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S.B.O. GUTTO, J.S. HATCHARD AND G. FELTOE.

*Faculty of Law  
University of Zimbabwe  
P.O. Box MP 167  
Mount Pleasant  
Harare  
Zimbabwe*

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PROTECTING THE PUBLIC FROM MALADMINISTRATION BY THE PUBLIC SERVICE:  
THE DEVELOPMENT OF THE OFFICE OF OMBUDSMAN

JOHN HATCHARD\*

1. INTRODUCTION

The 1974 Bar Association resolution on the ombudsman states that the office should be established in accordance with the following definition:

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

The institution of the ombudsman has been one of the main growth areas in the law in recent years. Between 1966 and 1984 over 80 national and provincial offices were set-up worldwide.<sup>(1)</sup> This is remarkable given the fact that the office of the modern ombudsman started in Sweden as far back as 1809 and for well over 100 years attracted little or no outside attention.

In Swedish the word "ombudsman" is quite common, meaning "attorney" or "representative". Amongst a variety of ombudsmen in the country is the justitieombudsman (JO), who is the Parliamentary ombudsman charged with the duty of supervising state and local authorities by investigating complaints against them by the public. Created under the 1809 Constitution the JO was made responsible to parliament so as to be independent of royal pressure. The office remained unique for over 100 years until Finland introduced a similar office in the Constitution Act of 1919. However, it was not until Denmark appointed an ombudsman in 1954 that a more general interest in the office was generated. For the first time information on the working and aims of the institution became readily available and this coincided with a growing concern over increasing governmental powers.

With the modern state assuming many new and increased functions as a result of the implementation of social and welfare legislation, the lives of every citizen were profoundly affected. Extensive powers were delegated to officials and agencies inevitably leading in some cases to friction between the bureaucrats and citizens. Redress of some grievances were already available but, as Caiden points out:

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1. For the most extensive survey on the ombudsman, see Caiden, G.E. (ed) International Handbook of the Ombudsman Westport: Greenwood Press (1983).

"... Within every society there are the disadvantaged, the under-privileged, the poor, the elderly, the weak and the frightened who do not understand the ways of bureaucracy, who are terrified at dealing with public officials...They need an expert who can articulate their grievances."(2)

Accordingly an independent and impartial body became necessary to deal with complaints. The office of ombudsman was seen by many states as being the means of opening an important new channel for a citizen seeking redress from some alleged grievance caused by a bureaucratic decision. An aggrieved person could now complain to someone who was independent and who had not only a legal right but also the power to fully investigate a complaint and if necessary take steps to rectify the error.

In 1962 New Zealand became the first Commonwealth country to set up the institution and was followed by Guyana in 1966. The institution was now becoming a world-wide phenomenon and it was not surprising therefore that it spread quickly to the African continent.

## 2. THE OMBUDSMAN IN AFRICA

Tanzania became the first African country to establish the office under the name of the Permanent Commission of Enquiry (PCE).<sup>(3)</sup> This followed the report of the Presidential Commission on the Establishment of a One Party State in 1965 (the Presidential Commission) which recommended the establishment of the PCE as a safeguard against the abuse of power.<sup>(4)</sup> The PCE commenced work in 1966 and is currently dealing with over 3000 complaints per year,<sup>(5)</sup> thus making it the most popular institution of its kind on the continent (per head of the population).

The reasons given by the Presidential Commission for the establishment of the PCE are relevant to many developing nations:

"In a rapidly developing country it is inevitable that many officials, both of Government and of the ruling party, should be authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have the most serious consequences for the individual, and the Commission is aware that there is already a good deal of public concern about the danger of abuse of power. We have, therefore, given careful thought to the possibility of providing some safeguards for the ordinary citizen which will not have the effect of limiting the actions of

2. Ibid at p.4.

3. See P.M. Norton (1973) "The Tanzanian Ombudsman" 22 I.C.L.Q. pp.603-631.

4. Government Printer, Dar es Salaam, 1965 p.32 et seq.

5. See the Annual Reports of the Permanent Commission of Enquiry.

Government or Party in a way which could hinder the task of nation building."(6)

It is interesting to note the clear message from the Commission that the institution would not be allowed to hinder development and this has been borne out in that the institution in many countries has been modified to take account of the realities of political life. These modifications will be considered later in the article.

