresses the following questions:

1. What is the nexus between the institution of Ombudsman and the protection of human rights?
2. What are the international and regional normative frameworks for the establishment and operation of the Ombudsman?
3. What is the implication of the new Amendment Proclamation No. 1142/2019 towards the protection and promotion of human rights?
4. What ought to be done to overcome the prevailing legislative challenges that became an obstacle for the protection and promotion of human right?

1.4. The Objective of the Study

1.4.1. General Objective

The overall objective of this paper is to analyze the extent to which contemporary legal reforms improve the effectiveness of the Institution of Ombudsman in increasing the accountability, efficiency, transparency in public administration and promoting a higher level on the protection of human rights.

1.4.2. Specific Objectives

1. To assess the nexus between the institution of Ombudsman and human rights.
2. To analyze the International and regional normative frameworks for the establishment and operation of the Ombudsman.
3. To identify and examine the implication of the new amendment proclamation towards the protection and promotion of human rights.
4. To suggest possible solutions that would help to overcome the legislative challenges which became an obstacle for the protection and promotion of human rights.

1.5. Scope of the Study

The scope of this research is confined to identify and explore the role of the Ombudsman in protecting human rights and the legislative loopholes of the new amended Proclamation No. 1142/2019 that may become an obstacle for the protection and promotion of human rights.

1.6. Literature's Review

There are works of literature which discuss the role of NHRIs in ensuring accountability, efficiency, transparency in public administration and in promoting and protecting human rights.

John McMillan¹⁹ in his paper discusses that the sole objective of the institution of Ombudsman is to help the people who are troubled by the complex bureaucracy of government agencies and stand for them against any mal-administration that violates their rights.

¹⁹ John Mcmillan, "The Ombudsman's Role in Human Rights Protection: An Australian Perspective", Paper To The 11th Asian Ombudsman Association Conference, 2-5 Bangkok, Thailand, November 2009.

Bernard Frank²⁰ in his article provided that human rights are not protected simply by constitution or legislation, by proclamations or declarations, rather there should be the availability of remedies by which the institution of Ombudsman is one mechanism of obtaining remedies as it ensures the protection and promotion of human rights.

Mirlinda Battali²¹ in her article tried to show that the object of the office of Ombudsman is to promote good governance in order to encourage accountability, efficiency and transparency in administration and it serves the public interest of ensuring that the government behaves properly towards promoting and protecting human rights.

Judge Anand Satyanand²² in his paper tried to discuss that the Ombudsmen are creatures of Statute, identified as officers of parliament, who serve to bring to account the actions of the domestic executive organ in the name of the individual citizen so that mal-administration would be corrected and human rights are protected and promoted.

Pasi Pölönen²³ in his paper provided that the NHRIs, particularly, the Ombudsman should fulfill the Paris Principles for the promotion and protection of human rights. He pointed out basic requirements that NHRIs needs to meet to promote and protect human rights i.e. a broad human rights mandate, pluralism whereby different stakeholders should be represented, and independence.²⁴

Maria Canineu²⁵ in her paper discusses that as poor administration of public services and government functions do result in abuses of human rights, the concept of mal-administration does not need a wide interpretation to include human rights, its promotion and protection. She also stated that improper police

²⁰ Bernard Frank, "The Ombudsman and Human Rights", *Administrative Law Review*, American Bar Association, Vol. 22, No. 3 (April 1970); Available at <https://Www.Jstor.Org/Stable/40708708>.

²¹ Battali (n 4).

²² Judge Anand Satyanand, "The Ombudsman Concept and Human Rights Protection", Occasional Paper #68, paper presented to the New Zealand Institute of International Affairs Seminar of April 1998 (1999) 29 VUWLR.

²³ Pasi Pölönen, "Monitoring fundamental and human rights as the Parliamentary Ombudsman's duty". In the publication *Oikeusasiames 90 voutta (Parliamentary Ombudsman 90 Year)*, 2010

²⁴ Ibid.

²⁵ Maria Canineu, "The Role of Ombuds Agencies in Police Accountability in the Commonwealth", available at: <https://www.humanrightsinitiative.org> (Accessed on 18 February 2020)

treatment, mistreatment of prisoners, and interference into private affairs are examples of public administration actions which may fall under the complaint jurisdiction of the Ombudsman.²⁶

Even though there is much research conducted concerning Ombudsman, none of those works and others tried to show the role of the new amendment Proclamation No. 1142/2019 and its legislative loopholes that may be an obstacle for the protection and promotion of human rights.

This research tries to fill the knowledge gap with regard to the role of the new amendment Proclamation No. 1142/2019 in improving the effectiveness of the Ombudsman in promoting and protecting human right as well as its normative loopholes that may undermine the protection and promotion of human rights.

1.7. Methodology of the Study

This research is primarily doctrinal research. Within this approach, it used an analytical research type.

Both primary and secondary sources are used in this research. The primary sources are Constitutions and proclamations. In doing so, the study has employed a structured interview with the Ethiopian Institution of the Ombudsman. The research also used secondary legal sources such as textbooks, printed and electronic journals, legal encyclopedias, policy documents, independent reports, academic commentaries, catalogues, databases, online research guides, and many other relevant websites.

1.8. Significance of the Study

The significance of this research starts from filling the knowledge gap towards the role of the new amendment Proclamation No. 1142/2019 in promoting and protecting human rights and its shortcomings that would hinder the effort of the institution of Ombudsman in promoting and protecting human rights. It may also serve as an input for further researches and the government to reconsider the proclamation so that the institution of Ombudsman promote and protect human rights effectively.

²⁶ Ibid.

1.9. Ethical Considerations

The researcher has taken an important ethical consideration into account by which the interviewee, inter alia, have been informed of the purpose of the study without any form of deception before securing informed consent from the investigator.

1.10. Thesis Overview

The study is organized into four chapters. The first chapter gave an introduction to the study. It briefly discusses the background of the study, the identified problem and the objectives of the study. It also provides significance and methodology of the study.

Chapter two discusses a general overview of human rights protection through the establishment of National Human Right Institutions, particularly the institution of Ombudsman. It explores the notion of human rights and NHRIs and their correlation. It also analyzes international and regional normative standards towards NHRIs. Chapter three discusses the normative implication of the Ethiopian Institution of the Ombudsman Amendment Proclamation towards the protection and promotion of Human Rights. The study tried to assess legislative challenges that could be an obstacle for the promotion and protection of human rights. Finally, Chapter Four of the study provides conclusions and some possible recommendations that may help to overcome the problems raised.

CHAPTER TWO

Human Rights and National Human Right Institutions in General

The Notion of human rights and National Human Rights Institutions are majorly discussed simultaneously by which the later operates for the full exercise of the former by avoiding mal-administration which is the major obstacle for the promotion and protection of human rights. By virtue of this, this chapter discusses the two concepts and tries to assess their nexus as well as the role of the latter in protecting and promoting the former which helps to understand the way the institution of Ombudsman helps the people to exercise their fundamental rights without any interference by government agencies. Assessing such concepts enables to examine and assess the effectiveness of the Amendment Proclamation No. 1142/2019 towards the promotion and protection of human rights.

2.1.The notion of Human Rights

Human Rights are rights that every human being has obtained by virtue of his or human dignity by which it also limits the power of a government and ensures that all people enjoy and exercise their human rights.²⁷ Human rights prescribed by domestic and international instruments should be protected, respected and fulfilled by the government and other duty bearers.²⁸ Human rights are linked with every activity of human beings by which they shape and determine their lives and behaviours.²⁹ Human rights are universal by which they apply to all human beings regardless of their status, race, colour, religion, or other characteristics.³⁰ Human rights are also inalienable by which they, subject to limitations and restrictions provided by law, cannot be taken away by government agencies and people have the right to be treated lawfully and with dignity.³¹ They have also the characteristics of indivisibility and interdependency by

²⁷ United Nations Human Rights Office of the High Commissions, Human Rights, Handbook for parliamentarians No. 26, Inter-parliamentary Union, P. 19.

²⁸ Ibid, 19-20.

²⁹ Ibid, 20.

³⁰ Ibid.

³¹ Ibid.

which human rights cannot be violated separately whereby the violation of one right affects the full realization of other rights.³²

In the immediate aftermath of the Second World War (WWII), States came up with the establishment of the UN in 1945 and adoption of the Universal Declaration of Human Rights (UNDHR) in 1948 by the General Assembly.³³ By virtue of this, the UN Commission on Human Rights (UNCHR), which was replaced by the UN Human Rights Council, was established with the objective of ensuring the incorporation of the main principles into particular international treaties and their implementation by State members.³⁴ The UN adopted the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 and both entered into force in 1976.³⁵ The two covenants which set out in more concrete terms the basic human rights and fundamental freedoms in the 1948 Declaration impose an obligation on all participating States to implement those rights by appropriate means.³⁶

Respect for human rights is essential to the functioning of open democracy and human rights principles provide a basis from which to build and maintain a safer, more prosperous, cohesive society, with care and consideration for the dignity and well-being of everyone at its heart.³⁷

2.2. National Human Rights Institutions

The UN initially defined NHRIs as:

*"bodies whose functions are specifically defined in terms of promotion and protection of human rights and are neither judicial nor law-making organs."*³⁸

³² Ibid, 22; see also Vienna Declaration and Program of Action (**Vienna Declaration**), Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5].

³³ Satyanand (n 22), 3.

³⁴ Ibid.

³⁵ International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force 23 March 1976) (ICESCR).

³⁶ Ibid; See also Satyanand (n 22), 4.

³⁷ Equality and Human Rights Commission, "Human Rights Report: Fulfilling the Paris Principles", 9 Available at: www.equalityhumanrights.com (Accessed on 18 February 2020).

³⁸ Office of the High Commissioner for Human Rights (OHCHR), "National Institutions for the Promotion of Human Rights", UN Human Rights Fact Sheet #19, April 1993, 3-6.

