"THE CASE FOR AN OMBUDSMAN IN KENYA"

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INTRODUCTION

The last two hundred years or so have witnessed a spectacular growth in state power. This has been necessitated by the increase in the role played by the state in the regulation of the economic and social welfare of the nation. In fulfilling this role, public officials have to wield substantial powers the nature of which is such that if misused it could cause untold harm to the private rights of individual citizens in the state. Indeed there are those who have felt that the present trend towards bureaucratization spells the doom of democratic institutions.

Consequently a great deal of thought has been given to searching for ways and means by which the harm attendant to the exercise of bureaucratic power may be minimised. With the passage of time the voices of those who have contended that sufficient safeguards exist in the way of courts of law, parliament, internal discipline in the public services etc. have grown fainter. Those who cast their eyes abroad to see what could be learnt from the experiences of other nations and how they have attempted to solve this dilemma made note of an institution of Swedish origin which was soon to spread to many areas of the world - the Ombudsman.

The Ombudsman in his classical form is an appointee of the legislature and he is empowered "to investigate and express opinions in three major areas of administrative malfunctioning. These include erroneous or negligent actions or inactions of civil servants and administrators which may affect individuals and groups, substandard practice and procedure and disparate or misinterpretations of law which may affect the public at large and inadequacies of legislation" [2]. As the institution has been transplanted all over the globe some of its essential features have had to be changed to accommodate political and other relevant conditions prevailing in the land of adoption. It is with this in mind that it is contended that the Ombudsman concept, with due regard to local dissimilarities, seems applicable to Kenya.

The problem of control of bureaucratic power in Kenya (as in most other lesser developed countries) is perhaps more acute than it is in the maturer democracies of the west. This is so because the traditional organs of control over administration do not work as well as they do in the land of their origin partly because they lack the length of time and tradition that is necessary for such institutions to be fully acceptable to the general citizenry as their defenders against misuse of public power. Of greater significance however is that owing to the indisputable and urgent need for rapid socio-economic development which has put a premium on a strong administration there has been greater concentration of bureaucratic power in the hands of public officials outstripping by far that wielded by their counterparts in the developed world.

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This last factor has led to a great deal of rethinking about the extent to which the state in the developing world must submit to scrutiny of its powers by organs of administrative control to regulate the economy and other welfare in the state. In part the debate has in turn centred on the need to redefine the meaning of 'freedom' in terms that are meaningful to the particular dilemmas confronting the developing world. Not surprisingly dissent has been expressed to John Stuart Mill's famous reflection that "the only freedom which deserves the name is that of proving in our own way, so long as we do not deprive others of theirs or impede their efforts to attain it" as such a definition's "emphasis on the individual and political freedom may be of little value in a society where intense poverty and economic inequality are the essential problems and by putting the needs of individuals above the need for independence and development of the mass of the people, a Government would forfeit the right to be called democratic" [3].

The consequence of this has been to licence an approach to development whereby a great deal of power must be placed in the hands of those involved in the carrying out of the task of implementing rapid development programmes. Few people would contest the necessity of such an approach but it would be equally unrealistic to ignore the dangers posed to the ordinary citizen if such servants of the state were to misuse their power and positions. The likelihood is not remote. It was authoritatively stated by the Ndegwa Commission of Inquiry [4] that, "The evidence adduced before us during our inquiry indicates that a real need for the appointment of an ombudsman in Kenya exists. Serious allegations regarding tribalism, nepotism, corruption and other forms of malfunctions were made against civil servants and other public servants".

Moreover although the Kenya civil service is fairly well disciplined this ought not to obscure certain realities. The period after independence was accompanied, as in many other independent developing countries, by a crash development programme in Kenya. Africanisation (or localisation) of the administration was a must if only for political reasons. The obvious result was that a relatively inexperienced civil service emerged just as the task of interpreting and applying social legislation increased substantially. Consequently the possibilities of misapplying the laws with disastrous consequences cannot be dismissed especially as there is some truth in the charge that some civil servants here have inherited "an insolence of office" [5] from the former colonial civil servants. It should leave us in no doubt therefore that it is not prudent to leave the ordinary citizen at the complete mercy of such administrators.

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objections, for example that it will dampen incentive in the civil service; and the second Chapter deals with those objections which argue that our political system is incompatible with such an institution.

In the last part (three), proposals are made regarding the form a Kenyan variation of the ombudsman could take.

FOOTNOTES

2. G. M. KAKULI. E.A.S. DEC. 1970
3. Robert Martin"Personal Freedom and the law in Tanzania"EALB P.1
4. Ndegwa Commission Para. 53
5. D.C. ROWAT. "The Ombudsman Citizens defender" (Allen & Unwin) P.xxiii
6. Sessional Paper no. 5 of 1974 Para. 107

CHAPTER I

THE COURTS

The manner in which courts conduct themselves as the defenders of the citizens against arbitrary misuse of power by public officials will be enquired into on two levels. Firstly we shall deal with the extrinsic factors which affect the willingness of members of the public to approach the courts whenever they have suffered injury at the hands of Government officials. Secondly we shall question whether the substantive rules and the procedure employed by the courts when they adjudicate between an injured citizen and the Government are properly geared towards the effective execution of such a role.

THE COURTS IN THE COLONIAL PERIOD

Before we consider the role of the courts in the colonial period in Kenya it would be pertinent to make the observation that only the naive would say of Kenyan courts what has been said of the courts in England, namely that "they are held in great respect by the public and the satisfaction of being able to challenge the legality of the Government's acts in the ordinary courts by ordinary procedure is a real one, not to be decried".[1] Such a presumption presupposes a public knowledgeable of its rights and able to bear the financial burden of litigation. Few would argue this to be the position in Kenya or elsewhere in East Africa. In fact it is no exaggeration to say that most people here would like to have nothing to do with the courts.

This attitude is recognized as largely being a response to the role played by the law as an instrument of colonial oppression under British rule in Kenya. As two learned authors have noted "the role of public law in the colonial era when looked at through the eyes of the colonized peoples provides one of the best examples there is of the operation of law as expounded by adherents of the Austinian theory of law,"orders backed by threats"..... law was second only to weapons of war in the establishment of colonial rule and for the early settlers and officials there was little difference between the two: They were both useful to coerce the African"[2]. This whatever role in society was required of the African he had to be forced into performing it, whether to work or pay taxes, to live in a particular place, or move about the country, and not surprisingly then the criminal law and the courts to enforce it were in many respects the key institutions in native administration as wholehearted tools of colonial oppression. "Much time" we are told "was therefore spent by administrators tinkering with native courts to make them more efficient and they resisted attempts to

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remove these courts from their control or make any radical alterations to the function which they (administrators) themselves performed as magistrates and supervisors of native courts".[3]

For the settlers on the other hand there was no question that they did not take the common law and representative government with them and were entitled to all their rights and priveleges. They were conceded a great degree of cooperation in the administration of the law whether in the field of government, in the legislative and executive councils, in agrarian policies, or in the judicial system via the jury, a qualified judge and the application to them of all the safeguards of an English criminal trial".[4]

It cannot be overemphasised that the introduction of such a dual system in the application of the law was grossly unfair, more so if it is considered that from the view of the ordinary citizen an essential characteristic of any legal system is that "it can be activated only if one knows ones rights, the mechanics of doing something about those rights and has the money to pay somebody to take the necessary action".[5] It was a system geared towards the perpetuation of the domination of the majority class for the benefit of the minority class. It was therefore unthinkable under the circumstances that an African might challenge the action of government official in open court.

It is true that some concessions were made to Africans but they were in substance more apparent than real and practically useless in the field of challenging arbitrary misuse of governmental power. Such concessions as the application of customary law to land disputes and the use of assessors in criminal trials were unlikely to offer scope for challenging maladministration. It is plain therefore that Africans in Kenya "came to political awareness within a legal system whose rhetoric praised equality and justice but whose practice sharply distinguished between the haves and the have-nots and also on the colour-line".[6]

With independence the situation did change somewhat. There was a fusion of the legal systems and consequently the disappearance of the dual system. There was introduced also a bill of rights guaranteeing personal freedom. It is submitted however that these developments have not appreciably affected the central problem - the lack of awareness or willingness to challenge governmental misuse of power through the courts. The reasons for this are many among them being lack of awareness that maladministration can be challenged in the ordinary courts (a by-product of the oppressive role of the courts when it was manned by the same administrators one sought to

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complain against); illiteracy and poverty, all fatal to the proper functioning of courts as implements for redress of grievances.

THE COMPLAINANT IN COURT

It is now time to consider what is likely to happen when a citizen petitions a court to entertain his grievance against a public official. It is to be kept in mind as we go along that courts are essentially concerned with a strict interpretation and delimitation of statutory powers not with pronouncing upon questions of the rightness or wrongness of the exercise of a power in a particular case.

It is to be noted from the outset that this area of law has been singularly lacking in both consistency and cohesion. As one writer has remarked [7] "what we do have now is not a developed system of administrative law, but a hodge-podge of ancient methods reluctantly adapted to new tasks together with a plethora of ad hoc tribunals and other authorities. The courts have built a system out of the old bits and pieces while perhaps feeling that it is not quite respectable to do so". Therefore as we had said earlier, the complainant has to overcome a great many pitfalls before he can obtain (if he does) judgement against an administrative authority or department.