The lead set by Tanzania was followed by a number of other African nations. Thus in Ghana in 1966, the Expediting Committee of the National Liberation Council assumed similar powers to those of an ombudsman and later other Commissions were periodically appointed to investigate specific sectors of public administration.(7) In fact the 1969 Constitution specifically created the office of ombudsman with the legislature required to enact detailed provisions regarding his jurisdiction and operations. The ombudsman had not commenced operations when the government was overthrown in 1972 and thus it was not until 1980 when the Ombudsman Act was passed that the institution became fully established in the country. In Mauritius the constitutions of 1967 and 1968 provided for the establishment of the office and the first ombudsman was appointed in 1970. Numbers of complaints have been somewhat limited with barely 200 cases being dealt with annually.(8) The next African country to establish the office was Zambia. The 1973 Constitution made provision for a Commission for Investigations (CFI) which began operating in 1974. An average of 550 cases per year are dealt with although budgetary and staffing problems continue to prevent an adequate service being given to the public and many cases are not disposed of for a number of years.(9) As well as this, lack of transport has made it impossible for the CFI to operate outside the main urban areas.(10)

In Sudan the institution is now governed by the Peoples' Assembly Committee for Administrative Control Act of 1974. Approximately 200 cases a year are dealt with, surprisingly low for a nation with a population of 18 million. A report by the International Commission of Jurists found that this was probably due to the institution being understaffed and without an adequate budget.(11) In Nigeria, Kaduna

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6. Report of the Presidential Commission p.32.
  7. For example, the Commission of Enquiry into Bribery and Corruption of 1970. See Werlin (1972) "The Roots of Corruption" 10 Jo of Modern African Studies 247.
  8. See Sewgobind, R. "The Mauritian Ombudsman" Occasional Paper 8, International Ombudsman Institute, Alberta, Canada (1980).
  9. Annual Reports of the Commission for Investigations. In the 1982 report, the Investigator-General reported that there were still 8 cases outstanding which dated back to 1975.
  10. See Annual Report for 1982.
  11. Report of the Follow-Up Mission to the Dar es Salaam Seminar on Human Rights I.C.J., Geneva (1978).

State was the first to establish the office in 1974. Following the recommendations of the Public Service Review Commission later that year, a national network of Public Complaints Commissions (PCC) was established in 1975.(12) The national headquarters is in the federal capital with the capital of each of the 19 states serving as the PCC headquarters at the state level. At present Nigeria is the only African country with this organisational structure. An average of 6 000 cases have been handled annually.(13) In 1982 the Zimbabwean Ombudsman commenced operations, and was followed by the establishment of an ombudsman in Swaziland.

As Professor de Smith has rightly pointed out, "an ombudsman cannot be bought off the peg: he must be made to measure."(14) This has meant that the ombudsman in Africa has developed somewhat different features to his counterpart elsewhere. Three characteristics in particular may be noted:

#### 1. Appointment by the Executive

The original concept of the institution was that the ombudsman should be linked to the legislature, and indeed in the Scandinavian countries the ombudsman is elected by Parliament itself. In New Zealand, during the parliamentary debate leading to the passing of the Parliamentary Commission (Ombudsman) Act of 1962, it was repeatedly stressed that the ombudsman was to be an officer of parliament, responsible to parliament and that he had to enjoy its confidence.(15) Accordingly, although actually appointed by the governor-general, such appointment is made on the recommendation of the legislative body. Similarly, in the United Kingdom, the Parliamentary Commissioner for Administration is appointed upon the recommendation of Parliament.

In Africa, in all countries with the institution with the exception of Sudan, the ombudsman is appointed by the executive. For example, in Tanzania, Zambia and Nigeria the appointment is the sole responsibility of the head of state. In other countries such as Ghana, the appointment is made by the head of state after consultations with others. Thus the 1980 Ombudsman Act provided for the appointment of the Ghanaian ombudsman to be made by the President acting in consultation with the Council of State and with the approval of Parliament. In Sudan there was some controversy during the constitutional debates concerning the branch of government to which the ombudsman should be responsible. The question was finally resolved in favour of the Peoples' Assembly. The

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12. Federal Republic of Nigeria, Public Service Review Commission, Main Report: Government Printer, Lagos 1974 pp.50-51.
  13. Statistics of the Nigerian Public Complaints Commissions. For example in 1976, 8357 cases were handled whilst in 1979 the total was 5225. See generally, Adamolekun, L.O. "Nigeria" in Caiden, G.E. (ed) op cit.
  14. Mauritius Legislative Assembly Sessional Paper No 2 of 1965, paragraph 39.
  15. N Z Parliamentary Debates, 1962 pages 1013 and 1016.

complaints procedure resembles that of the United Kingdom and France in that complaints can only be brought to the attention of the Peoples' Assembly Committee through a member of the Assembly. However, as the chairman of the committee is the Controller of the Peoples' Assembly and the members of the committee have to be members of the legislature, in practice complaints can be received directly.