However, as this definition does not reflect the true feature of NHRIs concerning the way the institutions establishes, the UN currently adopted another definition which reads as:

“NHRI is a body which is established by the government under a Constitution, or by law or decree the functions of which are specifically defined in terms of the promotion and protection of human rights.”³⁹

As per the definition, NHRIs are established by the government whereby its independence from State organs is crucial for effective observance and assurance of human rights protection. NHRIs created in a country’s constitution or under parliaments with specific guarantees of independence are more likely to be independent of the government and the political process than other complaint mechanisms not established in constitution or law that may be abolished at the political whim of the person or group that established them.⁴⁰

NHRIs provide the opportunity to have one’s complaint heard and investigated by experts that are neutral to avoid mal-administration and maintain the protection and promotion of human rights.⁴¹

At the international level, the history of NHRIs goes back to 1946 when the issue was first addressed by the Economic and Social Council (ECOSOC)⁴², two years before the General Assembly declared the UDHR as “a common standard of achievement for all peoples and all nations”.⁴³ Thus, the ECOSOC made a recommendation for member states "to consider establishing information groups or local human rights Committees within their respective countries to further work of the Commission on Human Rights (UNCHR)".⁴⁴

After many efforts the international community adopted the first International guidelines embracing the functions and Structure of NHRIs, which lacks some features of NHRIs, as a result of this, they adopted the ‘Principles Related to the Status of National Institutions’ (Paris Principles) in 1991.⁴⁵ In addition,

³⁹ Center for Human Rights (UN) (n 9), 6.

⁴⁰ Office for Democratic Institutions and Human Rights (ODIHR), "Ombudsman and Human Rights Protection Institutions in the OSCE Participating States", OSCE Human Dimension Implementation Meeting, October 1998, Background Paper 1, 21 September 1998, 8.

⁴¹ Ibid.

⁴² Reif (n 8), 3.

⁴³ Center for Human Rights (n 9), 4.

⁴⁴ Economic and Social Council Resolution 2/9 of June 1946 on the Commission on Human Rights, Section 5.

⁴⁵ Economic and Social Council, E/C 4/1992/43 and General Assembly Resolution 48/134 of 20 December 1993.

within the UN, the 1993 World Conference on Human Rights which was held in Vienna was organized with the core objective to examine the purpose of national institutions and concluded with the adoption of the Vienna Declaration.⁴⁶

The adoption of the Paris Principles and series conferences highly inspired the development of NHRIs to go beyond the UN framework and deeply penetrate at regional levels.⁴⁷ For instance, member states of the Organization of African Unity (OAU), during the adoption of the African Charter on Human and Peoples' Rights (ACHPR) in 1981, agreed to adhere to human rights principles incorporated under international instruments and any instruments adopted by OAU.⁴⁸

The Charter, therefore, allows Member states to establish and promote NHRIs.⁴⁹ Subsequently, NHRIs were granted an 'observer status' with the African Commission on Human and Peoples Rights in the 24th Ordinary Sessions of African Union (AU).⁵⁰ By virtue of this, NHRIs should be established by a Constitution or other national law of Member States in accordance with the Paris Principles so that they could assist the commission in ensuring the protection of human rights.

2.2.1. Standards of National Human Right Institutions

The Paris Principles set out minimum Standards or essential characteristics for the establishment and functioning of NHRIs.⁵¹ First, those institutions shall be independent of the government by which it must be manned by persons who enjoy public confidence and are known for their integrity and impartiality of judgment.⁵² The mandate of NHRIs is also important by which it should be broad to both protect and promote human rights established in the Constitution or by legislation.⁵³ Although the Paris Principles never specifically indicate rights that must be within the jurisdiction of NHRIs, the mandate must be proportionate to the challenges that are to be faced i.e. Social and Economic Rights (Second generation

⁴⁶ Vienna Declaration (n 32).

⁴⁷ Pohjolainen (n 1), 55.

⁴⁸ See the Preamble of African Charter on Human and Peoples' Rights, adopted in the 18th conference of Heads of States and Government, Nairobi, Kenya, June 1981.

⁴⁹ Ibid, Art 26: It is the only human rights instrument that embraces the issue of NHRIs.

⁵⁰ African Commission of Human and Peoples' Rights, meeting at its 24th Ordinary Session from 22nd -31st October 1998, Banjul, Gambia.

⁵¹ Principles Relating to the Status of National Institutions (**The Paris Principles**), UNGA Res 48/134, UN Doc A/RES/48/134 (1993).

⁵² Ibid, Section C (1) "Mode of Operation".

⁵³ Ibid, Section A (2) "Competence and Responsibilities".

rights) must get equal importance with first-generation Civil and Political Rights, and indeed third-generation rights, the right to development and healthy environment, should be given due attention.⁵⁴ The other standard is a pluralist representation of society in the choice of commission members and adequate financial and human resources⁵⁵ by which it helps the institution to avoid and not to depend upon those who violate human rights and checked by it, and also bridge the relation between the government and civil society.⁵⁶

2.2.2. Types of National Human Rights Institutions

The majority of NHRIs that exist in various countries are grouped into two common categories i.e. Human Rights Commission and Ombudsman.⁵⁷ The former is engaged in assuring protection and observation of human rights, while the latter controls government officials and protect the rights of individuals who alleged to be a victim of maladministration.⁵⁸ By virtue of this, we can realize that human rights commission has wider scope by which it embraces human right protection at private and public sectors while the Ombudsman only covers mal-administration in the public sector by government officials.

Apart from the two NHRIs, there are also other types which are less adopted by countries i.e. Specialized National Human rights Institutions which are established particularly to protect the right of a vulnerable and disadvantageous group such as indigenous people, migrants, women, children, refugees and the like.⁵⁹ In addition, there is also another kind, Hybrid National Human Rights Institution or Human Rights Ombudsman which undertakes the function of human rights commission and Ombudsman office.⁶⁰

⁵⁴ Kamal Hossain (Dr), “Human Rights and Development” In Besselink, L. F. M. (Ed.) “Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World”, Kluwer Law International, University Of Amsterdam, 2001, 55.

⁵⁵ The Paris Principles (n 51), Section B (1).

⁵⁶ Kamal Hossien (n 54).

⁵⁷ Office of the High Commissioner for Human Rights (OHCHR) (n 38), 3.

⁵⁸ Ibid, 4; See also Center for Human Rights (UN) (n 9), 7.

⁵⁹ Center for Human Rights (UN) (n 9), 8.

⁶⁰ Anna E. Pohjolainen (n 1), 18.

Depending on their legal system, countries adopt different approaches towards national institutions i.e. single system, dual system, and multi-organ system.⁶¹ A single system is a system which only recognizes the establishment of either Human Rights Commission with a power to receive complaints concerning human rights violations, or the institutions of Ombudsman with a general power to receive and investigate claims of the people.⁶² A dual system is a system which recognizes the establishment of both institutions i.e. Human Rights Commissions and institution of Ombudsman, while multiple organ systems recognize the establishment of various human right institutions and Ombudsman Institutions with limited competence.⁶³

2.3. The Nexus between Human Right Protection and National Human Right Institutions

Although the protection and promotion of human rights are important functions of the State, NHRIs have exclusive mandate to protect and promote human right which is the core mission and fundamental purpose of those institutions.⁶⁴

NHRIs, particularly those which are consistent with the Paris Principles, is the basis of the national human rights protection system, and serve as a link between international human rights norms and State.⁶⁵ Although NHRIs are, as a rule, accountable to the legislature either directly or indirectly, they are unique and do not resemble other parts of government i.e. they are not under the direct authority of the executive, legislature or judiciary so that they investigate violations of human rights without any influence.⁶⁶ NHRIs enable States to meet their international

⁶¹ Leonard F.M. Besselink, “Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues”, In Besselink, L. F. M. (Ed.) “Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World”, Kluwer Law International, University of Amsterdam, 2001, 143.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ C. Raj Kumar, “National Human Rights Institutions and Economic, Social and Cultural Rights: Towards the Institutionalization and Developmentalization of Human Rights”, Human Rights Quarterly, John Hopkins University Press, Vol. 28, 2006, 759.

⁶⁵ Office of High Commissioner for Human Rights, “National Human Rights Institutions: History, Principles, Roles and Responsibilities”, Professional Training No. 4, United Nations, New York and Geneva, 2010, 13.

⁶⁶ Ibid.

responsibility “to take all appropriate action” to ensure that international obligations are implemented at the national level.⁶⁷

In addition, NHRIs link the government and civil society, which have opposing sides towards the human rights protection debate, with respect to the protection and promotion of human rights.⁶⁸ By virtue of this, as civil society contributes to the promotion, protection and advancement of human rights, their cooperation and coordination with the government which is the responsible organ to protect, respect and fulfill human rights, would help to avoid, at least reduce violation of human rights.

2.3.1. Role of NHRIs in the Protection and Promotion of Human Rights

As the Paris Principle require NHRIs to have as wide mandate as possible, particularly;⁶⁹

- A. Human Rights Promotion: NHRIs should help in the creation of a system where national human rights wholly respected and the culture of tolerance, equality and mutual respect develop. The Paris Principles provide that all NHRIs should promote human rights particularly to assist in the formulation and delivery of education initiatives; publicize human rights; and increase public awareness, including through the media.⁷⁰
- B. Human Rights Protection: NHRIs should help to identify and investigate human rights violations, to bring the responsible persons to justice, and to provide appropriate remedy and redress for the victims. NHRIs should have a legally defined mandate to undertake these functions and to issue views, recommendations or even seek remedies.⁷¹
- C. Advising Governments and Parliaments; the Paris Principles impose a general responsibility on NHRIs to advise government, parliament and other authorities by giving opinions, recommendations, proposals and reports.⁷² It also provides that NHRIs must be free to publicize their advice without

⁶⁷ Ibid, 20.

⁶⁸ Ibid.

⁶⁹ Paris Principles (n 51), Section A (3) “Competence and Responsibilities”; See also Ibid, 21.

⁷⁰ Ibid, Section A (3) (g).

⁷¹ Ibid, Section D.

⁷² Ibid, Section A (3) (a).

restraint and with appropriate immunities by which such role is important in creating a strong culture of human rights in the Country.⁷³

- D. Cooperation and Coordination; The Paris Principles and the International Coordinating Committee's sub-committee on Accreditation provides that NHRIs should cooperate and share information with other institutions, like Non-Governmental Organizations (NGO), civil society, that promote and protect human rights.⁷⁴
- E. Protecting and Promoting the Rights of Specific Groups; Although human rights are interdependent and indivisible, NHRIs have special responsibilities to help those least able to help themselves like human rights defenders, indigenous peoples, migrant workers, persons with disabilities, persons living with HIV/AIDS, refugees, women and the like.⁷⁵

NHRIs are mandated to protect and promote human rights by which they examine a wide variety of issues. However, the international community has neglected the obligations under the ICESCR with its nearly uniform focus on the ICCPR, as a result, this has contributed to NHRIs focused attention to addressing the violation of Civil and Political Rights.⁷⁶ This would become an obstacle and not adequate in the promotion and protection of human rights while the two groups of rights are interdependent that one cannot be properly protected without the other.