ABUSE OF DISCRETION

It may be, for example, that the decision complained of was one which it was within that official's statutorily conferred discretion to make. Where this has been the case, courts have trod softly for it is a general principle of administrative law that courts must take care not to usurp the discretion given to some other body. If a statute says that the Minister or the local authority is to decide something, it is not for the court to impose its own idea of what ought to have been decided. For example in Associated Provincial Pictures v. Wednesbury Corporation [8] the Cinematography Act 1909 empowered the local council to licence Sunday opening of cinemas, subject to such conditions as the authority thinks fit to impose". A licence was granted subject to the condition that no children under fifteen years of age should be admitted whether accompanied by an adult or not. This total ban on children was attacked as being unreasonable and therefore ultra vires. The attack failed the court holding that the discretion belonged to the council not to the court. Greene M. R. made a clear statement that the courts cannot be used as courts of appeal to review the merits of administrative decisions, "(the) proposition that the decision of the local authority can be upset if it is proved to be unreasonable in the sense that the court considers it to be a decision that

no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether".[9]

Nevertheless courts have from time to time been tempted to interfere with the reasonable exercise of a power on the ground that there is some implied statutory restriction which gives the offending act an aspect of irregularity. This may be the case where an authority uses its power ostensibly in furtherance of a statutory purpose but in actual fact to achieve some object outside the purpose or object of the statute. A case in point is Re (an application) Bukoba Gymkhana Club[10] in which the applicant who was the holder of a liquor licence for about thirty-four years applied for renewal under S.9 of the Liquor Licensing Ordinance to the Bukoba Township Liquor Licensing Board. The Board could refuse, under the Act, an application for renewal of a licence 'in its discretion', and an application made by the Bukoba Gymkhana Club was refused on the ground that the constitution of the Club was still largely discriminatory. On this ground of alleged discrimination the Board pointed to'Rule 6' in the Club's constitution which required applications for memberships to be supported by two current members of the Club. But the Board failed to file a counter affidavit to show that this clause was being used so as to effect racial discrimination, and in a letter to the Board the Secretary of the Club stated that they had members of all three nationalities. Finally the Club sought a writ of certiorari to invalidate the refusal and a writ of mandamus to order the Board to rehear the application. On these facts it was held that the "Board's decision was not only influenced by, but was indeed based on the fact that the Club's rules provided that candidates for membership must be proposed and seconded by members. That fault was a consideration extraneous to the proper scope of the exercise of the Board's discretion. The refusal was therefore declared invalid. It is noted with appreciation that courts are becoming more and more willing to pronounce decisions of governmental officials void where they feel that they have misused their discretion. Two examples will suffice to illustrate this. Firstly in Mixnams Properties Ltd. v. Chertsey U.D.C. 1965 A.C. 735 the respondents who were owners and occupiers of certain land used as a caravan site applied to the appellants of licensing authority, under the caravan sites and Control of Development Act 1960 for a site license as required by S.3 of that Act. The appellants issued the licence but also imposed a large number of conditions, for example, that the respondents are not to impose restrictions on the caravan occupiers rights to form or be members of any form of tenants association, political party or other organisation. The court held that there was nothing in the Act suggesting any intention to authorise local authorities

to go beyond laying down conditions relating to the user of the licensed site and the above conditions were ultra vires and thus void. Hall v. Shoreham U.D.C. (1964) 1. All ER 1 concerned the grant of planning permission to develop part of a plot of land. The plaintiffs were granted a declaration that some of the conditions the planning permission was to be subject to were ultra vires and void because condition 3 required the plaintiffs to construct a road on their land and virtually to dedicate it to the public without the defendants being obliged to pay compensation therefore, while a more regular course for constructing a road at public expense under which a compensation for compulsory acquisition of land would be payable was open to defendants under the Highways Act 1959. These developments are encouraged in that courts appear to have relaxed the requirement that discretion will ruled to have been abused only if it has been clearly shown that the authority acted out of an ulterior motive.

THE JURISDICTIONAL FACT

Secondly the court may find that it has no right to adjudicate over the matter that a citizen has brought before it. This may happen in cases in which the"Jurisdictional Fact" is in issue. A case in point is The King v. Woodehouse[11] in which Justices of the Peace were empowered to sit "for the purpose of granting licences to persons keeping or about to keep Inns, ale-houses and victualling houses".[12] The majority of the court of appeal concluded that it was for the Justices to decide whether any particular applicant fell within this description and that if they decided the point wrongly this did not amount to excess of jurisdiction. The consequence was that the complainants grievance could not be entertained by the court. Courts have stressed that in this type of case, a great deal depends upon the true construction of the relevant legislation. For example in White & Collins v. Minister of Health,[13] the Housing Act gave power to acquire land which was not part of any park land. The argument for the Minister was that the court could not review his findings of fact and it was for him to determine what was part of a park. The court held that the test was objective and that on the evidence the land was part of a park and the order was illegal. It may happen therefore that a citizen is denied justice because of the courts reluctance to disturb the findings of a tribunal which heard and weighed the conflicting testimony to which the prerogative of deciding the jurisdictional fact had been entrusted.

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THE ADMINISTRATIVE/JUDICIAL DICHOTOMY

An administrative decision may also not be invalidated if the court labels such a decision as administrative and not judicial the principle being that the act of an administrative authority is only subject to review if the body making that decision was acting judicially. As was stated by Lord Aitkin in R. v. Electricity Commissioners,[14] "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs". In practice courts were quite willing to treat acts that were substantially administrative as judicial in order to subject them to review. For example in the Electricity Case[15], the power under review was one to set up an electricity authority and it was held that such a power (a patently administrative one) did not authorize the setting up of two electricity authorities. Despite such practice by the courts on the whole, "the penalty for misuse of language had to be paid".[16] Late in the nineteenth century courts began to mislead themselves by holding that decisions of licensing authorities were not judicial. More serious confusion took reign in the 1950's in decisions involving the application of the principles of natural justice. In the case of Nakkuda Ali v. Jayaratne[17] the Privy Council held that a textile trader could be deprived of his licence without a hearing. In the course of that judgement Lord Radcliffe said that there was no ground for holding that the licensing authority was acting judicially or quasi-judicially. From this it appears that there is a grave danger of courts misusing this administrative/judicial dichotomy so as to deny an individual his rights if it feels minded to do so. In East Africa courts appear not to have been unduly perturbed by the administrative - judicial distinction and would review decisions which in U.K. might have been labelled administrative. For example in Sheik Bros. v. Hotels Authority[18] by a regulation made in 1948, Defence (Control of Hotels) Regulations, the Hotels' authority empowered to fix the percentage of accommodation which should be available to monthly residents of hotels as may be considered reasonable and to vary in its discretion the percentage that may have been fixed. The Authority was also empowered to entertain complaints by hotel residents as to the management of a hotel and to investigate and adjudicate upon such complaints. Some residents of the Nairobi Salisbury Hotel complained of its management. The Authority thereafter fixed the percentage of accommodation at 100 per cent for monthly

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residents instead of the previous figure of 85 per cent. The hotel owners sought to have the decision set aside. It was held that the Authority had exceeded its powers.

Welcome developments in respect of this issue have taken place in England over the last ten years. In Ridge v Baldwin[19] the Chief Constable of Brighton had been tried and acquitted on a criminal charge of conspiracy to obstruct the course of justice. The Brighton watch-committee, without giving any notice or offering a hearing to the Chief Constable unanimously dismissed him from office. The Chief Constable turned to the courts of law praying for a declaration that his dismissal was void since he had been given no notice of any charge against him and no opportunity of making his defence. The House of Lords declared his dismissal null and void and in the course of the judgement Lord Reid demonstrated how the term judicial had been misinterpreted. He explained that the words "wherever there is a legal authority to determine questions affecting the rights of subjects really means wherever there is a power to make a decision or order, there is also a duty to act judicially".[20] This is a much more satisfactory position as it widens the scope for review of administrative actions.

OUSTER CLAUSES

Also to be considered is an important legislative practice which severely limits the ability of the courts to control the exercise of statutory powers. The legislature may insert words into an act which are designed to prevent the courts reviewing the exercise of the power established by the act. Specific words may be used to exclude the jurisdiction fo the courts. Thus, in S.3 Preventetive Detention Act of Tanzania for example, "No order made under this Act shall be questioned in any court" the position here is as was said in Re Marles application[21], "if .... there are express words clearly defining the intention of the legislature to deprive the citizen of access to the courts, then the courts themselves are bound to give effect to such words". However it has been held in Anisminic v. Foreighn Compensation Commission[22] that an exclusionary clause of this kind is only sufficient to protect from review acts which are prima facie within the scope of the power granted. Where the limits of the statutory power are exceeded its purported exercise will be in law a complete nullity and there will therefore be nothing to which the protection of the exclusionary clause can attach.

REMEDIES

With regard to judicial remedies in administrative law one finds that they tend to be over-complicated and hedged about by rules some of which are mere historical anomalies. As articulated by Robert Martin[23], in developing

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administrative law remedies, "Judges relied on a random collection of rules of private law which heavily fortified by class pressures permitted them to guide the administrative process in directions they thought fit ..... no attempt was made to articulate an overall approach to the problem of legal control of public administration".[24] For our purpose it will suffice to consider the remedies of certiorari, prohibition, mandamus and the declaration and indicate the manifold ways in which they are fettered, thus stripping them of much of their potential.