There are a number of possible reasons for executive control of the appointment of ombudsmen. Firstly, by its very nature the office is in a politically sensitive position having wide-ranging powers to investigate the workings of government. In young nations where government officials are often inexperienced or poorly educated, it may be deemed necessary for executive control to be maintained so that, for example, the jurisdiction and investigative powers remain within limits acceptable to the government. Secondly, there could be a reluctance on the part of the executive to permit the distribution of power to other organs in order to consolidate the position of the head of state. As well as this in many developing countries, particularly in one party states, the influence and prestige of the legislature may be relatively limited, thus rendering it an inappropriate body to make such an appointment. Accordingly unless the ombudsman is seen to have the blessing of the head of state it may well be very difficult for him to operate effectively.

## 2. Implementation of Recommendations

Closely linked with the previous point is the question of the implementation of recommendations. Without exception, ombudsmen in Africa have no enforcement powers but rely on making recommendations to rectify an injustice. In general, implementation (or otherwise) is the responsibility of the head of state and not a role of the legislature as in the Scandinavian model. In view of the limited prestige of the legislature in many African countries, it may be unrealistic to expect such a body to be able to implement recommendations. However, the personal authority and prestige of the head of state can ensure that recommendations are effectively implemented. For example, in Zambia and Tanzania, the reports are sent directly to the President who may personally determine the action to be taken. In practice, Presidential involvement may occur only in difficult or important matters but the fact remains that Presidential involvement can greatly assist the ombudsman in his work.

The role of the head of state means that he retains complete control as to how to deal with a report and clearly political considerations will play an important part in the decision making process. Thus in 1975 a gross abuse of authority by a junior minister led to the CFI in Zambia recommending his dismissal. The President, without giving reasons, refused to endorse the recommendation and decided on a reprimand instead.<sup>(16)</sup> In such circumstances it is not unreasonable for an aggrieved citizen to view somewhat sceptically the work and independence of the ombudsman.

A further result of this situation is that the role of the legislature may be adversely affected. In general the body has little contact with the ombudsman (save, in most countries, receiving an annual report). In fact the work of a member of parliament in dealing with his constituents' complaints, leading in some cases to parliamentary questions, can overlap with that of the ombudsman. However complainants may feel that consultations with an ombudsman may prove more effective than with the parliamentarian because of the wide powers enjoyed by the former. Indeed some members of parliament may consider this a more appropriate avenue, especially in a one party state where one's political future rests with those who perhaps may well be the object of the citizen's complaint.

Any diminution in the role of the legislature in calling upon ministers to account for the administration of their department is unfortunate but it is hard to see how the legislature itself can play an increased role in the operation of the ombudsman in view of the realities of political life in many African nations. However the contribution that Members of Parliament can make individually by bringing cases of possible maladministration to the attention of the Ombudsman is potentially important. This is discussed later in the article.

### 3. Multi-Member Institutions

Although many Western nations have more than one ombudsman, in every case each acts independently with jurisdiction over a particular area such as local government or the health service. In Africa the multi-member institution has been introduced in a number of countries. Thus in Tanzania the PCE consists of a chairman and two commissioners acting as a single body whilst in Zambia the CFI is made up of the Investigator-General and three commissioners. A similar arrangement operates in Sudan and was also used in Ghana at one stage.

This style of organisation has been criticised on the grounds that, firstly, the authority and prestige of the office can best be developed by focusing on an individual, and secondly, that split decisions might adversely affect the effectiveness of the office.<sup>(17)</sup> The first point is particularly important. As discussed earlier, it would appear that executive control over the ombudsman derives largely from the perceived need to ensure that investigations do not take place into politically sensitive areas. By having a multi-member institution with a constant change of membership (for example one member of the CFI retires annually) the fear of a politically dangerous office is further reduced.

Today there appears to be a move away from this system for in Ghana (1980), Zimbabwe and most recently Swaziland, a single ombudsman has been appointed and it is suggested that this is the most satisfactory method of organisation both promoting efficiency and increasing public confidence in a known individual.

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17. See Report of a "Colloquium on the Rule of Law" in 26 I.C.J. Bull 8 (1966).

### Conclusions

The institution of the ombudsman has proved to be a sturdy import to Africa. It operates in multi-party states such as Zimbabwe, one party states such as Tanzania and under military governments such as Nigeria. It has withstood many pressures including military coups. For example, in Ghana, the Provisional National Defence Council (Establishment) Proclamation 1981, specifically provided for the office of ombudsman, as established under the 1979 constitution (and 1980 Ombudsman Act), to continue as before despite the suspension of the constitution by the Council.(18)

The office in Africa is clearly somewhat different to that envisaged in the definition of the International Bar Association mentioned earlier. It has taken on distinct characteristics as a result of political and other factors. Thus a new form of the institution is developing and it is to be hoped that confidence in it will continue to be generated so that it is allowed to become an increasingly valuable ally to those seeking redress as a result of governmental maladministration. Clearly there is some way to go before a satisfactory level of performance is achieved. The number of complaints received is small compared to the size of the populations in many countries - an indication perhaps that for a number of reasons the ombudsmen are not able to reach enough of the population. Thus as has been seen, budget staffing and transport problems have seriously affected the performance of a number of offices. There is an obvious need for more resources to be made available and if the institution is really to perform an important function, these problems need to be tackled urgently.