The Paris Principles do not make explicit reference to either Civil and Political Rights or ESC rights but simply states that national institutions should be devoted to the protection and promotion of human rights; however, the principles guarantee a "broad mandate as possible" to national institutions that they should address issues concerning ESCR.⁷⁷ In addition, the Committee of Economic, Social and Cultural Rights in its 19th session (1998) recognized the great role that can be played by the national institutions in the promotion and protection of ESC Rights providing that;

⁷³ Ibid.

⁷⁴ Ibid, Section C (6) "Methods of Operation"; See also Sub-Committee on Accreditation (SCA), Rules of Procedure and General Observations, [1.5].

⁷⁵ Office of High Commissioner for Human Rights (n 65), 25-26.

⁷⁶ Raj Kumar (n 64), 758.

⁷⁷ Morten Bergsmo (ed.), "Human Rights and Criminal Justice for the Downtrodden: Essay in Honor of Asbjorn Eide, Martinus Nijhoff Publishers, Lieden, Boston, 2003, 642.

*"The Committee notes that national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. It is therefore essential that full attention is given to ESC rights in all of the relevant activities of these institutions".*⁷⁸

NHRIs are seen to have an important role in monitoring implementation of ESC rights whereby access to food, housing, employment, education and health services are often of immediate interest to the public.⁷⁹ As there has been a strong trend in the last decade to assert the justiciability of ESC rights, the UN recognized that NHRIs can monitor government policy, hold inquiries into economic and social issues, and handle complaints.⁸⁰

Particularly, the Institution of Ombudsman has a vast role in protecting and promoting human rights. The Ombudsman is vested with the authority of citizen's support in the case of violation of their rights whereby it is represented as an institution of external control over the public administration.⁸¹ The Ombudsman as an institution presents a dedication to the consolidation of the democracy and an instrument of control, transparency and accountability, to protect citizen's rights and freedoms, and to fight mal-administration.⁸² The main function of the institution of Ombudsman is to maintain fairness and legality in public administration so that it protects the right of individuals and prevent further violations.⁸³ The institution of Ombudsman is considered as a protector of the public by which it defends and protects human rights from the unnecessary bureaucracy of administrative agencies.⁸⁴ In other words, the Ombudsman helps

⁷⁸ Economic and Social Council, "The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights: General Comment 10", E/C. 12/1998/25, 14th December 1998.

⁷⁹ Office of High Commissioner for Human Rights (OHCHR), "Assessing the Effectiveness of National Human Rights Institutions", International Council on Human Rights Policy, 2005, 18.

⁸⁰ In its General Comment No. 10 (14 December 1998), the UN Committee on ESC Rights provided an indicative list of activities that NHRIs can undertake to protect ESC rights. Available at: www.unhchr.ch/tbs/doc.nsf (Accessed on January 26, 2020).

⁸¹ Battali (n 4), 235.

⁸² Ibid.

⁸³ Center for Human Rights (UN) (n 9), 8.

⁸⁴ Abedin, A, "What should be the primary focus of the Ombudsman Institution? Protecting human rights and redressing public grievances versus fighting corruption: emphasis on South Asia and the Commonwealth Caribbean," (2008) Vol 8, The International Ombudsman Yearbook, 152.

individuals by giving them a chance to exercise their right to make a complaint where they would otherwise fear to do.⁸⁵

With regard to categories of human rights, the length and diversity of categories of human rights recognized by states are very important for Ombudsman offices to extend its mandate in safeguarding those rights.⁸⁶ The UN General Assembly recommends national Ombudsman institutions to operate consistently with the standards embraced in different international instruments and the Paris Principles so that they will be effective in protecting and promoting human rights.⁸⁷ As mal-administration is more linked with violations of human rights, an investigation by the institution is concerned with human rights issues.⁸⁸ The Ombudsman should operate in accordance with the Paris Principles and other relevant international instruments in order to enhance their capacity to assist States in the promotion and protection of human rights.⁸⁹

For the effective protection and promotion of human rights, the Ombudsman should mainstream human rights into their activities and programs within the framework of their mandates by which compliant examination should have a human rights-based approach.⁹⁰ In addition, the human rights role of Ombudsman will greatly benefit from closer collaboration and cooperation with other human rights institutions.⁹¹

⁸⁵ Kajwara, F, “Impact of the Ombudsman on good governance and public service administration”, International Ombudsman Yearbook Vol. 1, 1997, 56.

⁸⁶ John McMillan (n 19), 2.

⁸⁷ UN General Assembly, Resolution 64/161.

⁸⁸ McMillan, J, “The Ombudsman and the rule of law”, The International Ombudsman Yearbook (2004) Vol. 8, 7&16.

⁸⁹ General Assembly resolution 65/207 dated 21 December 2010; the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights.

⁹⁰ The International Ombudsman Institute, “The Role Of The Ombudsman In Promoting And Protecting Human Rights - Should It Become A National Human Rights Institution?”, 10th World Conference Of The International Ombudsman Institute Wellington, New Zealand, 12-16 November 2012, 7.

⁹¹ Ibid, 8.

In general, the main objective of the institution of Ombudsman is to maintain good governance through inspection and monitoring government agencies so that human rights are protected and promoted.⁹²

However, the effectiveness of the institution of an Ombudsman can be determined by social, economic and political factors. Social factors like public awareness towards the Institution's mandates, their rights and laws could be factors to determine the effectiveness of the Institution. Lack of awareness among the people hinders mal-administration by government agencies and violations of human rights. By virtue of this, the Institution could not get complaints from victims so that it could not investigate cases and provide recommendations that could avoid mal-administration. The other factor, economic factor, may include the financial sources of the Institution which determines the independence of the Ombudsman. Sufficient budget to the Institution would enable the Ombudsman to operate effectively without any interference and with full independence. Regarding the political factors, the political system of a country affects the institution of Ombudsman in its operation. Although a law grants the Institution a broad mandate, the political system and structure of the particular country determine the independence, mandate, and the overall authority of the Institution which have an impact on its effectiveness.

2.4. Ombudsman and Human Rights Protection

The Ombudsman Committee of the International Bar Association defines the term Ombudsman as;

"An Office provided by the Constitution or by the action of legislature or Parliament and headed by an independent high-level public official, who is responsible to the legislature, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his or her motion and who has the power to investigate, recommend corrective action and issue reports".⁹³

⁹² Battali (n 4), 236.

⁹³ Ombudsman Committee, International Bar Association Resolution, Brief on the Office of the Ombudsman, 18th Biennial Conference, Berlin, Federal Republic of Germany, Occasional Paper #6, 1980, 2 [2].

Such an Ombudsman institution primarily has the authority to investigate claims of mal-administration by public authorities. The term 'Mal-administration' is a broadly defined term that embraces violations of laws, and actions, particularly, undue delay, failure and refusal to give information, mal-treatment or rudeness.⁹⁴ By virtue of this, such mal-administration directly affects the people from exercising their rights as its actions and decisions violate human rights.

2.4.1. The origin of Ombudsman Institution

The world has been a victim of corruption and mal-administration, especially, in developing countries where the effects can be seen on the social, political and economic conditions.⁹⁵ During the past few decades, countries have adopted different devices and procedures to impose administrative accountability on the public servant ranging from the legislature, judiciary, administrative tribunals, department checks and balances, etc.⁹⁶ However, experience shown that these mediums and devices are not efficient to avoid mal-administration by which administrative unaccountability, corruption and failure to provide remedies to complaints increased, as a result, there was a need to seek effective institution which stands for the people against corruption and mal-administration.⁹⁷ In the process of searching an effective institution to control corruption and mal-administration, no other institution has held so much attraction as the Scandinavian Ombudsman.⁹⁸

Even though different jurisdictions provided their definition to the term ombudsman, the common element which almost all states share is that;

⁹⁴ The report by a former Committee on Legal Affairs and Human Rights, Mr Jordi Xuclà (Spain, ALDE), Doc. 13236, [5].

⁹⁵ Stephen Nanoo, "Administrative Theory and Bureaucratic Control: A Study of the Ombudsman Idea in Trinidad and Tobago", *Indian Journal of Public Administration*, Vol. XXIII, No. 2, New Delhi, April-June, 1977, 244-248.

⁹⁶ Meenakshi Kulkarni, "Ombudsman the Institution of Lokayukta and Upalokayukta", Dattsons, Nagpur, 2004, 11.

⁹⁷ *Ibid.*

⁹⁸ Sadhan Kumar Samanta, "Corruption in India: A Case for the Ombudsman", *Vlak Sahitya*, Kolkata, 2003, 105-106.

"Ombudsman is considered as an officer of parliament whose duty is to confirm that civil servants carry out their duties in accordance to the law and if civil servants are not performing their duties, Ombudsman can make a recommendation to the competent authority to institute proceedings against them".⁹⁹

By virtue of this, the Ombudsman presents a new type of guarantee for the rights and fundamental freedoms of individuals.

After Sweden introduced the Office of Ombudsman in 1809, different countries like Finland, Denmark, Norway established the institution and its importance has been widely acknowledged.¹⁰⁰ The International Ombudsman Institute (IOI) was established in 1978 with the aim of promoting the institution of Ombudsman through different mechanisms, particularly, through regional and international conferences, educational programs, studies, publications and exchange of information.¹⁰¹

2.4.2. Types of Ombudsman Institutions

There are different kinds of Ombudsman Offices adopted by different countries depending on their legal system. First, the Classical Ombudsman Institution has the mandate to investigate claims of mal-administration by public authorities and additionally have some jurisdiction over private sectors towards freedom of information, privacy protection, child protection, anti-corruption and health service monitoring.¹⁰² Even though the Classical Ombudsman institution is defined in a way not to have a mandate concerning human rights violations, their competence can increasingly embrace investigating complaints concerning violations of human rights.¹⁰³

Human Rights Ombudsman Institution model, on the other hand, have explicit human rights protection and, increasingly promotion mandate.¹⁰⁴ Although such model has been given the role of human rights

⁹⁹ Ibid.

¹⁰⁰ Batalli (n 4), 234

¹⁰¹ Ibid.

¹⁰² Lord Richard Balfe, "Ombudsman Institutions in Europe: The Need for a Set of Common Standards", Committee on Legal Affairs and Human Rights, Council of Europe, Report, AS/Jur (2019) 30, 5 [9].