The remedy of certiorari was developed as a device whereby the English superior courts exercised control over the local justices in the execution of their administrative functions. In modern times it has been used to control tribunals and courts alike which either exceed their decision making authority or fail to observe the rules of natural justice. Its most unfortunate attributes are the procedural obstacles. For example to obtain certiorari a motion must first be made to the court for leave to apply, there is no proper interlocutory process as there is in ordinary actions so that it is impossible to obtain an order of discovery of documents by the other side, which may be of the utmost importance. At the hearing evidence is given on affidavit and it is exceptional for the court to allow cross-examination on affidavit. Consequently whereas in deciding issues of fault in the normal court cases a court directs a special issue to be tried, where its case turns upon a conflict of evidence, certiorari (and prohibition) may be useless. Secondly it is available only where the administrative authority is exercising a judicial function which anomally has already been noted.[25] There is also a time limit of six months within which the remedy must be sought. Prohibition whose defects are akin to those of certiorari issues to prevent an inferior tribunal acting in excess of its power or undertaking to adjudicate on a matter over which it has no jurisdiction.

Mandamus is an order from the High Court addressed to any public authority whether exercising a judicial function or not directing that authority to perform a particular duty according to law its major weakness is that it can only be granted where the authority has a clear duty to perform and is not available to compel the exercise of a discretion. Neither is it available against the government or government servants which makes its scope of operation rather limited.

As regards the declaration it has been lamented that despite its potential courts have permitted much of its usefulness to go to seed by placing too many restrictions on it. The party who seeks a declaration asks the court to declare his rights as against a specified authority in a

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particular set of circumstances so that he can then proceed to enforce them in the normal way or if an authority wishes to act he can defy it with impunity. Its usefulness is illustrated by the case of Dyson v. The Attorney General [26] in which a landowner was required to complete a return to the Inland Revenue showing the annual value of his land on a certain basis. He objected that this demand was not authorized by the relevant act and he succeeded in persuading the court of appeal to issue a declaration against the crown to this effect. Unlike the injunction it will ~~be~~ issue against the state and most authorities and unlike the certiorari there is no similar problem concerning discovery of documents.

Unfortunately certain restrictions have crippled much of its usefulness to the citizens. Firstly as it merely declares, it is only useful where the action in question is ultra vires for the action is then effectively stripped of its legal authority. Where action is ultra vires, and yet can be quashed by certiorari, for example an error on the face of the record, it is futile merely to declare that such an error appears for the action remains lawful. One can only regard this particular shortcoming of the declaration apprehensively as one contemplates the recent muddle over what actions are void and what are voidable. For example out of the nine judges who were involved in the Ridge v. Baldwin's [27] case four maintained that failure to give a hearing renders a decision voidable, which in effect means that a declaration would be impotent since a voidable act is lawful up to and until it is avoided.

A fault common to all these remedies is that they are discretionary and involves the possibility that an applicant might be refused relief against an unlawful action.

A major shortcoming then of administrative law has been its failure to develop a coherent system of remedies. A plaintiff cannot (as in civil matters) simply plead the facts which he claims gave rise to a legal liability on part of the defendant. He must in addition satisfy the court that he is entitled to a certain remedy. This though the plaintiff may convince the court that the state has acted unlawfully this may not be enough for him to obtain redress. If an aggrieved person applies for the wrong remedy the court will not assist even though he establishes clearly that he has been treated unlawfully.

Figures being what they are have been said to be more eloquent than narrative. The following statistics concerning applications involving these remedies in neighbouring Tanzania attest to the truth in this statement. Between 1951 and 1969, there were nineteen applications for certiorari, Mandamus, prohibition or injunction; of these four were granted, ten were

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refused or dismissed, four were withdrawn and one was settled[28], surely a measly fraction of the administrative decisions that may have been contested had more palatable machinery existed. Indeed it is staggering to consider in contrast that between 1966 and 1970, five thousand four-hundred and ninety four complaints were submitted to the Tanzanian Permanent Commission of Enquiry of which two thousand eight-hundred and fourteen were investigated and three-hundred and seventy two were successful.

Finally we shall investigate one claim which the government waived aloft in its half-hearted attempt to convince the public that the existing machinery is sufficient, namely that all is well since the government and its servants can be sued and prosecuted in civil matters.[29] It is true that the Government Proceedings Act[30] has put the state, so far as it can practically be done, in the same position as an ordinary litigant for purposes of suing or being sued. Prior to the passing of the act there existed the doctrine of state sovereignity which was flatly in contradiction to the idea of the rule of law which requires that the state should not be allowed to inflict unlawful injury.

However lacunae still exists in this area in the form of the statutory suppression of evidence in the public interest. Although it is conceded that government departments can at times effectively discharge their duties only if their interference with private rights is allowed yet some of the provisions regarding state privilege have been carried to a ridiculous extreme. Section 132 of the Act provides for example that no public officer can be compelled to disclose communications made to him during the course of his duty, if he considers that the public interest would suffer by the disclosure. It is to be noted that whether he gives evidence or not is a matter to be decided by the official, using a subjective test. This, to say the least, is highly unsatisfactory. Secondly S.131 of the Act provides for a Minister to state on oath that he is of the opinion that the production of a certain document will be harmful to public interest in which case such document shall not be admissible in evidence. For a plaintiff whose case rests mainly on having access to particular material in departmental custody these provisions have often proved disastrous. Until recently the position in England was similar. In the case of Duncan v. Cammel Laird[31] evidence required by the plaintiff was the plans of a naval submarine on which her husband had been killed. It was obvious especially in wartime that secrecy must prevail even at the cost of depriving the plaintiff of her legal rights. The House of Lords however in deciding this case made a break with earlier authority by laying down a sweeping doctrine that the Minister's

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affidavit was conclusive, no matter what be the nature of the case. In particular the House ruled that the Minister might say that the evidence belonged to a class of documents which the public interest required to be withheld from production. The aftermath of this case was that it became common "to claim privilege for everything however commonplace that has passed between one civil servant and another" as per Lord Radcliffe in Glasgow Corporation v Central Land Board.[32]

This was the position until Conway v Rimmer[33] came along in 1968. This was a case where a junior police officer had brought an action for malicious prosecution against a superior officer and needed to see the reports made on him in the police service. The Home Secretary intervened with a claim of 'class' privilege. The House of Lords disallowed the claim, inspected the documents themselves, and ordered their disclosure, saying that they could see no possible danger to the public interest. They ruled that they will not allow any claims (other than based on genuine state secrecy) unless the public interest in doing justice to the litigant, and that this is to be determined by the court, not the executive. This is a very satisfactory stand and the Kenya legislative ought to follow suit.

THE HIGH COURT AND THE OMBUDSMAN - A COMPARISON

A general comparison between the High Court and an ombudsman as institutions for controlling administrative maladministration will hereby be attempted. The starting point for such an enquiry should be a consideration of the types of cases both bodies deal with. The practice of the Tanzanian Permanent Commission of Enquiry in this regard has been that once a matter is held to fall, prima facie, within the jurisdiction of the commission, the decision as to whether an investigation will be carried out is up to the commission itself. According to the annual report 1966 - 67[34] it has adopted the practice of not pursuing complaints which fall into any of the following categories:-

a) the complaint is frivolous, vexatious, trivial or not made in good faith; or

b) having regard to the existing circumstances of the case any further investigations is unnecessary; or

c) under the law or existing administrative practice, there is adequate remedy or right of appeal and the complainant has not exhausted it;

d) the case is too old; or

e) if after a preliminary investigation, there is not a prima facie case against an official; or

f) if it is against government policy.

Clause (c) appears to indicate that the Permanent Commission of Enquiry (PCE) regards its jurisdiction as being complimentary to, rather than alternative to, that of the courts. In actual practice the commission has often assisted a complainant in circumstances where at least in theory he might have sought his remedy in the High Court. In the words of its first Chairman, E.A.M. Mang'enya, the commission can deal with ".....arbitrary decisions or arrests, omissions, improper use of discretionary powers, decisions made with bad or malicious motive or decisions that have been influenced by irrelevant considerations, unnecessary or unexplained delays, obviously wrong decisions, misapplication and misinterpretation of laws, by-laws or regulations". Thus an examination of the case synopses contained in the commission's Annual Reports show that the commission has handled cases involving such clearly justiciable matters as wages, false imprisonment, ownership or, rights of occupation in land and workmen's compensation. It is obvious that in deciding to exercise this very broad jurisdiction, the PCE has become a forum for hearing a host of grievances which for the lack of an appropriate and accessible forum previously went totally without redress.

While the courts have veered away from substantive questions of the rightness or wrongness of the exercise of power in a particular case, the PCE has concerned itself with such matters and has even gone beyond this to note and attempt to correct mistakes of maladministration and consequently it is not only protecting the individual's right but also helping to uplift the quality of administration. "Restrained within the confines of the adversary system the courts are unable to negotiate with either the plaintiff or defendant in an attempt to extricate the controversy from its either/or impasse. It is clear that the PCE regularly negotiates between the parties to a dispute. Similarly a court hearing of a case involving a public authority is concerned only with the question of whether or not to give a remedy to an aggrieved citizen.