It is now proposed to examine the office of the Zimbabwean Ombudsman.

### 3. THE ZIMBABWEAN OMBUDSMAN

In Zimbabwe, provision for the establishment of an Ombudsman was made originally in the short-lived Constitution of Zimbabwe-Rhodesia of 1979 (the Z-R Constitution). This scheme was never implemented but the 1979 Constitution of Zimbabwe made general provision for the office and the Ombudsman Act of 1982 (the Act) laid down a detailed scheme of operation. Whilst based on similar principles, it will be seen that the Z-R Constitution gave the Ombudsman a considerably wider jurisdiction compared to the scheme now operating.

The administration of the Act is vested in the Minister of Justice, Legal and Parliamentary Affairs, and on 1st September 1982 the first Ombudsman, Mr. Justice Moodley took up his appointment. Complaints from the public were received as from 1st January 1983 although the office only became operational with regard to the investigation of complaints on 1st May 1983. Commending the Ombudsman Bill to Parliament, the then Minister of Justice explained the role of the Ombudsman by stating that:

"... this country has never had an ombudsman before, as in the colonial days people had to 'suffer in silence' when aggrieved by the often heavy-handed actions of government officials. It is the present government's policy that the Public Service should be the servant and not the master of the people, and it is in accordance with this policy that I am pleased to present this Bill to Parliament."<sup>(19)</sup>

The scope of the resulting Act can now be examined.

### 1. Appointment

In line with the normal practice in other African countries, the Zimbabwean Ombudsman (and Deputy Ombudsman) is appointed by the President of the Republic, acting on the advice, tendered after consultation with the Judicial Service Commission, of the Prime Minister (or minister designated by the Prime Minister).<sup>(20)</sup> The Commission is made up of the Chief Justice, Chairman of the Public Service Commission, the Attorney General and up to three others appointed on the advice of the Prime Minister. As can be seen, the legislature has no part to play in the appointment. It is the Prime Minister who plays the key role here, a point explained by the fact that under the Constitution of Zimbabwe political power including appointments rests almost entirely with the Prime Minister. No person is eligible for appointment as the Ombudsman unless he is an experienced lawyer, a top civil servant or, in the opinion of the President "is a person of ability and experience and distinguished in the public life of Zimbabwe" (Section 3 (1)). The first incumbent, a High Court judge from Zambia, is a rare illustration of the appointment of an ombudsman who belonged to the jurisdiction of another country and his appointment probably indicates the perceived need to have a clearly independent figure in the office.<sup>(21)</sup> The appointment of a lawyer is perhaps not surprising being very much in line with the practice elsewhere in Africa. Thus in both Ghana and Zambia, the holder of the office must be a lawyer whilst in Mauritius although there is no specific provision, the appointee has always been legally qualified. In both Tanzania and Nigeria, no formal qualifications are necessary for appointment and this was also the position in the Z-R Constitution. There appears to be no compelling reason for an Ombudsman himself to have legal training, although access to legal advice is essential. The critical point is that he should be an independent high-level official with the authority to criticise those bodies within his jurisdiction.<sup>(22)</sup>

19. Parliamentary Debates 17th June 1982 col. 59.

20. Section 107 of the Constitution of Zimbabwe (as substituted by section 6 of the Constitution of Zimbabwe Amendment (No.4) Act, 1984).

21. Cf Mauritius where a non-Mauritian, Judge Gunnar Lindh, was appointed the first ombudsman in 1970.

22. See also the 1974 International Bar Association Resolution on this point.

With the scope of section 3(1) being so wide permitting, as it does, the appointment of suitable persons from both within and without the government, one wonders whether a listing of acceptable qualifications serves any real purpose.