¹⁰³ Linda Reif, "The Ombudsman, Good Governance and the International Human Rights System", Brill, 2004, 2

¹⁰⁴ Richard (n 61), 6.

preventive and monitoring bodies,¹⁰⁵ they may also have other additional mandates like the Classical model i.e. the role of investigating mal-administration, or environmental protection.¹⁰⁶ Unlike the Classical Ombudsman which only has the powers of investigation, recommendation and reporting, the Human Rights Ombudsman institutions have additional and supplementary power which embraces prosecutions, bringing actions before Courts, and inspections and supervising detention facilities.¹⁰⁷

The other model is Thematic or Specialized Ombudsman institution which includes those institutions with an explicit human rights mandate, such as children's and equality ombudsman institutions, and those institutions without the mandate of human rights, such as defence force, police and persons Ombudsman institutions.¹⁰⁸

By virtue of this, States have a wide discretion to choose a model of Ombudsman institution which they believe operates effectively.

2.5. The Mandate of the Ombudsman on decisions of the Police Force

As decisions of the police force mainly linked with human rights, States, like Ethiopia, which have a human rights commission is mandated with the power to investigate any human rights violations by the police force. However, there are many States which granted their institution of Ombudsman with the power to receive complaint against the police force and investigate the case.

In Grenada, a Caribbean country, citizens have a right to submit a complaint to the institution of Ombudsman against poor service from public sector institution including the Royal Grenada Police Force and Prisons services.¹⁰⁹ In addition, the Ombudsman office of Vanuatu, a Pacific Island country, has the jurisdiction to receive and investigate complaints against public servants, public authorities and ministerial

¹⁰⁵ Such role is required by the UN human rights treaties and soft law instruments, such as National Preventive Mechanisms (NPMs) under the UN Optional Protocol to the Convention Against Torture (OPCAT), and National Monitoring Mechanisms (NMMs) under the UN Convention on the Rights of Persons with Disabilities (CRPD).

¹⁰⁶ Lord Richard (n 102).

¹⁰⁷ Linda Reif, "Transplantation and Adaption: The Evolution of the Human Rights Ombudsman" Boston College, Third World Law Journal 269, 2011, 302-307.

¹⁰⁸ Lord Richard (n 102).

¹⁰⁹ Government Press Releases, "Grenada Cabinet approves establishment of Public Sector Complaints Authority", 2004; See also Ibid, 3.

departments, including the police force, except the president of the Republic, the judicial service commission, the Supreme Court and other judicial bodies.¹¹⁰

In a similar context, the institution of Ombudsman in Malta, which was established in 1995, has given the mandate to investigate complaints against the police force.¹¹¹ The Ombudsman comments that “compliant handling system of the police force is not well publicized and not effectively managed so that the involvement of the Ombudsman is very crucial for the promotion and protection of human rights.”¹¹²

2.6. Power of the Institution of Ombudsman to Take Measures

An Institution of Ombudsman, even if it varies in different jurisdictions, has the power to take measures and provide remedies after it conducts an investigation. Those measures are discussed as follows:

A. Power to Recommend

The power to recommend regarding complaints, where NHRIs has been investigating, is granted to NHRIs in almost all situations.¹¹³ The recommendations of NHRIs may be provided to a government agency, a public official, or a private individual or an organization by which it depends upon jurisdiction of the institutions.¹¹⁴

The Paris Principles recognized the power of recommendation as one important responsibility of NHRIs by which it stipulates that they submit opinions, recommendations, proposals and reports to the government, parliament and any other competent body regarding the promotion and protection of human rights.¹¹⁵ In addition, the Paris Principles provides that;

¹¹⁰ Canineu (n 25), 4.

¹¹¹ Ibid, 5.

¹¹² See *ibid*; and Information obtained from the Annual Report 2003, Office of the Ombudsman, Malta, 60-61.

¹¹³ Center for Human Rights (UN) (n 9), 33.

¹¹⁴ *Ibid*.

¹¹⁵ The Paris Principles (n 51), Section A (3) (a).

"NHRIs shall examine legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights."¹¹⁶

NHRIs also have the power, if necessary, to recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures.¹¹⁷

B. Power of Referral

Apart from the power of recommendation, NHRIs may also have the power to refer cases to another competent body for further action or decision.¹¹⁸ Such power would be granted to NHRIs in different circumstances. Those are;¹¹⁹

- In case the administrative organ, which the institutions investigated, failed to comply with the decision of the institution or does not take account of the recommendation;
- When the settlement of the case is difficult to secure;
- If the institution face failure to obtain necessary cooperation from the agency against which complaints submitted;
- If the investigation indicates a reasonable suspicion that a criminal act or disciplinary offence under the law has been committed which warrants intervention by prosecuting authorities;
- If the investigation reveals that the matter may be more appropriately dealt with by another body or agency;
- Due to dissatisfaction of both parties with the results of an investigation or with a decision taken by the NHRIs.

The Paris Principles recognized such power of referral stipulating that “NHRIs may transmit any complaints to any other competent authority within the limits prescribed by the law.”¹²⁰

¹¹⁶ Ibid, Section A (3) (a) (i).

¹¹⁷ Ibid.

¹¹⁸ Center for Human Rights (UN) (n 9), 33.

¹¹⁹ Ibid.

¹²⁰ The Paris Principles (n 51), Section D (c).

C. Power to make Determinations

The power to make determinations is granted to NHRIs to provide relief to victims of human rights violations.¹²¹ Such power of NHRIs is ordering interim injunctions or interim relief which can be provided during the process of investigation whereby it aims to protect the position of complainants from being worse during the investigation.¹²² Such relief could extend from ordering a public apology to a reversal of a particular administrative decision or a change in practice or policy.¹²³

D. Power to make Enforceable Orders

NHRIs may also be granted the power to make legally enforceable orders and decisions.¹²⁴ Such power allows NHRIs to have a higher status like a tribunal, court or prosecutor's office in case a party refuses to comply with a decision within a given time.¹²⁵

The Paris Principles also recognized the Quasi-Judicial competence of NHRIs stating that;

*"Seeking an amicable settlement through conciliation or, within the limits prescribed by law, through binding decisions or, where necessary, based on confidentiality."*¹²⁶

Such power enables NHRIs to perform their task effectively in the process of maintaining the protection and promotion of human rights.

2.7. International and Regional Normative Standards on National Human Rights Institutions

Regarding the establishment and operation of NHRIs, there are international as well as regional instruments which deal with standards and objectives by which existed and new NHRIs are expected to comply or fulfill. Those instruments help states in their process of establishing NHRIs and in strengthening or developing the effectiveness of existed NHRIs.

¹²¹ Center for Human Rights (UN) (n 9), 33.

¹²² Ibid, 34.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ The Paris Principles (n 51), Section D (a).

2.7.1. International Normative Standards

The United Nations and its organizations as well as other regional bodies have supported and stressed the importance of Ombudsman and national institutions as democratic ways to promote and protect human rights.¹²⁷ By virtue of this, the international community came up with standards which provide the way NHRIs establish and function appropriately. International Standards which deals with NHRIs are the Paris Principles and the Vienna Declarations.

Principles Relating to the Status of National Human Rights Institutions (The Paris Principles)

At the international arena, the most important discussion took place in Paris in early October 1991 at the First International Workshop on National Institutions for the promotion and protection of human rights which concluded with the adoption of the Paris Principles annexed to General Assembly resolution 48/134.¹²⁸ The Paris Principles affirm that national institutions are to have the competence to promote and protect human rights with as broad a mandate as possible set out clearly in a constitution or legislative act.¹²⁹ The Paris Principles embraces minimum standards that detail the role of NHRIs by which they are vital for the independence and effective functioning of NHRIs .i.e. monitoring and implementing human rights standards, and the way this role ought to be undertaken which is maintaining independence from government and civil society.¹³⁰

The Paris Principles provide that a national institution shall comment on human rights matters to government and any other competent body;¹³¹ encourage implementation of international standards;¹³² contribute to international human rights reports;¹³³ increase public awareness of human rights;¹³⁴ and cooperate with other human rights institutions.¹³⁵

¹²⁷ Office for Democratic Institutions and Human Rights (ODIHR) (n 40), 6.

¹²⁸ Ibid; See also The Paris Principles (n 51).

¹²⁹ Ibid.

¹³⁰ See The Paris Principles (n 51); see also Equality and Human Rights Commission (n 37), 7.

¹³¹ The Paris Principles (n 51), Section A (3) (a).

¹³² Ibid, Section A (3) (c).

¹³³ Ibid, Section A (3) (d).

¹³⁴ Ibid, Section A (3) (f).

¹³⁵ Ibid, Section A (3) “Competence and Responsibilities”.

The Paris Principles also recognized the quasi-judicial competency of NHRIs stating that;

*"National institutions have the competence to receive and act on complaints of human rights violations by which they may seek a better mechanism to settle disputes, inform complainants available remedies, hear complaints or refer their case to any other competent authorities, and make recommendations to competent authorities which could help in the process of maintaining the protection and promotion of human rights."*¹³⁶

The Paris Principles provides benchmarks against which proposed, new and existing NHRIs can be assessed or 'accredited' by the International Coordinating Committee's Sub-Committee on Accreditation (ICC).¹³⁷ The ICC SCA assesses NHRIs, with the assistance of the United Nations Office of the High Commissioner for Human Rights (OHCHR), whether they are consistent with the Paris Principles by which it awarded an accreditation status based on the result of the assessment.¹³⁸

In general, NHRIs, under the Paris Principles, are required to meet the following criteria;¹³⁹

- protect and promote human rights;
- to have a broad mandate and competence;
- autonomy from government;
- independence guaranteed by Statute or Constitution;
- Accountability and Publicity;
- pluralism through membership and effective cooperation;
- Adequate resources; and adequate powers of investigation.

With regard to the legal status of the Paris Principles, as it is adopted by the United Nations General Assembly Resolution 48/134, even though its binding effect is questionable, all State members to the United Nations (UN) are obliged to comply with the standards and criteria which are provided under the

¹³⁶ Ibid, Section D "Additional principles concerning the status of commissions with quasi-judicial competence".

¹³⁷ Office of High Commissioner for Human Rights (OHCHR) (n 65), 31.

¹³⁸ Equality and Human Rights Commission (n 37), 7: The accreditation Status is awarded as 'A', 'B' or 'C' status depending on the extent to which NHRIs comply with the Paris Principles. The status grants voting rights in the ICC and full participation rights in international fora (for example, the UN Human Rights Council).