The PCE provides its services free of charge and does not involve anyone in the formalities an intricate procedural rules of the courts. The commission specifically recognises that it is acting as a "poor man's lawyer". Finally it is evident that one of the reasons for the commission's success has been that it holds its hearings in private. A great deal of potentially dangerous and embarrassing and obviously extremely beneficial investigations of administrative shortcomings have been conducted. That these investigations appear not to have been tampered with must be due largely to the fact they were not carried out in public.

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Other instances in which weaknesses pertaining to the courts have been prevented from attaching to the PCE has been through provisions such as those stating that the jurisdiction and powers conferred on the commission may be exercised notwithstanding any provision in written law to the effect that an act or omission shall be final or that no appeal shall lie in respect thereof, or that no proceeding or decision shall be challenged, reviewed, quashed or called in question[35] or such as empower an ombudsman to have access to all documents which he considers necessary as an aid to his investigation save those expressly disallowed by the President.

A question that has troubled many commentators has been that of the enforcement of the commission's recommendations. It is no overstatement to say that such criticisms seem to miss the essential point that decisions of the High Court depend, equally as much as those of the PCE on the executive for their enforcement.

Finally "it is clear that the PCE has demonstrated its greater relevance to the needs of Tanzanians than the High Court with its paraphernalia of prerogative writs and orders".[36]

In conclusion it is to be urged that there is great need for rationalisation and simplification of the substantive administrative law and there are signs that this is being accomplished by judicial decisions. Unfortunately this process has not been matched by any corresponding simplification of the procedure by which judicial review can be obtained. Remedies by various prerogative writs still co-exist with civil action for a declaration, each subject to its own technical rules on locus standi and periods of imitation. It is urged in this respect that these writs and such other remedies ought to be swept away and a single comprehensive mode of applying for judicial review of administrative action substituted.

CHAPTER I: FOOTNOTES

1. H.W.R.H. WADE "Administrative law" 3rd Ed. P.47
2. Ghai & McAuslan "Public Law and Political Change in Kenya" P.506
3. Ibid P.507
4. " P.507
5. " P.508
6. " P.508
7. Sir Guy Powles "The New Zealand Ombudsman" 13 ICLQ P.761
8. (1948) 1 K.B. 223
9. Ibid
10. (1963) E.A. 478
11. (1906) 2 K.B. 838
12. Ibid
13. Wade P.135
14. (1924) K.B. 171
15. Ibid
16. Wade P.135
17. (1951) A.C. 66
18. (1949) 23 K.L.R. 1
19. (1964) A.C. 40
20. (1924) K.B. 171
21. (1958) E.A. 153
22. (1969) 1 All ER 208
23. Robert Martin "Personal Freedom and the Individual in Tanzania" EALB P.127
24. Ibid P.127
25. SUPRA P.10
26. (1911) 1 K.B. 410
27. SUPRA P.10
28. MARTIN P.130
29. Sessional Paper no.5 of 1974 Para.107
30. CHAPTER 40 LAWS OF KENYA
31. (1942) A.C. 624
32. (1956) S.C. 1
33. (1968) A.C. 191
34. MARTIN P.214
35. Permanent Commission of Enquiry Act S.5
36. J.P.W.B. McAulan "Evolution of Public Law in East Africa" P.170

CHAPTER 2

PARLIAMENT

In keeping with the stock response of some other governments which have had the occasion to reject the proposals for the adoption of the ombudsman institution, our own government has parroted the line that "a citizen injured by an abuse of office by public servants can have the matter raised in parliament by means of a parliamentary question".[1] The charge here is that this statement, made as it is without any qualification, blandly dismisses the many problems pertaining to this area of (political) control over executive and administrative action and is therefore not truly representative of the position. Our argument here is that the doctrine of ministerial responsibility has not been particularly successful in Kenya. Indeed its success is also contested in the Westminister style parliamentary democracies in spite of its being a cornerstone of that system.

MINISTERIAL RESPONSIBILITY

In Ministerial responsibility the argument runs that whatever is done by an official there is always a Minister accountable to parliament. Commenting on this role of parliament, President Nyerere[2] has said, "Members of parliament have the right to question Ministers on any subject which comes within their jurisdiction; they have the right to demand answers. It is part of a Minister's job to answer and explain policies of government as a whole and the Ministry for which he is responsible. He must also be able to account for all the actions which are done by the civil servants in his Ministry..... Most important of all members must not under any circumstances attack a member of the civil service in this House. If they believe a civil servant is acting wrongly and injustice in consequence is being done, it is the Minister whom members must call to account. Then it is his task to investigate and if necessary, to invoke the disciplinary procedures against the government servant". This in a nutshell is the import of Ministerial responsibility.

It is conceded that in the Kenya National Assembly, debating functions are free and uninhibited, in fact, the debates are some of the liveliest in Black Africa. It has become a convention that even the most sensitive matters can be raised in parliament. Members of parliament are generally concerned with their popularity and so important local grievances get raised in parliament. Questions may be put to Ministers on matters of administration or policy and each sitting of parliament normally begins by oral replies to the questions though a member can request a written answer. Supplementary questions may be asked but only for the purpose of clarifying the answer to the original question. It is also possible for a member of parliament to pursue a Minister on a matter

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of administration on a motion of adjournment which is generally a half hour debate at the end of a day's sitting, notice for which has previously been given."[3]

All these devices have been exploited by the members to criticise the government and to try to make it accountable to the assembly and on occasion members have pushed their concern on a matter further as when they were dissatisfied with the action taken by the government to deal with police officers at Makupa Police Station in Mombasa alleged to have beaten up innocent people. The assembly set up a select committee to enquire into the incidents and report to it[4]. The committee found the allegations of brutality justified[5].

As earlier intimated however it cannot be denied that the successes of the national assembly in making the government accountable for maladministration have been more apparent than real. A Minister will often decline to answer the member of parliament's question and remain silent in the hope (not always pious) of weathering the storm. He may also postpone the answering of a question promising a full investigation. The danger here is one of departmental bias since the investigation will be wholly internal and only such information as is deemed appropriate shall be divulged and as the member of parliament has no access to departmental files he will have to take whatever answer he is given. Secondly the initiative to pursue the grievance is removed from the complainant and the vigour of the pursuit of such grievance will depend upon unpredictable factors, such as its potential to embarrass the government. A Minister again may choose to side-step a question and in the wake of the exploding laughter that follows the members question loses much of its significance. The expertise with which some Ministers have done this has become legend.

Also some of the speaker's rulings have been harmful to the substance of Ministerial responsibility. The result has been that a rule which gave the National Assembly an opportunity to call the government into account has been transformed into one which enables the government to pick and choose what it will be responsible for, even to the extent of refusing to be responsible for its own actions. In 1967 the speaker ruled as out of order an opposition attempt to give notice of a motion censuring an individual Minister for what he had done as a Minister[6] and that only a motion critical of the government as a whole can be accepted. That motions, the ruling continued, attacking Ministers individually must be directed against them in their personal and not their official capacity. The effect of this ruling is that a Minister cannot be compelled to resign through failures in his department as well as that his conduct as head of a department cannot be discussed on a substantive

motion of censure. The overall result has been then that Ministerial responsibility works only to the extent that the cabinet wants it to work.

Moreover even if maladministration is proved, a Minister rarely resigns. He may be transferred to another department or nothing may happen as in the case of the Makupa Police Station[7] in which even after a select committee's findings of police brutality, a further debate only served to highlight parliament's inability to do any more than expose the administration because though the government may have been chastened by the proceedings and warned that its maladministration would not pass unnoticed or unquestioned, it could not be forced into a specific course of action which it was unwilling to take. Finally even when a grievance is so aired in parliament hardly is any compensation paid for damage occasioned through the act complained of.

PROCEDURE

A further agent which operates to the disadvantage of members articulation of citizens' grievances in parliament is the complexity of the assembly's procedure. Despite official rhetoric which has it that our parliament is a "council of elders" whose traditions are rooted in our past, a survey of the procedures and proceedings of the assembly makes it difficult to support such a claim. The standing orders are to a large extent faithful reproductions of the practice of the House of Commons - the paraphernalia of the mace and wigs, the restrictions on points of order and the motions of adjournment etc. have proved to be beyond the comprehension of some members and two commentators[8] have had the occasion to note that "the artificiality of the rules induces in the members a feeling of participating in a game ..... and written rules often acquire an added mystique and become a hindrance to effective debate".

It has been noted also that the National Assembly as a forum for raising one's grievances is not as accessible as is often taken for granted. Unlike, say New Zealand, there is no right available to any citizen to petition parliament. These petitions are heard by the appropriate parliamentary committees of the House and matters petitioned include redress of grievances. If a grievance received a 'most favourable' recommendation, and only a tiny fraction does, the grievance will be satisfactoriy remedied. British parliamentarians as well have, on the whole, a much closer relationship with their constituents than their Kenyan counterparts. Many spend week-ends and holiday recesses with their constituents. A considerable number of them hold 'surgery hours' usually on Saturdays during which they have appointments with people who wish to have their (members) advice or assistance. This is a relationship admirably suited to picking up the grievances the people may have arising out of their interaction with governmental agencies. In Kenya on the

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other hand this has not been the case. Communication in large sections of the country is especially bad; complaints have been rife in the daily press that members spend all their time in Nairobi and only scuffle back to their constituencies on the eve of the elections to solicit votes. This is hardly a relationship geared towards funnelling grievances to the National Assembly and necessarily frustrates the premise that redress of grievance in the Assembly will depend upon contact and familiarity between the member and his constituents.