A person is not qualified for appointment and ceases to be qualified if he holds either any other public office, any other paid office or employment, or he is a director, consultant or adviser to any corporate body or partnership.(23) He must also be under sixty five years old.(24) The Ombudsman is appointed for three years and his salary, paid out of the Consolidated Revenue Fund, is above that of a permanent secretary. He is eligible for re-appointment for a further term of office not exceeding three years.(25)

## 2. Investigations

No complaint may be investigated unless the person aggrieved is a citizen or resident of Zimbabwe (in the case of an individual) or carries on any business or activity in Zimbabwe. Local authorities or organisations linked with the State such as parastatals are not entitled to make a complaint. Persons detained in a mental institution may complain and the complaint must be forwarded without alteration or comment.(26)

All complaints must be lodged in writing with supporting documentation. In practice those unable to write out their complaints are assisted by the staff at the office. Complaints must be made within 12 months from the date on which the person aggrieved first had notice of the act complained of unless the Ombudsman considers it proper to extend this period in a particular case. In practice extensions have been granted on many occasions particularly in cases where the complainant was previously unaware of the existence of the Ombudsman.

All proceedings are in private and the Act gives extensive investigative powers. The Ombudsman can require any relevant body or authority to furnish relevant information or documents. He can summon and examine witnesses at a formal inquiry and has the power to have witnesses committed for contempt of court.(27) In practice the holding of a formal inquiry has been rare (only 1 having been held in 1974) due partly to the amount of time involved but more especially due to the cooperation received from the relevant public bodies. Thus most cases have been dealt with by correspondence although on a number of occasions investigating officers have visited government offices to peruse

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- 23. Ombudsman Act 1982, section 3(3) (hereinafter referred to only by the relevant section).
  - 24. Section 3(5).
  - 25. Section 4(1).
  - 26. Section 13.
  - 27. Section 15.

documents or hold direct consultations with officials. Indeed the Ombudsman has emphasised that his policy will continue to be one of persuasion rather than confrontation.(28)

Another aspect of the work has been the giving of advice to complainants. Even in cases outside his jurisdiction, efforts have been made to assist either through informal channels or by directing the complaint to the correct body. For example, in cases involving a complaint by a member of the public against the police, which is outside the jurisdiction of the Ombudsman, the complaint is forwarded to the relevant Ministry and Commissioner of Police for comment. Efforts are made to monitor these referred cases in order to ensure that complaints are being investigated. In a number of cases the police have actively assisted the Office in dealing with complaints. For example, a complaint was received alleging failure by the police to prosecute certain persons. The police made the relevant documents available to the Ombudsman and the explanation for their decision not to proceed with the case rendered to the complainant.(29)

An increasing number of persons are bringing complaints concerning the Ministry of Labour, Manpower Planning and Social Welfare. In 1983, 48 such cases were received whilst in 1984 the figure rose to 149. The complaints related largely to dismissals and disciplinary action involving the private sector over which the ombudsman has no jurisdiction. However action was taken to try to ensure that the case was dealt with by the appropriate authorities. As the Ombudsman states in his 1984 Annual Report:

"We channel these complaints to the Industrial Relations Branch of the Ministry with a view to encouraging the Ministry to initiate enquiries into the complaints with employers. Our role in respect of such complaints is to satisfy ourselves that the Minister is made aware of the complaints and that the Minister and his officers examine fairly each application for an employee's dismissal before the application is approved or rejected so as to be consistent with the rules of natural injustice."

(at page 9).

This kind of action is to be very much welcomed and forms an important additional role for the office to perform.

### 3. Jurisdiction

#### (a) Organisations which may be investigated

The Act provides that any person may make a complaint to the Ombudsman requesting him to investigate any action (or failure to act) by specified government and non-governmental bodies. Any force or service maintained and controlled by the State (other than the defence,

28. Annual Report of the Zimbabwean Ombudsman 1983, p.6.

29. 1983 Annual Report, Case OMB/132/83.

police and prison services), all Ministries and departments, local government authorities, hospitals or educational establishments controlled by the State and any statutory body fall within his purview.<sup>(30)</sup> Certain officers and authorities are not subject to investigation. Thus public officials at the highest echelon of government are specifically excluded, following the pattern in other African states. Similarly the exclusion of judicial officers is a common one being necessary to ensure judicial independence.<sup>(31)</sup>

Whilst members of the defence forces, police and prison services may complain to the Ombudsman concerning action taken against them by these bodies, the Act specifically denies this right to the public. This is a matter for some concern for it is in precisely these spheres of governmental activity that the ordinary citizen can be subjected to the most dramatic abuses of administrative power. During the Parliamentary debate on this point, two reasons for these exclusions were put forward by the Minister. Firstly, he stated that the restrictions were for security reasons and to extend the jurisdiction of the Ombudsman to these bodies "might have the result of inhibiting the activities of [these forces] much to the detriment of the State."<sup>(32)</sup> He also pointed out that originally the Parliamentary Commissioner for Administration in the United Kingdom had a similar restriction to his jurisdiction. Secondly, the Minister argued that there would be too many complaints for the Ombudsman to deal with as any prisoner or person arrested would be inclined to "rush to the Ombudsman and complain".<sup>(33)</sup>