¹³⁹ See The Paris Principles (n 51)

Paris Principles.¹⁴⁰ Decisions of the General Assembly, *ratione materiae*, are a recommendatory as a rule except for some matters by which its decision is binding.¹⁴¹ However, *ratione personae*, decisions of the General Assembly bind the UN at large and consequently all member States.¹⁴²

Vienna Declaration and Program of Action (Vienna Declaration)

The World Conference on Human Rights, which was held by the UN in Vienna, Austria, adopted the Vienna Declaration in June 1993, which recognizes the vital role of NHRIs in ensuring the protection and promotion of human rights, particularly, their role of providing recommendations to competent authorities and creating awareness concerning human rights.¹⁴³ It also recommends that States should give priority and emphasis to measures that assist in the strengthening and establishing NHRIs which stands to protect and promote human rights.¹⁴⁴

The Vienna Declaration was adopted considering that the promotion and protection of human rights is a matter of priority for the international community and recognizing that the international community should come up with means which helps to maintain the full realization of all human rights by ending the challenges and the continuation of human rights abuse.¹⁴⁵ By virtue of this, the Declaration recognized equality, dignity and tolerance by considering the elimination of racism and racial discrimination and preventing discrimination against indigenous people, migrant workers, women, children, and disabled person.¹⁴⁶ Having recognized this, the Declaration allows regional and NHRIs as well as NGOs to present their views to the Secretary-General of the UN on the progress made in the implementation of the present Declaration.¹⁴⁷ By virtue of this, NHRIs plays an important role in promoting and protecting human rights through checking and reporting the progress of human rights implementation at the national level.

¹⁴⁰ See Ibid, The Preamble.

¹⁴¹ Mark Divac Öberg , “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ” (2005) 16 European Journal of International Law, 883.

¹⁴² Ibid, 884.

¹⁴³ Vienna Declaration (n 32), Section I (36).

¹⁴⁴ Ibid, Section II (C) (66) and (67) “Cooperation, development and strengthening of human rights”.

¹⁴⁵ Ibid, the Preamble.

¹⁴⁶ Ibid, Section II (B).

¹⁴⁷ Ibid, Section II (F).

In general, since the adoption of the Paris Principles and the Vienna Declaration, many nations have created Ombudsman and human right protection institutions that receive and investigate complaints about violations of human rights.¹⁴⁸

2.7.2. Regional Normative Standards

There are regional standards which are meant to regulate NHRIs by setting requirements for their establishment and operation. Those include the Venice Principles, Larrakia Declaration, African Charter on Human and Peoples Rights, Harare Commonwealth Declaration, Yaoundé Declaration.

Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles)

The Venice Principles adopted on 15 March 2019 by the Venice Commission which is the Council of Europe's Commission.¹⁴⁹ The Principles are adopted by considering the important role of Ombudsman in protecting Human Rights Defenders and strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms.¹⁵⁰ The Principles provided that the Ombudsman institution shall be based on a firm legal foundation, preferably at the constitutional level, while its characteristics and functions may be further elaborated at the statutory level.¹⁵¹ It also put an obligation on States to adopt models that fully comply with the Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country.¹⁵²

The Principles recognized the independence of the institution whereby it shall not be given nor follow any instruction from any government authorities and it should have sufficient and independent budgetary resources.¹⁵³ With regard to the mandate of the Ombudsman, the principles provide a broad mandate which includes investigating cases, on his or her initiative or as a result of a complaint, with due regard to

¹⁴⁸ Office for Democratic Institutions and Human Rights (ODIHR) (n 40), 7.

¹⁴⁹ Principles on the protection and promotion of the Ombudsman Institution (Venice Principles), adopted by Venice Commission of the Council of Europe's Commission on 15 March 2019.

¹⁵⁰ Ibid, the Preamble [6] and Art 1.

¹⁵¹ Ibid, Art 2.

¹⁵² Ibid, Art 5.

¹⁵³ Ibid, Art 14 and 21.

available administrative remedies.¹⁵⁴ The Venice principles also recognized the immunity of the Ombudsman by which the Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the institution (functional immunity) as well as after they leave the institution (personal immunity).¹⁵⁵

In addition, the Venice Principles deals with the immunity of the Ombudsman by which the Venice Commission provided that Ombudsman institutions should enjoy functional immunity.¹⁵⁶ According to principle No. 23 of the Venice Principles, the Ombudsman, the deputies and the decision making staff shall enjoy functional immunity by which they should immune from criminal proceedings regarding activities and words, spoken or written, carried out in their official capacity for the institution.¹⁵⁷

The Asia-Pacific Forum of National Human Rights Institutions (Larrakia Declaration)

The Asia-Pacific region is a diverse region which embraces small islands as well as very large states like India and China.¹⁵⁸ Although the region does not have a formal human rights mechanism, their effort in the establishment and development of NHRIs created a framework for cooperation on human rights.¹⁵⁹ The first effort of the Asia-Pacific regional workshop of NHRIs was held in Darwin, Australia in July 1996.¹⁶⁰ This meeting brings representatives of National Human Rights Commissions from Australia, India, Indonesia, and New Zealand to an agreement to establish the Asia-Pacific Forum of NHRIs by which the four Commissions signed the Larrakia Declaration.¹⁶¹ This declaration provides different

¹⁵⁴ Ibid, Art 16.

¹⁵⁵ Ibid, Art 23.

¹⁵⁶ Venice Commission, Joint Opinion on the Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, CDLAD(2004)041, [18].

¹⁵⁷ Venice Principles (n 149), 23.

¹⁵⁸ Food and Agriculture Organization (FAO), Overview of the Asia-Pacific Region, Available at; www.fao.org/3/w4388e03.html, accessed on 3 May 2020.

¹⁵⁹ Kieren Fitzpatrick, “The Asia-Pacific Forum: A Partnership for Regional Human Rights Cooperation” in Birgit Lindsnaes. Lone Lindholt, Kristine Yigen (eds.), “National Human Rights Institutions”, Articles and Working Papers, The Danish Centre for Human Rights, 2000 , 141.

¹⁶⁰ Ibid, 142.

¹⁶¹ Ibid.

objectives by which member States to the Forum are expected to achieve or fulfill. The following are some of the objectives;¹⁶²

- Respond to requests of governments in the region for assistance concerning the establishment and development of NHRIS.
- To create cooperation, support, and joint activity among member commissions in exchange of information, expertise sharing, training and development for commission members and staff and the like.
- Respond to requests from other NHRIs to investigate violations of the human rights of their nationals located in a country having NHRI.
- Encourage governments and human rights non-governmental organizations to participate in Forum meetings as observers.
- Welcome as participants in the Forum other independent national institutions to conform to the Paris Principles.

This declaration recognizes the Paris Principles whereby it obliges, in order to be a member to the Forum, existed and newly established NHRIs within the region to meet the fundamental criteria set out in the Paris Principles i.e. independence guaranteed by statute or constitution, autonomy from government, pluralism, a broad mandate based on universal human rights standards, adequate powers of investigation, and sufficient resources.¹⁶³

The Forum undertakes a wide range of activities on human rights by which the approach of the Forum is to focus on practical outcomes through constructive cooperation and dialogue.¹⁶⁴ The Forum members meet annually by which the previous annual meetings of the Forum have been co-sponsored by the UN Office of the High Commissioner for Human Rights (OHCHR) whereby the Forum currently become one of the most significant vehicles for regional cooperation on human rights in the Asia-Pacific.

¹⁶² Ibid.

¹⁶³ The Paris Principles (n 51); See also Ibid.

¹⁶⁴ Fitzpatrick (n 139), 144.

African Charter on Human and Peoples Rights (ACHPR)

The ACHPR places a legal obligation on States to allow the establishment and improvement of NHRIs entrusted with the promotion and protection of the rights and freedoms recognized by the Charter.¹⁶⁵ The Charter, under its Article 45, also obliges State parties to co-operate within the UN to establish NHRIs so that it promotes human rights. By virtue of this, NHRIs in Africa must conform to human rights standards in the ACHPR, which are stipulated under chapter one of the Charter, in carrying out their functions as they are expected to ensure the promotion and protection of the rights recognized by the ACHPR.

Furthermore, the African Commission, which is mandated with promotion and protection of human and peoples' rights in Africa, has laid down criteria that NHRIs in Africa must follow to be able to apply for affiliate status with the African Commission which are;¹⁶⁶

- The national institutions should be duly established by law, Constitution, or decree;
- That it shall be a national institution of a State party to the African Charter;
- That the national institution should conform to the Paris Principles;
- That a national institution shall formally apply for status in the African Commission.

Harare Commonwealth Declaration

Regional conferences have been held which have resulted in declarations that can be seen as a standard for NHRIs whereby one of these declarations is the Harare Commonwealth Declaration.¹⁶⁷ This Declaration reaffirms the Declaration of Commonwealth principles agreed in Singapore in 1971¹⁶⁸ by which the States agreed to work for the promotion and protection of fundamental political values of Commonwealth i.e. democracy, democratic processes and institutions which reflect the protection and

¹⁶⁵ Organization of African Unity, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, Art 26.

¹⁶⁶ See African Commission document DOC/OS (XXVI)/115, distributed at the 26th Ordinary Session of the Commission in Kigali, Rwanda, November 1999.

¹⁶⁷ The Harare Commonwealth Declaration Issued by Heads of Government in Harare, Zimbabwe, 1991: It is a declaration of the Commonwealth of Nations which is a political association of 54 member states, mostly former territories of the British Empire.

¹⁶⁸ The Declaration of Commonwealth Principles, 1971, Available at:

<http://www.rcscanada.org/commonwealth/declaration.html> > (accessed on 24 February 2020)

promotion of human rights.¹⁶⁹ In general, the Harare Declaration include: pledge by governments to assist in creating and building the capacity of requisite institutions; to protect and promote fundamental human rights; to strive to promote in their respective countries those representative institutions and guarantees for human rights and personal freedom under the law; and to support the UN and other international institutions in the promotion of international consensus on major global, economic and social issues.¹⁷⁰

Yaoundé Declaration

This Declaration was a product of the First African Conference of National Institutions for the Promotion and Protection of Human Rights, held in Yaoundé, Cameroon from 5-7 February 1996, at the invitation of Cameroon's National Commission on Human Rights and Freedoms, under the auspices of the United Nations Centre for Human rights, by which it reaffirms the important role NHRIs must play to promote human rights and provide a remedy when those rights are violated.¹⁷¹ The Declaration was adopted in considering the indivisibility, universality and interdependence of human rights, pursuant to the spirit of the Vienna Declaration and Program of Action.¹⁷² It recalls the need to ensure the effective functioning of National Institutions by providing concrete guarantees of their independence and pluralism, especially at the legal and financial levels.¹⁷³

Those international regional instruments can be used as standards to establish new and develop existed NHRIs so that they operate effectively in the process of maintaining the protection and promotion of human rights. All instruments shares a common objective concerning the purpose of NHRIs which is to protect and promote human rights. By virtue of this, we can analyze and examine the Ethiopian Institution of the Ombudsman Amendment Proclamation No. 1142/2019 pursuant to those instruments, even though the regional instrument is not applicable to Ethiopia.