If we are to attempt to quantify the value of the activities of the Assembly in safeguarding citizens against maladministration such an exercise would be incomplete if we failed to take into account the formidable powers of the executive vis a vis the assembly, resulting in a situation in which the executive will accommodate the watchdog role of the assembly only to the extent that it wishes to do so.

PRESIDENTIAL POWERS IN RELATION TO M.P.s

A necessary starting point in advancing this postulate is an outline of the relevant Presidential powers. Kenya has tried to secure the advantages of a strong executive in conjunction with the principles of parliamentary government by seeking an active association between the government with parliament as a source of strength. The President must be an elected member of the National Assembly[9]. He has general powers of dissolution[10] and not merely at the time of a vote of no confidence (this acts as an antidote to restive members). He has powers to summon and prorogue[12] parliament which may be used to bring an unruly and critical session to an end. Secondly the President can waive in relation to any member the rule that he loses his seat if he is absent for eight consecutive days in any session without permission of the speaker[13]. This obviously gives the President important power over an overcritical member who may find the President undisposed to use this power to his benefit. Thirdly a large proportion of the members are also members of the government either as Ministers or Assistant Ministers. The docility of a further number is assured by appointments to the statutory boards. Similarly preferment to high political office depends on the President.

At constituent level, another handicap is that the members representational function has tended to be confused due to the position and behaviour of the local administrative officer to whom complaints tend to be taken rather than the member and there has been considerable hostility between politicians and civil servants as a result thereof, particularly at District and Provincial Commissioner level.

In conclusion we should note that the ~~behaviour~~ belief in the doctrine of ministeri responsibility as responsive machinery for redress of citizens' grievances has

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persisted so strongly for the simple reason that it suits Ministers to have this faith fostered because it appears to be subjecting them to control by parliament although the reality is very different and also because it flatters the backbenchers' ego as they wish to feel that they are more than governmental rubber stamps. It would therefore not be true to assign to our National Assembl what Professor Abel[14] has said of the doctrine as it appertains to England that "with Ministerial responsibility the ombudsman in anything like his classical form seems to be in grave and necessary conflict". For example as we have no opposition parties, it could not be said that the ombudsman might usurp the role of questioning government maladministration. Moreover it has been found that "the ombudsman deals in exactly the cases where the doctrine of Ministerial responsibility has failed to work efficiently. The ordinary run of minor and non-political complaints, and so far from weakening Ministerial responsibility the ombudsman has helped that principle to work better".[15]

In fact in New Zealand the statute that set up the ombudsman took notice of this fact and has incorporated it, the relevant provision being that a committee of the House of Representatives may at any time refer to the ombudsman for his investigation and report any petition or related matter before the committee, so far as it is within his jurisdiction. Some Ministers have in fact urged members to present the grievances to the ombudsman. One member who appreciated this development had this to say, "passing complaints to him (ombudsman) leaves us free to do our primary job, a job nobody else has power to do". Some have resisted what they feel to be an encroachment on their grounds, said one "I'd be a fool to let the ombudsman have all the glory"; some have waxed hysterical, "[17]keep that fellow out of our hair!" [18] but most genuinely admire his achievements.

Reasons for the opposition of ombudsman.
- Civil servants argue that he will be a watch-dog.
- Reveal govts secrets
- Be a secret police

CHAPTER 2: FOOTNOTES

Sessional paper no. 5 of 1974 Para. 107

OLUYEDE: Administrative law in East Africa PP. 79-80

Standing orders 17(4) and 18

House of Rep. Debates vol.IX Part I col. 183

H/R Debates vol. X Part II cols.1803 - 1834

National Assembly Debates vol.XII (19/7/67) col.2410

Op.cit

Ghai & McAuslan P.347

Kenya constitution c.c. (amend. Act) no.28 1964 sched. I

K.C. S.59

K.C. S.58

K.C. S.59(i)

K.C. S.39(i)

D.C. ROWAT "Ombudsman: Citizens defender" P.283

Scwartz & Wade "Legal control of Government" P. 67

Gellhorn "Ombudsman & others" P.151

" " P.152

" " P.153

CHAPTER 3

OTHER MEANS OF CONTROL

We shall turn briefly to a number of other means of control over public maladministration namely the internal discipline within the civil service; administrative tribunals, public inquiries and the Mass Media. Admittedly a play a role in this area and though noteworthy are attended by serious short comings.

INTERNAL DISCIPLINE WITHIN THE CIVIL SERVICE

Though it is a moot issue as to what is the division of responsibilitie for the civil service between the President and the Public Service Commissio it is readily conceded that the commission has power to exercise disciplinar control over persons holding or acting in such offices and the power to remo such persons from office, except in the case of very senior civil servants like Permanent Secretaries.

Some of the Public Service Commission's powers for internal discipline have been delegated to such senior civil servants as Permanent Secretaries over junior civil servants. These powers range from a mere reprimand for a minor transgression to dismissal for more serious offences and most civil servants will conform to service regulations so as to escape such disciplina measures as they do not wish to spoil their records.

On the whole the Kenya civil service is fairly efficient. The qualific tion requirements for entry are stringent and there are frequent in service training courses and promotion is on merit. However some unsavoury aspects have been noted. For example the fact that many men in the senior posts in the civil service tend to assume heavy responsibilities very early in their careers means that they become more inclined to rely on the system as it sta and less inclined to experiment.[21] Thus there is a real danger of reinforcin established ways. If this be the case, then the value of an external critic in the form of an ombudsman cannot be question.

Secondly it should be recognised that though powers exist to discipline civil servants, much of the type of maladministration we are concerned with is not covered under such powers.

Also no less an authority than the Ndegwa commission charged that durin its enquiry "serious allegations regarding tribalism, nepotism, corruption a other forms of malpractices were made against civil servants and other publi servants" and went on to give the opinion that "these allegations if not hee and investigated impartially could undermine the integrity of the government and adversely affect public confidence and the morale of the public services

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All of these reflections make a strong case for the appointment of a public watch-dog in the nature of an ombudsman.

ADMINISTRATIVE TRIBUNALS

In Kenya, unlike the United Kingdom, the tribunal has not as yet developed into a major feature of public administration but there is every sign that this will be the case in the future.

The establishment of tribunals came about because to add the new style of disputes pertaining to welfare administration or such other area where tribunals are to be found could first of all cause a breakdown. Secondly it would be wrong in principle because the process of courts is elaborate, slow and costly. In the administration of social services what is essential is the smooth and cheap disposal of disputes. Moreover in most instances only small amounts are at stake and this would make it impractical for them to be determined in the ordinary civil courts of law with all the expense involved in advocates appearing for the parties. Also the issues arising in the majority of cases concern matters of fact in which the opinion of the professional lawyer is no more likely to be reliable than that of a fair minded layman. Given all these considerations it is no wonder that the tribunal has proved to be a most useful device in the mechanism of the dispensation of social services.

It is to be appreciated that the early stage of development which the tribunal finds itself in is an argument in favour for the adoption of an ombudsman to whom complaints that would otherwise go to a tribunal in areas where there isn't one.

PUBLIC INQUIRIES

This may take the form of a commission of inquiry under the commissions of inquiry Act cap 102 or an inquiry by a select committee of parliament.

The first type may be set up by the President to inquire into the conduct of any public officer or the conduct or management of any public body or into any matter into which an inquiry would in the opinion of the President be in the public interest. The second is much like the first but may be set up by the National Assembly. Both are therefore geered towards investigating and establishing facts with regard to alleged maladministration or other failings or where a grave crisis of confidence has arisen.

A common failing of both is that they are difficult to set in motion and once in motion move with preponderance. A failing of the first is that it can only be set in motion at the will of the administration and its success will depend largely on the administration's good faith. As regards the second, its failure lies in the National Assembly's ability to enforce its recommendations

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as to the action to be taken unless the administration is willing to entertain such actions. Two instances will serve to point this out.

The Maize Commission of inquiry[7] was appointed towards the end of 1965 partly to investigate allegations that there had been corruption and profiteering in its operation, following widespread maize shortages in 1964-5. "The commission's report painted an unflattering picture of the Ministry and the Board. Under pressure and the activities of the responsible Minister whose activities as described in the report showed a definite departure from what had hitherto supposed to be acceptable cannons of ministerial conduct in Kenya".[3] Both as Chairman (which he had been before appointment to Minister) and as Minister, the committee found that he had allowed his private interests to come into conflict with his public duty to the detriment of the latter and had interfered too much in the day to day administration of the Board. The recommendations of the commission were that politicians should not be appointed to any board dealing with Maize Marketing and that the rule requiring Ministers to disclose their business interests and put public duty before private interest should be applied more stringently.

The government's reception of these recommendations is distressing. The Minister was not required to resign only being transferred to another Ministry. Politicians were appointed to the New Maize and Produce Board and have continued to be appointed to other Boards in all areas of administration

The second illustration concerns the National Assembly's dissatisfaction in 1966 with action taken by government to deal with police officers at Makupa Police Station in Mombasa alleged to have beaten up innocent persons. The Assembly set up a select committee to inquire into the incidents and report to it.[4] The committee found the allegations of brutality justified[5] but all that emerged after further debate was that the government could not be forced into a specific course of action which it was unwilling to take.