In the light of these arguments, it is interesting to note that in both Zambia and Tanzania the Ombudsman has always had jurisdiction over these forces and in Sudan there is a separate complaints institution in the office of the Inspector-General of the Army. There is no indication that there have been any security problems or excessive number of cases in these jurisdictions.<sup>(34)</sup> The need for such jurisdiction is illustrated by the fact that in Zambia, for example, complaints against the police accounted for over 25% of all cases received in 1982.<sup>(35)</sup> A useful example of the benefit of such jurisdiction is found in a case reported to the CFI in Zambia in 1975. Here X, a senior police officer, had demanded free entrance to a dance at a restaurant for himself and his six companions. This was refused and he accordingly sent members of the National Police Force to stop the dance and close the restaurant. The investigation concluded that there had been a very serious abuse of

- 30. Section 108(2) of the Constitution of Zimbabwe, section 8 and the first schedule of the Act.
- 31. Section 9 and the second schedule of the Act.
- 32. Parliamentary Debates 18th June 1982 Col. 113.
- 33. Ibid.
- 34. See Annual Reports from Tanzania and Zambia and Report of the Follow-Up Mission of the International Commission of Jurists, Ibid.
- 35. Annual Report of the Commission for Investigations 1982.

authority and the President directed that X be dismissed from the Force.(36)

In fact the problems raised by the Minister are already dealt with in the Act as the Prime Minister can order the Ombudsman not to investigate a complaint in the interests of security and there is power for the Ombudsman to refuse to investigate a matter which he considers frivolous, vexatious or trivial.(37) It would appear that the restrictions were considered necessary because of the security situation prevailing in the country at the time of the passing of the Act. There was considerable unrest in Matabeleland with many reports of severe action being taken by members of the armed forces in particular against civilians. Investigations by the Ombudsman may have been considered politically undesirable and have thus formed the basis for the exclusion. The Act does permit the President to make regulations providing for any or all of the powers of the Ombudsman being exercised over the defence, police and prison organisations and it is to be hoped that such regulations will be forthcoming in the near future. In February 1985 the Ombudsman was appointed a member of a Commission of Inquiry into the activities of the Commissioner of the Zimbabwe Republic Police. This perhaps reveals an increasing confidence in the work of the Ombudsman and may well assist in future efforts to expand his jurisdiction.

Finally the question of complaints against political parties must be considered. Tanzania was the first African nation to give the ombudsman jurisdiction over a political party, in this case the sole party TANU (now CCM), and this lead was followed by Zambia. An increasing number of complaints are being received by the Zimbabwean Ombudsman against the ruling party, ZANU(PF), and at present these are quite outside his jurisdiction. If such a trend continues, it may be desirable to follow the lead set by Tanzania. Again the major question is whether such a move would be politically acceptable.

#### (b) Independent investigations

A notable difference between the Z-R Constitution and the Act concerns the power of the Ombudsman to make independent investigations. In line with other countries such as Nigeria and Mauritius, the original provisions gave the Ombudsman power to instigate investigations when he considered it desirable to do so. The 1982 Act does not permit such activity. It is difficult to understand the reason for this situation and it can only be presumed that the decision was based on a desire to "wait and see" how well the institution operated in practice. The Ombudsman himself has indicated a desire to have an independent power of investigation particularly so that action can be taken in urgent cases where his immediate intervention could resolve a dispute. Such a power is clearly necessary if the avowed aim of the institution to be people-oriented is to be fulfilled.(38)

36. Annual Report of the Commission for Investigations 1975; Case 216/75.

37. Section 9 (3) (c) and (d).

38. Annual Report of the Zimbabwean Ombudsman 1983, p.5.

#### 4. Post Investigation Proceedings

If it appears after investigation that injustice has been done to the person aggrieved in consequence of maladministration and some action should be undertaken in consequence thereof, the Ombudsman must report this opinion to the relevant body and make any necessary recommendations for rectifying the problem. The act complained of must be either contrary to law, based wholly or partly on a mistake of law or fact, or unreasonably delayed or otherwise unjust or manifestly unreasonable. (39)

The actual meaning of the term "maladministration" is not defined in the Act. A number of broad meanings have been postulated in other jurisdictions. For example the Investigator-General in Zambia stated in 1976 that:

"The abuse of authority or maladministration about which my office is concerned may take various forms, e.g. corruption, bribes, favouritism, tribalism, harshness, misleading a member of the public as to his rights, failing to give reasons when under a duty to do so, using power for wrong purposes, failing to reply to correspondence or causing unreasonable delay in doing desired public acts." (40)

It is preferable that no formal definition is formulated and the present practice continued of identifying maladministration by actual examples rather than by taking a legalistic approach. The list of the Inspector-General however does provide very useful guidelines for determining the scope of the term.