¹⁶⁹ The Harare Commonwealth Declaration (n 147).

¹⁷⁰ Ibid.

¹⁷¹ The Yaoundé Declaration, Available at <http://www.nhri.net/pdf/the%20Yaounde%20declaration.pdf> (accessed on 24 February 2020).

¹⁷² Ibid, The Preamble [7].

¹⁷³ Ibid, Art 4.

CHAPTER THREE

Rethinking the Ethiopian Institution of Ombudsman: A normative shift towards the protection and promotion of Human Rights

This chapter attempt to assess the implication of the Ethiopian Amendment Proclamation No. 1142/2019 to the Institution of the Ombudsman towards the protection and promotion of human rights. Accordingly, the chapter assesses the role of the proclamation and its major shortcomings that could be an obstacle for the Institution to protect and promote human rights.

3.1. General Overview of the Institution of Ombudsman Amendment Proclamation

The 1995 FDRE Constitution, under its Articles 55, 14 and 15, stipulates the establishment of both the institution of Ombudsman and Human Rights Commission. Regarding the institution of Ombudsman, the Constitution provides as follows:

“It (the House of People’s Representative) shall establish the institution of Ombudsman. It shall select and appoint its members. It shall determine by law the powers and functions of the institution.”¹⁷⁴

As per the Constitution, Ethiopian Institutions of Ombudsman was established by proclamation No. 211/2000 (hereinafter 'the establishment proclamation') to duly rectify or prevent unjust decisions and orders of executive organs and officials which have a direct linkage to the daily lives and rights of citizens.¹⁷⁵ However, this proclamation is repealed by the new amendment Proclamation No. 1142/2019 (hereinafter 'the amendment proclamation') having the same objectives i.e. promoting and protecting human rights by maintaining good governance.¹⁷⁶

According to the Minutes of the HPR for the ratification of the draft amendment proclamation, the draft amendment proclamation was presented to and accepted by the HPR believing that it would create a

¹⁷⁴ FDRE Constitution, Art 55, 15.

¹⁷⁵ Institution of Ombudsman Establishment Proclamation No. 211/2000, **Federal Negarit Gazeta**, Addis Ababa, Ethiopia, 2000, (**Establishment Proclamation**) Preamble.

¹⁷⁶ Institution of Ombudsman Establishment Amendment Proclamation No. 1142/2019, **Federal Negarit Gazeta**, Addis Ababa, Ethiopia, 2019, (**Amendment Proclamation**), the Preamble and Art 6.

system of mal-administration supervision and accountability.¹⁷⁷ The House also believed that the draft amendment proclamation creates an independent, neutral and trustworthy democratic institution by solving the normative and practical loopholes that would be an obstacle for the effectiveness of the Institution.¹⁷⁸

This proclamation clearly and unlike the establishment proclamation, extensively provides power and functions of the institution.¹⁷⁹ This provision tried to embrace mandates which are incorporated under the Paris Principles i.e. "creation of awareness of good-governance and on matters related to administrative justice; provide advice to the government on the issue of good governance; and supervise and follow up the implementation of part three of Freedom of Mass Media and Access to Information Law."¹⁸⁰

With regard to complaint handling, both proclamations entitled 'third parties' to submit a complaint to the ombudsman.¹⁸¹ Unlike the establishment proclamation, the amendment proclamation defines the term 'third party' as follows;

*“Third party means a Family member or a Legal Representative or a person who is elected to represent a group or association or Organization working on Civil Rights Advocacy or any person”.*¹⁸²

However, although the provision defines the term to include 'any person', it is not clear whether this term could be broadly defined and includes non-citizens and multi-national corporations. Amnesty International affirmed an interpretation stating that anyone including non-citizens and organizations shall have the opportunity to communicate with the institutions of Ombudsman irrespective of their status under national law so that institution would serve the purpose of maintaining effective promotion and protection

¹⁷⁷ የኢ.ፌ.ዴ.ሪ 5ኛ የህዝብ ተወካዮች ምክርቤት 4ኛ ዓመት የስራ ዘመን 36ኛ መደበኛ ስብሰባ, የህግ፣ፍትህና የዲሞክራሲ ጉዳዮች ቋሚ ኮሚቴ የህዝብ እንባ ጠባቂ ተቋም ማቋቋሚያ አዋጅን ለማሻሻል የቀረበውን ረቂቅ አዋጅ በተመለከተ ያቀረበውን ሪፖርትና የውሳኔ ሀሳብ መርምሮ ረቂቅ አዋጅን ለማጽደቅ, ሚያዝያ 17 ቀን 2012 ዓ.ም.

¹⁷⁸ Ibid.

¹⁷⁹ Amendment Proclamation (n 176), Art 7.

¹⁸⁰ The Paris Principles (n 51), Section A and C; See also Ibid, Art 7 (7 -10).

¹⁸¹ The Establishment Proclamation (n 175), Art 22(1); The Amendment Proclamation (n 176), Art 26(1).

¹⁸² The Amendment Proclamation (n 176), Art 2(16).

of human rights.¹⁸³ According to Mr. Mengistu Kagne, unlike the Establishment Proclamation, the Amendment Proclamation grants anyone, i.e. natural and legal persons, the right to submit complaints to the Institution concerning mal-administration of government agencies regardless of their nationality and Headquarters of the agency or complement respectively.¹⁸⁴

As many administrative issues have inter-linkage with human rights and the primary objective of the Ombudsman is to protect human rights by maintaining good-governance, there could be an overlapping of jurisdiction between the institution of Ombudsman and Human Rights Commission. Thus, both proclamations entitled the institution and the Human Rights Commission to determine, upon their mutual consultation, the question of which of them would investigate cases.¹⁸⁵ However, if they failed to determine upon mutual consultation, the organ having pendency shall undertake the investigation.¹⁸⁶

Regarding legislative review, the Paris Principles state that NHRIs shall ensure the consistency of national legislations with fundamental human rights and its effective implementation by which it may, if necessary, recommend the adoption of new legislation, and amendment of legislation in force.¹⁸⁷ Such responsibility of the Institution of Ombudsman is also recognized under the establishment and amendment proclamations stating that;

“Make Recommendations for the revision of existing Laws, Practices or Directives and for the enactment of new Laws and formulation of Policies, with a view to bringing about Good Governance.”¹⁸⁸

¹⁸³ National Human Rights Institutions: Amnesty International Recommendation for Effective Protection and Promotion of Human Rights, 1 October 2001, AI INDEX: IOR 40/007/2001, 15.

¹⁸⁴ Mr. Mengistu Kagne, Investigator in the Ethiopian Institution of the Ombudsman, Interviewed on April 28, 2020, at 9:14A.M.

¹⁸⁵ The Establishment Proclamation (n 175), Art 29; The Amendment Proclamation (n 176), Art 34.

¹⁸⁶ Ibid, Art 29(2) and Art 34(2).

¹⁸⁷ The Paris Principles (n 51), Section A(3) (b) and (a) (i).

¹⁸⁸ The Establishment Proclamation (n 175), Art 6; The Amendment Proclamations (n 176), Art 7

3.2. The Ethiopian Institution of Ombudsman Amendment Proclamation in light of the Paris Principles

The mere establishment of NHRIs does not necessarily mean it is effective and serves its purpose. The effectiveness of NHRIs should be examined in line with the Paris Principles by which it recognizes factors that determine the effectiveness of NHRIs i.e. independence, accessibility, operational efficiency accountability of those institutions.¹⁸⁹ By virtue of this, the Ethiopian Institution of the Ombudsman establishment amendment Proclamation No. 1142/2019 is examined in light of the Paris Principles. As operational efficiency is mainly analyzed by examining the practice, the researcher mainly focuses on the other three factors.

3.2.1. Independence

The Paris Principles recognized that NHRIs, in order to function effectively, shall have independence from government organs.¹⁹⁰ As the objective of NHRIs is to investigate mal-administration and violation of human rights in government organs, it shall refrain from any kind of interference that would be an obstacle for its effective functioning and reduce its credibility. However, this does not mean NHRIs are independent from the government by which NHRIs depend on the government regarding the establishment regulation of their mandate and accountability.¹⁹¹

The notion of independence starts with the process of establishing these institutions by which they should be created by the Constitution or a legislative act. Such way of establishment grants NHRIs independency as there would be less possibility to amendment and government interference. Regarding the importance of the institution's independence, Mrs. Lensa argued that independence of the Institution of the Ombudsman and human rights defenders, in general, is very crucial for the effectiveness of the institutions in investigating mal-administrations and human rights violations and providing remedies to the victims.¹⁹²

By virtue of this, the Ethiopian institution of Ombudsman is established with a legislative act i.e. proclamation No. 211/2000 as amended by Proclamation No. 1142/2019, declaring the institution to be established in accordance with Art 55(1) and (15) of the FDRE Constitution as an autonomous organ

¹⁸⁹ The Paris Principles (n 51), Section B and C.

¹⁹⁰ Ibid, Section B.

¹⁹¹ Center for Human Rights (UN) (n 9), 10.

¹⁹² Mrs. Lensa Beyene, Director of the Ethiopian Women Lawyers Association, Interviewed on May 15, 2020, at 10:30 A.M.

having its juridical personality.¹⁹³ Thus, the Ethiopian Institution of Ombudsman has independence own legal autonomy so that it is consistent with the Paris Principles. Independence of such institution shall also be recognized through the financial autonomy of the institution. The Paris Principles states that "national institutions should have suitable infrastructure to execute their conduct, particularly adequate funding."¹⁹⁴ Submitting the proposed amount of annual budget to the parliament for approval indicates the financial autonomy of NHRIs.¹⁹⁵ So excluding the executive organ from the process of approval and allocation of budget to the institution of Ombudsman manifests the independence of the institution so that it functions effectively without any interference.

However, even if the budget is approved by the parliament, totally relying on government fund would obstruct the independence of the institution by which it should also have another financial source from NGOs or other donors. Regarding financial autonomy, the Amendment proclamation declares that the budget of the institution of Ombudsman shall be drawn from the government and sources like assistance, grant and any other sources.¹⁹⁶ By virtue of this, the availability of diverse resources of budget guarantees independence of the institution.

The other way of maintaining the independence of Ombudsman is through appointment procedure. The Paris Principles provide that "the composition of national institution and the appointment of its members shall ensure the pluralist representation of the social forces (civil society)."¹⁹⁷ The International Coordinating Committee of National Human Rights Institutions stipulated that the method of appointment should involve representative bodies of different stakeholders, particularly the parliament and civil society in order to comply with the Paris Principles and to bridge between the government and civil society.¹⁹⁸

¹⁹³ The Amendment Proclamation (n 176), Art 5.