MASS MEDIA

An effective press has a major role to play in moulding administrative agencies to ensure the liberty of the subject. But where it is possible for the government to gag the press, impose unreasonable censure on the press and to muzzle newspapers at will, the liberty of the subject through the press is meaningless. In Kenya the press has generally appeared to be relatively free although sporadic instances of censureship have been quite obvious to the average observer. Indeed a local daily has recently noted[6] "even in Kenya, which cherishes democracy in its institutions the authorities are not entirely prone to leave the press alone ..... we cannot claim to be a free press unless we are free from pressures and encroachment from these circles (the government, parliament, government institutions and government officials)".

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Of significance is the editorial opinion in local dailies by which means administrative agencies are sometimes made to engage in self examination and a readjustment to the needs of the public.

Also worth mentioning is a recently introduced column in the Daily Nation, the Action Line, which is a complaint column. It receives (or prints) an average of about seven complaints a week and the newspaper usually reports on the steps taken to keep the complainant have his complaint met. This however is by no stretch of the imagination a substitute for an ombudsman as the newspaper has neither the personnel, the resources or the legislature mandate such an office requires. Indeed when an Australian newspaper in April, 1965 started the first complaint column in Australia and in its first two years received about 3,500 complaints, a government Minister argued that an ombudsman would be unnecessary because that column was meeting the need. The paper, the Daily Perth News, was the first to refute this.

In conclusion it is to be observed that since so few people read newspapers owing to mass illiteracy, and taking into consideration the ease with which government agencies can and have ignored newspapers opinions, the sum total effect of the mass media as a deterrent against maladministration is not appreciably significant.

FOOTNOTES

1. Ghai & McAuslan P.307
2. Ndegwa Commission Para. 54
3. Supra
4. H/R debates vol.IX Part I col.183
5. H/R debates vol.X Part II cols.1803-1834
6. Daily Nation 17/5/75
7. Ghai and McAuslan PP306-308

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CHAPTER 4

CIVIL SERVANTS OBJECTIONS TO THE OMBUDSMAN

Wherever the ombudsman scheme has been proposed civil servants have been foremost in opposing its adoption. We shall here consider their objections and show that by and large their fears, seen in retrospect, are unfounded.

One such apprehension, indeed one of great weight if true, was raised in Denmark in 1954 when the scheme was being debated, its substance being that it would destroy initiative largely at subordinate levels. No doubt it has its adherents here in Kenya. In Denmark this fear was prevalent among the low ranking public officials who felt that the ombudsman's weight would fall on them as they were the ones who met the public face to face. Consequently they thought they would be the ones against whom the public would complain even when they were simply carrying out their standing orders. They forecast that to avoid being involved in controversy many civil servants might refer matters to their superiors this delaying final action and destroying initiative at subordinate levels.

On taking office the Danish ombudsman sought to allay these fears. He has declared that most complaints are made impersonally against the administrative organ concerned rather than individuals[1]. Many of the decisions in cases he has taken up for investigation have stated explicitly that while no basis has been found for critising the civil servant whose actions have been in question, the ombudsman has nevertheless desired to comment on the general administrative practice that, in his view, should be revised for the future. Thus he has taken pains to avoid blaming an individual official for following paths that have been mapped for his use.

Decisions have been taken with "sufficient blurring to protect both complainant and officials from unnecessary harrassment"[2]. According to a President of the largest civil service organisation in Denmark, "we thought that inflexibility uncritical insistence upon rules, bureaucratic rigidity and efforts to obtain advance approval were going to increase after the ombudsman had found a few occasions to criticise officials. But we have been proved wrong. The civil service in Denmark has had a good tradition and the ombudsman has not weakened it"[3]. From New Zealand comes similar testimony. According to an observer in Wellington, "the ombudsman has gingered up the public service even when no formal changes have occurred"[4]. This is borne out for example by the following text of a memorandum sent by a permanent head to all his section chiefs on the subject of 'making decisions' and it read, "several months ago, the ombudsman spoke in public about the cold,

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impartial and often implacable application of the rules. Thinking of the public service in general and of this department in particular I believe there are some grounds for this comment. I wish to ensure that in future we as a department do not offend in this respect. When you are making decisions or submitting recommendations will you please place yourself under scrutiny from this angle? You can do this without running the risk of becoming flabby"[5]. Another has testified that the ombudsman is a source of leverage i.e. where requesting a subordinate to pull up his socks, previous criticism made by the ombudsman on that subordinate are made use of. In conclusion few would challenge the observation that the ombudsman does not interfere with departmental initiative to any appreciable extent.

Secondly it has been argued that the ombudsman scheme would duplicate the work of the entire civil service. Would not every administrative action, it has been earnestly pointed out, be automatically subject to complaint? Would not the ombudsman have to build up a staff as large as the civil service itself in order to cope with grievances against the civil service? Would not the whole course of administration be continually frustrated by his very existence? These and other questions were raised but again have been properly answered. We note in the case of Denmark that the ombudsman's empire did not expand dramatically. After six years he had a staff of only about ten[7]. Also the increase in complaints has not been remarkable. These two phenomenon have also been part of the Tanzanian experience since the setting up of the Permanent Commission of Enquiry. Similarly the number of unworthy complaints have gone up meaning that more and more complaints are being rejected as civil servants have positively responded to the ombudsman's overtures. In all honesty then it cannot be said that the ombudsman and his staff have developed into a shadow civil service.

Thirdly it is said that the ombudsman and his staff would become the "receptacles for grudges and persecutory delusions of every crank and lunatic and that habit of protest against authority would merely be fostered by the provision of a permanent vehicle of complaint"[8]. According to a Kenya Government release[9] "it is feared that the ombudsman might be misused by unscrupulous elements in society for witch-hunting and undue victimisation". Such predictions have been proved to be largely alarmist. In fact the ombudsman has protected the civil service and not merely let himself be used to pursue the delusions of persecution maniacs and witch-hunters. Civil servants have themselves attested to this. According to one in Wellington, the ombudsman has found it "necessary to advise a few complainants in quite forceful terms that they should cease groundless attacks on departments or

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officials".[10] Indeed the recourse of such complainants to the ombudsman has been appreciated by civil servants one of whom testified about "these obsessively suspicious and chronically querulous - whose burdensomeness is greater than their numbers - their turning to the ombudsman has been a boon to the administrators against whom they have often complained"[11] for one departmental Head put it, this way, "I'll say this for the man, he has ticked off some of them in a way we never would have dared do ourselves".[13] In many ways the ombudsman has also proved to have a tonic effect on the complainants who once becoming aware that their allegations have been fully investigated and found wanting quieten down. His communications to complainants are lengthy, exceptionally detailed, patient and explanatory "more calculated to persuade, not merely to announce".[14] Persons whose complaints have been rejected have often expressed appreciation of the ombudsman's activity on their behalf. To suggest that the ombudsman may be misused for witch-hunting is to exhibit manifest misconception about the manner in which the office operates for every claim is thoroughly investigated before any blame can be attached to an individual civil servant. The time wasted in investigating false claims moreover is a small sacrifice for the benefits that the office is capable of contributing to democratic government.

One aspect of the relationship between the civil servants and the ombudsman which has come as a pleasant surprise to the former is that they have found the ombudsman a helpful ally in ventilating their own complaints against their superiors. His capacity to inquire into every type of official lapse was quickly seized upon in Denmark by public civil servants who thought that they had been ill treated by their superiors. In fact between 1962 and 1964, 13% of all cases fully investigated by the ombudsman involve controversies about public personnel matters.[15]

It is not strange then to see that the relations between the ombudsman and the civil servants remain cordial wherever the institution operates despite the initial suspicion on the part of the latter. Administrators generally admit that laziness has diminished because during his existence an outsider has been in a position to criticise. Said one high official, "the ombudsman coming from the outside sometimes sees things that are perfectly obvious, but we have stopped noting because they are constantly before our eyes".[16] Work methods have in some instances been rationalized at the behest of superior officials, impressed by the ombudsman's suggestions concerning other organizations. Staffs have sometimes been liberated from their bondage by the ombudsman's fresh approach. In this respect the Director of a maximum

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security prison in Denmark is noted to have said, "some of our habits were justifiable only because they were easy. Then conservatism - reluctance to try anything different - made us look for other reasons to justify existing practices. Now the staff is more likely to deal with the real merits of suggestions instead of resisting them simply because they are new"[17]. The ombudsman has also found occasion to say cordial things about particular administrative agencies whose proceedings frequently come to his notice, "he is not an apologist, glossing over administrative imperfections, rather he expresses what is too often ignored, namely that most public servants do in fact serve the public well most of the time and deserve to be thanked for performing hard jobs faithfully".[18]

His work has been noted to be of educational value in the sense that the correction of one error induces avoidance of others. His reports are taken seriously and more so by senior public officials. In the Danish Ministry of Justice "the higher up you go, the more carefully you read the ombudsman's report"[19]. The New Zealand ombudsman has publicly claimed that his decisions have encouraged departmental officers to take great care in the exercise of discretionary powers, which before were final and not open to challenge.[20] This is attested to by one senior official who said, "the ombudsman has affected what we do. We refer more cases than before to our legal counsel. We are becoming somewhat more formal, less quick to do rough justice and I think the ombudsman is the reason".[21] It would be fair to note that some of the more sensitive appear to get irritated by his attention. Said one, "The ombudsman hasn't made an ounce of difference. We never ask ourselves, what would the ombudsman think about this case?"[22] No doubt, however, the weight of the testimony would lead us to believe that the overall effects of the ombudsman's scrutiny have been substantially healthy on the functioning of public departments.