In common with other jurisdictions, the Zimbabwean Ombudsman has no executive powers and thus cannot enforce his recommendations. Failure by the offending body to implement a recommendation can only be dealt with by making a personal report to the Prime Minister and by laying a special report on the case before Parliament. He is thus entirely reliant on other bodies, and to a certain extent, public opinion, to compel compliance with his decisions. By the end of 1985 in only one case had it been necessary to resort to this procedure, and this concerned the actions of a local authority. The offending official was later removed on the orders of the Prime Minister.

#### 4. THE OMBUDSMAN IN PRACTICE

From the outset, the Ombudsman has sought to publicise the office by extensive use of the media. Interviews in English and the vernacular have been given and 5 000 posters in English, Shona and Ndebele published for distribution to all courts and government offices nationwide. This, together with the publication of two annual reports

39. Section 16.

40. Chomba, F. (then Investigator-General) in an address to the 3rd Annual Conference of the Institute of Personal Management, Lusaka, 20th March 1975 p.8.

has contributed to a steady increase in the number of complaints received. In 1983, 414 complaints were lodged and in 1984 this figure rose to 696. At present complaints are averaging 100 per month.

TABLE 1: DISPOSAL OF CASES

	<u>1983</u>	<u>1984</u>
Number of complaints lodged	414	696
Total number of cases disposed	195	558
Method of disposal: Sustained or Resolved	51	201
Not Sustained	67	198
No jurisdiction/declined	51	96
Otherwise disposed of	26	63
Carried Forward	219	357

Source: Annual Reports of the Office of the Ombudsman, 1983 and 1984.

As can be seen, complaints sustained or resolved now account for about 36% of cases investigated. These are instances where a complainant either suffered injustice in consequence of maladministration and corrective action was taken or an action was rectified without the necessity of an investigation. The figures for complaints not sustained show that the role of the Ombudsman is not only to seek corrective action against instances of maladministration but also to protect government departments against unjustified complaints. Indeed it is important that correct governmental practices be publicised, for in this way public officials will come to realise that the Ombudsman is an important protection against unfounded, malicious and unfair attacks upon them and accordingly be more willing to cooperate. A welcome feature in 1983 was the number of ministries which nominated senior officials, some at the deputy secretary or under secretary level, to liaise with the office. Similar arrangements have also been made with a number of Parastatal organisations. As the Ombudsman points out in his 1984 Annual Report:

"This is a practice which should be encouraged since it facilitates communication between my office and the authorities concerned and is of considerable help in the expeditious disposal of queries and complaints. It all too often happens that heads of authorities, closeted in their ivory towers are impervious to the problems and difficulties experienced by aggrieved members of the public." (page 7).

The figures for complaints rejected for lack of jurisdiction have fallen from 26% in 1983 to 17% in 1984 but remain a cause for concern.

Some were undoubtedly the result of public uncertainty as to the role of the Office, but it is clear that many rejected complaints were the result of the jurisdictional problems discussed earlier. Once again it can only be urged that the jurisdiction of the Ombudsman is expanded rapidly into other relevant areas.

**TABLE 2: MINISTRIES SUBJECT TO COMPLAINTS**

	<u>1983</u>	<u>1984</u>
Ministry of Defence (including Air Force and Zimbabwe National Army)	44	200
Ministry of Labour, Manpower Planning and Social Welfare	48	149
Ministry of Home Affairs (including Police and Immigration Control)	42	92
Ministry of Justice, Legal and Parliamentary Affairs (including Prison Service)	41	87
Ministry of Finance, Economic Planning and Development	32	58
Ministry of Education	30	63
Others	177	266
<b>TOTAL</b>	<u>414</u>	<u>915</u>

Source: Annual Reports of the Zimbabwean Ombudsman.

As Table 2 indicates, over 70% of all complaints centre on only six out of the 24 ministries and other bodies falling within the jurisdiction of the Ombudsman. An increasing proportion of complaints have been directed against the Ministry of Defence. These largely relate to delays in processing terminal and pension benefits in respect of those members of the National Army who were either demobilised or retired from the Force. The demobilisation exercise is now complete and it is thus likely that the number of complaints of this nature will fall considerably in future years. With regard to complaints against the Ministry of Justice, these concern cases involving administrative problems in the Primary Courts, particularly with regard to maintenance and related domestic issues. As has been seen, although there is no jurisdiction to consider complaints against the judiciary, matters concerning administration within the Ministry fall within the scope of the office.