¹⁹⁴ The Paris Principles (n 51), Section B (2).

¹⁹⁵ Center for Human Rights (UN) (n 9), 8.

¹⁹⁶ The Amendment Proclamation (n 176), Art 38.

¹⁹⁷ The Paris Principles (n 51), Section B (1).

¹⁹⁸ Appointment Procedure of National Human Rights Institutions, Paper for the Discussion of the International Coordinating Committee of National Human Rights Institutions, 13 April 2006. Available at:

http://www.nhri.net/pdf/OHCHR_Appointments_Procedure_Paper_E.pdf, March 14, 2020; see also Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", Human Rights Quarterly, John Hopkins University Press, Vol. 28, 2006, 923.

The Amendment Proclamation provides that nomination of appointees is made by a committee composed of members mainly from the Parliament and the Court.¹⁹⁹ Thus, the Proclamation fails to recognize the significant role of civil society in the appointment procedure as well as in the effective functioning of the institution. As the nomination committee has a strong link with the leading political party, except the two members from a competent political party, the appointment of nominees would face political influence from the government as there would not be a challenge from other independent stakeholders. By virtue of this, the Amendment Proclamation is more open for government interference and it is inconsistent with the Paris Principles regarding the appointment procedure.

3.2.2. Accessibility

Accessibility is the one factor that determines whether the Institution achieves its purpose of ensuring the protection and promotion of human rights. Accessibility is the way the Institution introduces itself to the society so that the latter understands the existence of the institution and uses it as a means to seek a remedy. Accessibility of the institution of Ombudsman could be maintained by creating awareness among the public regarding the institution. NHRIs, in general, should create awareness in order to make themselves known by the public so that the latter use the institution to get a remedy.²⁰⁰ The Amendment Proclamation obliges the institution to create awareness of Good-Governance and on matters related to Administrative justice so that in case they face mal-administration and violation of human rights, they can submit a complaint to the institution.²⁰¹

The other way of maintaining accessibility is through the physical accessibility of the institution throughout a country. In order to ensure such accessibility, the Paris Principles stipulated the need to set up local or regional sections to assist it in discharging its function.²⁰² In a similar context, the Amendment Proclamation stipulates that the institution should have branch offices Ombudsman by which they may be established in different regions of the country.²⁰³

¹⁹⁹ See The Amendment Proclamation (n), Art 17 and 18.

²⁰⁰ Center for Human Rights (UN) (n 9), 13.

²⁰¹ The Amendment Proclamation (n 176), Art 7(8).

²⁰² The Paris Principles (n 51), Section C (e).

²⁰³ The Amendment Proclamation (n 176), Art 10(5).

According to Mengistu Kagneu, the Institution creates awareness among the people through Mass-Media and training so that they can bring their complaint to the institution. Concerning the physical accessibility of the Institution, the Investigator stated that the Institution has branch offices in all regional states of the Country except in Somalia and Harari. Victims of mal-administration can submit their complaint using phones, fax, emails and other mediums.²⁰⁴ By virtue of this, the Institution is accessible to some extent even if there is a lot to do, for instance, establishing branch offices on those regional States and fulfills the infrastructures that enable the Institution to perform its duty effectively.

3.2.3. Accountability and Publicity

NHRIs have both formal and public accountability.²⁰⁵ The former embraces the accountability to the authority that established the institution, In Ethiopia, the House of Peoples' representative (HPR).²⁰⁶ The latter is the accountability of the institutions to the public by addressing public opinion directly or by publishing its opinion and recommendations through different Media and press organs.²⁰⁷ Such a way of accountability creates confidence among the public towards the institution. It also uses as 'public shame' on the organ found at fault so that they would be forced to correct their faults and avoid further violation.²⁰⁸ However, this does not mean that the Ombudsman should publicize all cases whereby sensitive details that might endanger complainants, their families and human rights defenders may be held confidential.²⁰⁹ In general, making the Institution accountable to the HPR makes the Institution accountable to the representative of the People i.e. the HPR so that it assess the effectiveness of the Institution towards protecting and promoting human rights.

²⁰⁴ Mr. Mengistu Kagneu (n 184).

²⁰⁵ Smith (n 198), 937.

²⁰⁶ The Amendment Proclamation (n 176), Art 8.

²⁰⁷ The Paris Principles (n 51), Section C (c); See also Ibid, Art 36.

²⁰⁸ Mehari Tadele, "Ethiopian Institute of Ombudsman and Its Role in Building Democratic System", Addis Ababa, Ethiopia, 2001, 14.

²⁰⁹ The Amendment Proclamation (n 176), Art 42; See also National Human Rights Institutions (n 11), 21.

3.3. Demerits of the Ethiopian Institution of Ombudsman Amendment Proclamation towards the Protection and Promotion of Human Rights

The new Ethiopian Amendment Proclamation No. 1142/2019 has many shortcomings that would be an obstacle for the effective functioning of the Institution in ensuring the protection and promotion of human rights. *Inter alia*, the mandate of the Institution and immunity of its staff members are the main shortcomings the Amendment proclamation fail to recognize.

3.3.1. The mandate of the Institution of Ombudsman

Regarding the mandate of the Institution of the Ombudsman, three issues are discussed i.e. the mandates of the Institution towards ESC Rights, decisions of the Police Force and the power of the Institution to take measures.

The Paris Principles provide that NHRIs shall have the competence to promote and protect human rights by giving a broad mandate to the institutions so that they function effectively.²¹⁰ The International Committee for Economic, Social and Cultural Rights (ICESCR) acknowledged the crucial role of NHRIs to promote the indivisibility and interdependent nature of all human rights.²¹¹ However, like the Paris Principles, both the Establishment and Amendment Proclamations do not specifically indicate whether the mandate of the Ethiopian Ombudsman embraces Economic, Social and Cultural (ESC) Rights. Such failure of the proclamation to specifically recognize both categories of rights i.e. civil and political rights and ESC rights would narrow the mandate of the institution so that it could not achieve its purpose and objective. In addition, this could make the establishment of the institution inconsistent with the Paris Principles which requires NHRIs to have a broad mandate.²¹² In other words, even if the Paris principles do not specifically require NHRIs to have a mandate for ESC Rights, it expressly indicates that NHRIs should be given a broad mandate which impliedly indicates that the mandate of NHRIs embraces the two categories of rights. However, both the Establishment and Amendment Proclamation failed to specifically indicate or expressly give a 'broad mandate' to the institution. According to Mr. Mengistu Kagne, as the Amendment Proclamation generally gives the institution a mandate to "ensure the Peoples' Rights and

²¹⁰ The Paris Principles (n 51), Section A (1) and (2).

²¹¹ Economic and Social Council, "The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights: General Comment 10, E/C. 12/1998/25, 14th December 1998.

²¹² The Paris Principles (n 51), Section A (2).

benefits", the institution receives complaints concerning mal-administration that could violate every right prescribed under the laws of the nation.²¹³ Besides, Mr. Deneke Shanko added that any violations of both categories of human rights due to mal-administration are the mandate of the Institution of the Ombudsman unless the Institution transferred the case to the Ethiopian Human Rights Commission (the Commission) believing that the victim would get better remedy if investigated by the Commission.²¹⁴

In addition, although the proclamation expressly provided the mandate of the institution, it provided limitations which the institution of Ombudsman lacks the power to investigate. Those are;²¹⁵

- Decision given by councils, established by election, in their legislative capacity;
- Decision given or cases pending in courts of law or quasi-judicial organs;
- Decision given or cases pending on matters under investigation by the Federal or Regional Office of the Auditor-General; or
- Decision given by police Forces or Defense Forces, in respect of matters of National Security or Defense.

However, regarding decisions given by police forces, there are issues where such limitation could be an obstacle for the institution of the Ombudsman to operate effectively in promoting and protecting human rights. It is obvious that poor administration of public services and government functions results in abuses of human rights and misuse of power by which they fall under the compliant jurisdiction of the Ombudsman, for instance, interference into private affairs, improper police treatment, mistreatment of prisoners.²¹⁶ The torture of individuals and inhuman treatment by police forces during interrogation and in prison and other cases of police brutality are human right cases where the institution of Ombudsman could have jurisdiction and mandate to investigate.²¹⁷

²¹³ Mr. Mengistu Kagnew (n 184).

²¹⁴ Mr. Deneke Shanko, Advisor of the Chief Ombudsman and Directorate Director of Appeal Investigation, Interviewed on May 14, 2020, at 10:30 A.M.

²¹⁵ The Amendment Proclamation (n 176), Art 9.

²¹⁶ Maria Canineu (n 25), 2.

²¹⁷ Ibid.

By virtue of this, as violations of human rights and misuse of power by police forces are not rare, there must be an independent organ which conducts systemic investigation over the administration system and structure of the Police Force. Poor administration system results in providing poor decisions by the police force which violates human rights so that systemic investigation is crucial to avoid future violations by the force. So limiting the jurisdiction of the institution towards decisions of police force highly undermines the effort of a government to ensure democracy and obstacles the effective operation of the institutions towards the promotion and protection of human rights.

Regarding the power of the Institution of the Ombudsman to take measures, the institution is only granted a power to merely give an opinion or recommendation on the decision of different agencies or existed laws based on the result of its investigation and refer cases to the Court in some matters.²¹⁸ The Proclamation grants the Institution of the Ombudsman the power to recommend competent authorities by undertaking studies and find solutions concerning mal-administration of government agencies.²¹⁹ Besides, the Institution is also granted the mandate to provide recommendations for amendments of existed laws and enactments of new laws that would ensure the protection and promotion of human rights by avoiding mal-administration.²²⁰ In addition, the proclamation allows the Institution to recommend appropriate remedies to victims of mal-administration according to the result of its investigation.²²¹ The Institution of the Ombudsman is also granted to provide advice to the government concerning Good-Governance which ensures the protection and promotion of human rights.²²²

In addition to providing recommendations, the Amendment Proclamation allows the Institution of the Ombudsman to refer cases to competent bodies in some situations. Those situations are expressly provided with the Amendment Proclamation as follows;²²³

- Has received a summons from the Institution, or been called upon by it otherwise, does not appear;
- or

²¹⁸ The Amendment Proclamation (n 176), Art 7 and 32.

²¹⁹ Ibid, Art 7 (5).

²²⁰ Ibid, Art 7 (6).

²²¹ Ibid, Art 7 (3).

²²² Ibid, Art 7 (7).

²²³ Ibid, Art 32.