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CHAPTER 4: FOOTNOTES

1. Gellhorn P.34
2. " "
3. " 35
4. " 144
5. " 145
7. Utley "Occasion for an ombudsman" P.13
8. Gellhorn P.32
9. Sessional Paper no.5 of 1974 para.107
10. Gellhorn P.142
11. " "
12. " P.143
13. " "
14. " P.144
15. " "
16. " P.145
17. " "
18. " "
19. " "
20. Public lecture by Sir Guy Powles/Christchurch 27/4/1964
21. Gellhorn P.143
22. Gellhorn P.148

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CHAPTER 5

THE OMBUDSMAN AND THE POLITICAL INSTITUTIONS IN KENYA

In this Chapter we deal with two specific allegations which have been raised to counter proposals for the adoption of the ombudsman institution. Firstly that the constitutional assumptions that characterise the governments of commonwealth countries are by and large not congenial to the office of the ombudsman. Secondly that in a de facto one party state (such as Kenya) the ombudsman will not succeed because the institution depends largely on a strong and responsive legislature, a phenomenon we have amply demonstrated absent in Kenya! Partly in response to this second allegation, will also be argued that in fact the ombudsman institution is a prime necessity at this time as a means of bolstering the legitimacy of the present government.

THE OMBUDSMAN AND THE COMMON LAW

The first argument, which found a champion in the person of Professor Albert Abel[2] could be summarily dismissed by pointing out that the institution is working quite well in both New Zealand and the United Kingdom, two very commonwealth countries. However it would be fairer to give Professor Abel a run for his money. The gist of his argument is that it is hard to see how the ombudsman can occasionally avoid challenging some if not all of our basic constitutional notions, namely parliamentary supremacy, ministerial responsibility and the rule of law.

Abel[3] concedes in regard to parliamentary supremacy that whatever friction could arise would not be too serious. While they (the ombudsman and parliamentary supremacy) seem not to be fully congenial their opposition requires somewhat obscure and refined analysis for its discovery. It would in operation almost never come out in the open and can be plausibly verbalized away.

In respect of the rule of law he has no doubt that the two would be strange bedfellows. According to him, the intricate array of prerogative writs with statutory supplementation by means of which the courts call in question administrative action has reserved the courts an effective although clearly an inefficient control over administrative conduct. Then he goes on to say that "attitudes throughout the commonwealth are strongly conditioned in favour of this system of court control".[4] It will be remembered that we have quarrelled with this assumption at great length,[5] and argued that the role of the courts during the colonial period has had the effect of discouraging recourse to courts to protect oneself against arbitrary government action. The Professor's caution then that any ombudsman who gave signs of becoming trully effective in monitoring

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the administration would by threatening to challenge the judicial establishment as a power centre is bound to run afoul of the rule of law does not seem to hold much water.

Abel[6] considers that Ministerial responsibility would be the greatest stumbling block. Firstly that the opposition would have fewer occasions for initiative.

In Kenya we have no opposition so prima facie that argument does not apply. However even if an opposition exists, and in theory would at any moment that such opposition was recognised by the law, the ombudsman institution would be no threat to its well being.

Firstly it has already been noted[8] that in some other commonwealth countries with an ombudsman opportunity is taken by members of parliament to use the parliamentary report of the ombudsman in asking Ministers questions concerning their ministries. It can be seen therefore that the ombudsman in fact here strengthens the device of ministerial responsibility and renders Ministers more accountable to parliament.

Secondly the veil of secrecy that is encouraged by unbridled observance of the doctrine of ministerial responsibility can be very harmful in Kenya where civil servants are now allowed to own business since 1970[9]. Indeed owing to this development the need for accountability becomes greater for civil servants may from time to time misuse this power to defeat an outsider contesting for the same business interest as he is. Thus such an outsider could complain to an ombudsman where he feels he has been so discriminated against by a civil servant.

It is further recognised that the Westminister democratic model institutions do not work so well here as they do in their parent countries. It has in fact been argued that the success of the Tanzania Permanent Commission of Enquiry has sprung from this fact. Says Martin, "If we stand Professor Abel's analysis on its head, we may conclude that the practical absence of these institutions in Tanzania may have had an important effect in creating the conditions for the commission's success"[10].

THE OMBUDSMAN AND THE AFRICAN ONE-PARTY STATE

According to Professor Rowat "among the three essential features of the original ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution who supervises the administration". But as we have seen[12] the priority given to rapid socio-economic development in the Third World has put a premium on a strong executive, inevitably to the detriment of the western concept of the legislature's role of a watchdog against maladministration. At the same time it is essential that the ombudsman should

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have the support, indeed seen to be an arm of the most powerful institution of the state, which is the Presidency. Just as the executive in Kenya will contain parliamentary criticism to the extent that it wishes to, if an ombudsman were to be an instrument of the legislature the same fate would be likely to befall his investigations. If thus being a foregone conclusion that legislatures in African one-party states are weak the only issue is whether an ombudsman can be fitted into such a framework.

As has been rightly pointed out by Tom Sargant[13] the toleration of an effective oppositon which is free to question and at times to ridicule the government is something learned only after many centuries and which could obviously lead to paralysis at a time when years of neglect have to be remedied with all possible speed.[14] But this is not the end of the matter for some kind of check is needed. Sargant sees a parallel between the autocrati states of the 18th century, viz Sweden and Finland, which evolved the ombudsman institution and the modern one-party African states and considers it "worthwhile for those who are now moulding the destinies of these states to consider whether this institution borrowed from an historically neutral nation, could provide at least a transitional answer to Africa's problems of how to reconcile dynamic and purposeful government with respect for administrative justice and the rights of the individual"[15].

Professor Mittlebear[16] who disagrees with Sargant regarding the efficiency of the ombudsman in the one-party state appears to miss an essential point. For while he argues that "The success of this institution rests principally on the fact that he is responsible to and relies upon the backing of a popularly elected parliamentary body which reflects the real locus of power" yet it has been shown that it can work quite well drawing upon the Head of State as a court of power as is the case in Tanzania and should soon be in Zambia when that state puts its plans to adopt the institution into effect as it has resolved to do. Without belittling the dilemma posed by Mittlebeer regarding the likelihood of executive tampering with the ombudsman's investigation where the ombudsman is responsible to it, it is not strictly true to say that "in an African state there is simply no group of sufficient political potency to back up an ombudsman in an extremity"[17] for such awareness is increasing from day to day and it is unlikely to be an issue which any executive would like to gamble on, for were the institution to become popular with the masses, the Executive would have no choice but to give it as free a hand as possible.

This view was given a shot in the arm by N. M. Hunnings[18] who argues (not unlike Sargant) that as the originating idea in Sweden, where the instituti evolved and the first ombudsman was an appointee of the King, was that the King

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wished to ensure for his subjects a just and legal administration by his servants, then there is no reason why an autocratic African ruling body (whether sole party, military oligarchy or a parliamentary cabinet) should not share this desire to just administration with autocratic European monarchies. If the administration wishes to be subject to the rules of law (and the Kenya government has so declared its willingness[18]) then it is a matter of constitutional expediency what form the ombudsman should take but were it unwilling, neither one responsible to the legislature or to itself would be of any effect.

Before concluding this Chapter it has been felt necessary to point out that adopting the ombudsman institution in Kenya would add greatly to the government's claim to legitmacy. It would do the image of the government a great deal of good if it were to go out of its way to prove that it is not impervious to the problem of bureaucratic control by the introduction of such a body ~~a body~~ as the ombudsman. The Ndegwa Commission has put it on record[20] that during its enquiry serious allegations regarding tribalism, nepotism, corruption and other forms of malpractices were made against civil servants and other public servants. The commissioners sounded a sober warning; "we feel that these allegations, if not heeded and investigated impartially could undermine the integrity of the government and adversely affect public confidence and the morale of the public services. The situation needs to be contained and we believe that the way to achieve this would be through the ombudsman".[20] It therefore was particularly cynical of the Kenya government to maintain that there is no need for the institution at the present. A timely warning which the government ought to heed was given by two authors which said, "development can only take place if peasants and workers cooperate in government plans and this is more likely to happen if they have some opportunity of satisfying themselves that the increasing powers of government are being used wisely and honestly, and of seeking redress if they are not satisfied"[21].

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FOOTNOTES

2. D.C. Ruwat P.281
3. " " P.282
4. " " P.283
5. Ante P.~~19~~ I
6. D.C. Rowat P.284
7. ~~Supra P.31~~
8. Supra P. 19
9. Ndegwa report Para. 3
10. Martin P. ?
11. Rowat P. ?
12. Introduction
13. JAL vol.8 1964
14. Ibid
15. Ibid
16. JAL vol.9 1965
17. Ibid
18. JAL vol.10 1966
19. Sessional Paper no.5 of 1974 para. 107
20. Ndegwa Commission Para.53
21. Ibid

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CHAPTER 6

A KENYAN OMBUDSMAN - WHAT FORM?