- Does not appear or respond to bring documents of investigation or supervision upon the request of the Institution; or
- Obstructs the proper carrying out of the investigation or supervision of Institution; or
- 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.

Thus, in case those issues came to existence, the Institution reports the case with supporting evidence to the concerned Attorney Office so that it opens criminal suit against the person who commits the offences provided under Art 32(1) of the Proclamation.²²⁴ By virtue of this, the Ethiopian Institution of Ombudsman lacks the other vital powers which enable the institution to function effectively by having abroad power so that it could maintain the protection and promotion of human rights.

3.3.2. Immunity of the Institution of Ombudsman

The independence, impartiality and fairness of an institution of Ombudsman could be ensured by giving the institution-specific privileges, immunities and protections.²²⁵ By virtue of this, the Ombudsman acting in an official capacity is immune from civil and criminal proceedings performed in good faith according to the law.²²⁶ Regarding suspension of the immunity of the institution, it is only the power of the legislative body which appointed the Ombudsman by the same majority vote of the full body required to appoint.²²⁷ However, the Paris Principles do not explicitly recognize the immunity of NHRIs so that States are not in an obligation to grant immunity to their NHRIs.

The Ethiopian Establishment Proclamation recognized immunity of the appointee and investigator of the institution stating that:²²⁸

²²⁴ Ibid, Art 32 (2).

²²⁵ Dean M. Gottehrer, “Fundamental Elements of an Effective Ombudsman Institution”, 2009, 15.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ The Establishment Proclamation (n 175), Art 35.

"No appointee or investigator of the institution may be detained or arrested without the permission of the House of the Chief Ombudsman, respectively, except when caught in *flagrante delicto* for a serious offence."

The immunity of the Institution ensures independence of the institution by which the appointee and investigator perform their duty effectively and without any fear of persecution. Even though the Establishment Proclamation recognized the immunity of the institution, the Amendment proclamation excludes this provision and denies functional immunity of the institution that would help the latter to operate effectively. According to the Minute of the HPR for the ratification of the draft Amendment Proclamation, many members of the House argued that the provision of the draft amendment proclamation which deals with the immunity of the Institution contradicts with Art 54(6) of the FDRE Constitution which only grants immunity to the members of the House.²²⁹ They argued that as the FDRE Constitution does not give the House a power to grant immunity which is exclusively granted to members of the House, its implementation is very difficult which requires the exclusion of such provision from the draft.²³⁰ Thus, such provision excluded from the draft with a majority vote and the draft ratified unanimously.²³¹ According to Mr. Mengistu Kagnev, although the Establishment Proclamation recognizes the immunity of the Institution, the Amendment Proclamation excludes such provision because the House of Peoples Representative (HPR) believed that immunity is only granted to members of the House.²³² He further stated that the institution opposes such argument by which they are trying to incorporate a provision of immunity in the draft implementation regulation by asking permission from the HPR even if it has so many challenges.²³³ In addition, Mr. Deneke Shanko argues that immunity of the Institution of the Ombudsman is not that much important for the Institution, rather it is very crucial for the people, particularly the victim.²³⁴ Granting immunity will be a confidence for the Institution to provide the appropriate remedy to the victims by conducting an investigation using all available means without fear

²²⁹ The Minutes (n 177).

²³⁰ Ibid.

²³¹ Ibid.

²³² Mr. Mengistu Kagnev (n 184).

²³³ Ibid.

²³⁴ Mr. Deneke Shanko (n 214).

so that excluding such privilege highly affects the people.²³⁵ Besides, according to Mr. Misganaw²³⁶ and Mr. Adham Duri²³⁷ also believe that immunity fundamentally gives confidence to human rights defenders in their task of protecting and promoting human rights. Immunity is very crucial in countries like Ethiopia where their human rights system is not developed and the Executive Organ is very powerful which influences human rights defenders.²³⁸ Immunity is used as a pass permit to any restricted areas or confidential documents so that it enables human rights defenders to unveil any violations and mal-administrations. In addition, Mrs. Selamawit also believes that most human rights violations are caused by the Administrative Organ which is the powerful organ so that granting immunity to human rights defenders would balance the power.²³⁹

The researcher disagrees with the position of the HPR towards the immunity of the Institution of the Ombudsman by which Immunity can be considered as one factor that could affect the effectiveness of the Institution in its task to achieve its purpose and ensure the protection and promotion of human rights.

²³⁵ Ibid.

²³⁶ Mr. Misganaw Mulugeta, Senior Advisor in the Ethiopian Human Rights Commission, Interviewed on May 14, 2020, at 8:30 A.M.

²³⁷ Mr. Adham Duri, Human Rights Protection and supervision Directorate Director in the Ethiopian Human Rights Commission, Interviewed on May 15, 2020, at 3:30 P.M.

²³⁸ Mr. Misganaw (n 236).

²³⁹ Mrs. Selamawit Seifu, Senior human Rights Violations Investigation and supervision Officer in the Ethiopian Human Rights Council, Interviewed on May 14, 2020, at 2:00 P.M.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. CONCLUSION

The institution of Ombudsman plays a vital role in protecting and promoting human rights by which it receives and investigates violations of human rights due to the mal-administration of government agencies. It is the mandate of the Institution to promote and protect human rights by providing recommendations, advises, and remedies which could end or reduce the continuation of the mal-administration and violations. The Institution stands with the people against the complicated bureaucracy of government agencies that would be an obstacle for the effort of protecting and promoting human rights.

There are international and regional instruments that provide standards which NHRIs needs to comply with during their establishment process and operation. The Paris Principles expressly provides benchmarks by which NHRIs should be established by constitution or legislation to effectively protect and promote human rights with a broad mandate. The other instrument is the Vienna Declaration which is adopted with the aim of protecting and promoting human rights. There are also regional instruments i.e. the Venice Principles, Larrakia Declaration, the ACHPR, Harare Commonwealth Declaration, and the Yaoundé Declaration which one way or another requires NHRIs to ensure the protection and promotion of human rights.

The Ethiopian Amendment Proclamation grants a broad mandate to the institution of Ombudsman to receive complaints concerning mal-administration of government agencies that violates human rights. It also grants every person either they are nationals or foreign nationals, the right to submit complaints to the Institution by which it makes the institution accessible to every person so that it extends the role of the Institution in protecting and promoting human rights. The Amendment Proclamation gives the Ombudsman institution the power to recommend for the adoption of new legislation or amendments which could help to prevent further normative loophole that opens room for violations of human rights. It also grants the Institution an additional power which is a systemic investigation that enables the Institution to conduct the overall structure of a government agency which examines and assess whether the agency operates consistently with the law.

The Proclamation limits the mandate of the Institution towards the decision of a police force which obviously affects and violates human rights. Although there is the Ethiopian Human Rights Commission

which deals with human rights issues, it only deals with the violation of human rights concerning the individual complainant. However, the Institution of Ombudsman investigates the structural organization and the administrative system of a police force by which its poor structure violates human rights. The Proclamation also failed to recognize the immunity of the Institution which maintains the effective operation of the Institution without any fear of criminal prosecution.

The Proclamation grants only a power to provide recommendations and refer cases to competent body in some limited scenarios by which other powers like the power to make determinations and enforceable orders that help the institution to effectively conduct an investigation and provide appropriate remedies are not given to the Institution.

In general, the Amendment Proclamation No. 1142/2019 has many normative loopholes which are a factor for the effectiveness of the Institution of the Ombudsman. Ignorance of such shortcomings highly affects and undermines the effectiveness and purpose of the Institution in the promotion and protection of human rights.

4.2. RECOMMENDATIONS

To avoid such non-compliance and confusion in the future, the researcher offers the following recommendations;

- As the institution of Ombudsman operates based on the power given to it by the Proclamation, the mandate of the institution should be expressly provided by the proclamation. Unlike the Paris Principles, the Amendment Proclamation does not indicate whether the institution has a broad mandate in promoting and protecting human rights. So the proclamation should explicitly provide whether the mandate of the institution embraces ESC Rights.
- The administration system of the police force is a contributing factor for the effectiveness of a decision given by the police force. Poor administration system results in providing poor decision and ineffective operation which is one element of mal-administration. By virtue of this, a mandate of a systemic investigation on the structural organization and administrative system of the police force should be given to the institution so that it promotes and protects human rights.
- The appointment procedure should be reconsidered by which other stakeholders like civil society should be involved in the appointment procedure as a member of a nomination committee and to be appointed as a nominee. By virtue of this, any interference that undermines the independence of the institution would be avoided so that the institution of the Ombudsman would effectively ensure the protection and promotion of human rights.
- The Amendment Proclamation should recognize and bless the Institution with immunity which enables the staff members of the Institution to operate effectively without any fear of criminal responsibility and prosecution, except in the case of *flagrante delicto* so that they maintain the protection and promotion of human rights.
- Besides the power to provide recommendations and refer cases to competent bodies, the Institution should be given additional power like to make determinations and legally enforceable orders during an investigation which makes the investigation smooth and avoid any obstruction by subsequent events.

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Annex I

Interview Guide Questions to Officers in the Ethiopian Institution of Ombudsman, Human Rights Commission, EWLA, and Human Rights Council

I, Rahel Beyene, an LL.M Student in Addis Ababa University, kindly requests to prepare or inscribe your answer for the following interview questions.

This interview guide is prepared for the purpose of gathering information for my Master's thesis that I am pursuing in AAU Law School. I am grateful for your kind cooperation investing your precious time to respond for my interview. You can refrain from writing your name.

Interview Questions:

1. The Amendment Proclamation tried to give a broad mandate to the Institution. However, it failed to explicitly stipulate whether the institution's mandate embrace the two categories of rights. i.e. Civil and Political Rights Vs Economic, Social and Cultural Rights (ESC). Does the Institution have a mandate to receive complaints and investigate cases regarding ESC Rights?
2. The Amendment Proclamation allows a victim or a third party to lodge a complaint to the institution. The definition of the term 'third party' includes any person. So does it mean the institution receive complaints from non-citizens and multi-national corporations?
3. The Proclamation limits the mandate of the institution on some issues. One of those limitations is regarding decisions of the police force. However, it is obvious that there is inhuman treatment by police force during interrogation and detention in prison. So what is the reason of limiting the institution not to investigate decisions of police force while there is violation of human rights?
4. The Establishment Proclamation grants the institution functional immunity under its Art 35 while the Amendment Proclamation excludes such provision. What is the main reason of the Parliament to exclude such provision which grants immunity to the institution?
5. Do you think the Amendment Proclamation helps the institution to ensure protection and promotion of human rights? If yes, in what way?