Having argued the need for the adoption of the ombudsman institution in Kenya we now come to the final stage of this paper. This shall comprise of some proposals that ought to be taken into account in considering the form that the office of the ombudsman ought to take in Kenya. We shall dwell only on the more vital aspects pertaining to such an office. This Chapter then will take the form of recommendation followed where necessary by appropriate commentary.

It is recommended that the institution should be established by an appropriate amendment to the constitution. Despite the scepticism voiced as regards the worth of constitutions in the African one-party state, yet a substantial residue of respect is still accorded to the constitution to warr such constitutional entrenchment of the institution.

QUALIFICATIONS OF THE APPOINTEES

In our view the institution should take the form of a collegiate commission consisting of a chairman and say two (or more if necessary) other commissioners whose tenures of office should be similar to that of a High Court Judge. The idea of three commissioners was first tried in Tanzan where it appears to have worked remarkably well. "The idea of having more than one person is to enable the commission to divide itself in order to be able to tour the regions". Such an arrangement would be indispensable in Kenya as well because owing to the illiteracy of a large proportion of the rural population oral communication between the complainant and the commissi would be more valuable than an insistence upon written communication where a complainant was unable to travel to Nairobi. As regards the figure three, A. M. Mang'enya[2] has been able to found a philosophical basis. It is his theory that the tripod "philosophy", which has uplifted the figure three to magical significance among African tribes, stems from the idea of strength a dependability deriving out of the idea of the cooking pot standing on three stones. This figure "meets the African aspirations and way of thinking"[3] - a worthy basis on which to legitimise such an institution.

On the question of qualifications a moot issue has always been whether the ombudsman should be a lawyer or non-lawyer. A. M. Mang'enya has provide an interesting answer to this question. It is his view that a lawyer ombuds is a must in advanced societies where decision-makers as well as executives etc. must have legal qualifications or a legal background. As regards devel countries he says, "it is my opinion that in developing countries, especiall

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in Africa, it is better to start with a non-lawyer, because the ombudsman is going to deal with many illiterate complainants who are not familiar with any legal entanglements, which in most cases arise from an imported legal system. As the society becomes more developed, it will be better to have a lawyer for the post because the work of an ombudsman is, in the final analysis, of a legal nature"[5]. Great stress is to be laid on the individual's character for he must be acceptable both to the decision makers and the general public.

Before we leave the question as to the composition of the commission. It should be mentioned that a plural commission is felt necessary because it gives the appearance of a greater degree of impartiality than where an investigation is carried out by one person. The argument that the undesirable element of multiplicity of justice will be introduced by having more than one commissioner is a risk to be run. This is not a serious risk if the right people are appointed commissioners.

APPOINTMENT - BY WHOM?

It is recommended that the commissioners should be appointed by the President in consultation with the Judicial Service Commission (not the Public Service Commission as such patent identification with the civil service is undesirable). In Kenya where the President is the executive head this appears necessary because such individuals must enjoy the confidence of the President and this would undoubtedly be a great source of strength. This would also be in keeping with the view that in developing countries the ombudsman must be, by and large, commissioned by the President to keep his house (the Public Service) in order and to curtail any tendencies to overstep their legal bounds. This has been a difficult recommendation to make but as was seen in the last Chapter[6] it appears to be the only viable escape (if at all) out of the dilemma.

WHAT IS TO BE INVESTIGATED?

The commission should have the power to inquire into the conduct of any public official. These should include all employees of the central government and para statal bodies, except the armed forces for whom a separate ombudsman could be appointed if it was felt necesarry as is the case in some Scandinavian countries. It is the practice to draw up a list of the scheduled agencies to be investigated and in some countries such as Britain the police cannot be investigated. I seriously consider that the police in this country ought to be subject to the ombudsman's jurisdiction as they wield powers which if misused will often lead to a great deal of suffering for the victim. The commission should be empowered to act on its own motion, at the behest of the complainant or that of the President.

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There appears to be no need to provide in strict terms what should be the nature of the act to be investigated. It should suffice to provide loosely demarcated limits leaving the commission free to investigate at its own pleasure. In this respect we ought to note the catalogue provided by Chief E.A.M. Mang'enya,[7] Tanzania's first Chairman of the PCE "arbitrary decisions or arrests, ommissions, improper use of discretionary powers, decisions made with bad or malicious motives or decisions that have been influenced by irrelevant considerations, unnecessary or unexplained delays, obviously wrong decisions, misapplication and misinterpretations of laws, by-laws or regulations".

As regards the local government agencies some countries have seen it fit to establish a separate ombudsman and this appears necessary here for it must not be forgotten that these agencies also wield substantial powers in relation to such duties as licensing of various trades within their localities, appointments to offices etc. However it ought to be introduced after the establishment of a national ombudsman, when sufficient confidence in the office has been generated.

PROCEDURE

The commission should have access into all relevant files and materials in the hands of any department for purposes of an investigation subject to the provisions of the evidence Act. In this regard the relevant sections of the evidence Act earlier tabulated[8] should be repealed and a new provision enacted which will embody the principle enunciated in Conray v Rimmer[9] namely that "It is universally recognised that there are two kinds of public interests which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice it to be done"[10] As suggested by Ssempebwa-Mukasa" the Evidence Act S.131 be amended to make it clear that the courts have a reserved discretion to decide, in spite of the affidavit of a minister, that a document is admissible in evidence". Moreover such amendment would only be in keeping with the judicial position in East Africa which was enunciated in Raichura v Sondhi[12] in which some iron sheets were alleged to have been stolen from a warehouseman with whom they had been deposited. The police officer in charge of the investigation stated in evidence that the sheets had been stolen without the complicity of the warehouseman. Claiming privilege under S.132 of the Kenya Evidence Act[13], he refused to state the facts upon which he reached his conclusions. The court in expressing its

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distaste for such a state of affairs as would allow such a claim pronounced, "such position could not but regard as being deplorable contrary to public policy, and contrary to the basic interests of the state, one of which interests is the proper administration of justice".[14] In making the above recommendation it is not contested that the state ought rightly to be in a position to bar such facts from the public gaze as might jeopardise its safety or the effective functioning of its foreign policy. Our contention extends only as far as to protest that such concession is no licence for unbridled claims of privilege so as to defeat justice at the expense of saving the state some embarrassment.

The Commission should have power to summon any witness and to enter into any premises for purposes of furthering their investigation.

It should also be mentioned that it is not felt necessary however that a body of law similar to case law should be built up and regarded as binding as one of the most attractive features of the institution in its informality and flexibility.

TO WHOM SHOULD THE COMMISSION REPORT?

Two alternatives are recommended here; either

A) That the commission should report straight to the President. This would be in keeping with the view already expressed that an ombudsman in developing countries could take the form of a committee for aiding the President to keep his subordinates in line and there is some logic in having the commission report to him. The disadvantage lies in that ultimately it will depend on him whether to act on those reports or not and a great deal of responsibility will therefore repose in the hands of one man. This is not a great risk if he is a man of unquestioned integrity with a substantial interest in observing that justice is done. Indeed his being the seat of power in the Republic might prove a great deterrent upon officials who would naturally have an interes in observing that their names do not appear in these reports as this might incur Presidential disfavour; or

B) That the commission should report to a parliamentary committee. This is the practice in most countries where an ombudsman operates. Its obvious advantage is that these reports are reviewed by the peoples chosen representativ and who will therefore have an interest in ensuring that compensation is paid to the victims or that erring public servants are disciplined. The disadvantage lies in the fact that the parliament as already observed[15] is not in a position to force the executive to carry out any acts which the latter is not inclined to do. Moreover a trend has been noted that Parliament and senior civil servants have been in constant tussel over who wields more powers within the

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constituencies and such a provision might be seen by some M.P.s as enabling them to harrass such civil servants, something to be decried. It is interestin to note that Chief Mang'enya has recommended that in Tanzania the law should be amended to allow reports to be made to a parliamentary or party committee. He gives the reasons as being that the President is being given an extra burden on top of his other duties and secondly that it is the practice with other ombudsmen.

These then are the recommendations I consider ought to be considered in the event of the institution being established in Kenya. Obviously a great deal more work in this area would be ~~safely~~ necessary before the institution could be safely incorporated into the Kenyan social political mainstream.

In conclusion it is felt singularly important to stress that the governmen must depart from its 'all is well' attitude.

A major effort was made in this paper to show that the institutions traditionally considered as the bullwarks of the citizens defence against public maladministration have been unable to cope successfully with this proble

The recognition that these institutions are ill adapted to deal with this problem ought in turn to be matched with action to adopt such an institution as the ombudsman which has proved itself elsewhere.

FOOTNOTES

1. Journal of the Denning Law Society, Chief Erasto Mang'enya, "The Permanent Commission of Enquiry of Tanzania" P.57
2. Ibid
3. "
4. "
5. "
7. Robert Martin P.214
8. Supra P.17
9. (1968) 1 All E.R. 847
10. Ibid
11. J D L, "Lord Denning and state Privilege in the Discovery of Documents" p.8
12. Per Newbold P. at p.629
13. Chapter 80 Laws of Kenya
14. (1967) E.A. 624