A large group of complainants have come from the civil service with problems concerning terms and conditions of service. These have been in the fields of education and local government in particular. Somewhat

surprisingly perhaps, non government institutions and other parastatals have been little involved with the Office with only a total of 58 complaints being received up to the end of 1984. It remains to be seen as to whether this figure indicates the efficiency of these organisations.

It is a considerable cause for concern to find that virtually all complainants come from urban areas and that the poorer and less privileged members of society, especially those in the rural areas, have made little use of the institution. The immediate cause of this is that the office is wholly based in the capital, Harare, and no visits to other parts of the country have been undertaken. This is a sharp contrast to Tanzania for example, where during the first year of operation the Permanent Commission of Enquiry spent 215 days travelling 16,096 miles to virtually every part of the country advising people as to their rights under the new law.<sup>(41)</sup> That this has proved impossible in Zimbabwe is largely due to budgetary and staffing problems. For example, in 1984 there were only two investigating officers, one law officer and five clerical staff to assist the Ombudsman. These figures may be compared to those of Zambia for example, where there are 19 members of staff and Tanzania where there are 20 investigating officers and a total staff of 50. The institution can only truly fulfill its function if it is able to reach all members of society and offer them effective help. Any expansion in staff and resources will be expensive but unless such a programme is undertaken, the Ombudsman will remain irrelevant to the majority of people in Zimbabwe.

##### 5. FUTURE DEVELOPMENTS

Whilst the Ombudsman has made an encouraging start, there are a number of areas in which improvements can be made. Attention has already been drawn to the question of extending his jurisdiction and expanding the Office. Possible future developments can now be examined.

###### 1. Funding

A fundamental principle for the successful establishment of the office is for it to be and be seen as being free from governmental influence. It is somewhat surprising, therefore, that the Act does not specifically provide for an independent budget for the institution. Although the salary of the Ombudsman is charged to the Consolidated Revenue Fund, the Ministry of Justice, being responsible for the administration of the Act, has borne the other expenses of the office. This lack of independent financing is a cause of concern for two reasons. Firstly it prevents the Ombudsman having independent control over the running of his office. As he himself points out:

"The Ombudsman should administer his own budget thereby ensuring the independence of his Office which, in my view, is consistent with the letter and spirit of the

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41. Annual Report of the Permanent Commission of Enquiry 1966-67, para. 6.

Constitution. I believe that this same principle applies to the office of the Comptroller and Auditor-General and I see no reason why it should not apply with equal force to my office."(42)

Secondly, the linking of the office with the Ministry could tarnish the image of the Ombudsman as an independent agent and cause potential problems when investigations against the Ministry of Justice are undertaken. Indeed in 1984, 87 complaints were received against the Ministry and although there was no apparent conflict, the potential for such a problem should not be allowed to exist. In view of the shortage of funds being experienced by Government, there is apparently no prospect of independent financing occurring at an early date. It is suggested that this is a priority area and accordingly funds must be made available if the office is to be viewed as an independent body by members of the public.

## 2. Tenure

The term of office of the ombudsman, i.e. three years renewable four up to three years, is unsatisfactory. To guarantee the independence of the office it is suggested that a longer term is required - perhaps a minimum of five years. Indeed in Nigeria consideration has been given to extending the term from three years renewable for three years to a full six years period for this very reason.(43) inevitably similar considerations to those raised in the earlier discussion on multi-member institutions are present here. The spectre of a powerful and popular ombudsman with first hand knowledge of the intimate workings of government and thus capable of forming the focus for political opposition may well be unacceptable to government. However, it must be said that the personal prestige of an ombudsman is most important to the success of the organisation and this can only be developed over a long period. Accordingly the possibility of extending the term of office (subject to the right to resign or for removal for cause) should be seriously considered.

## 3. Action Against Recalcitrant Bodies

Another omission in the Act is that the Ombudsman has no power to make orders or issue writs and directions comparable to those made or issued by the High Court. For example, at present the Ombudsman has no power to take action if an investigation is likely to be frustrated by the act of government department. Whilst unlikely to be used extensively in practice, this power remains a potentially important weapon against recalcitrant bodies.

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42. 1984 Annual Report, page 9. This strange situation is illustrated by the fact that the budget is so inadequate that it has not been possible to purchase a photocopying machine and the Ombudsman has been forced to make use of neighbouring government offices to copy relevant documents whilst a complainant waits.

43. See Adamolekun op cit.

#### 4. Expansion into the rural areas

With the majority of the people of Zimbabwe living in the rural areas, it is vital that new ways are found to reach such persons. Even with the limited resources available, a number of approaches are possible.

##### (a) Taking the Ombudsman to the People

The setting up of regional offices throughout the nation would be the ideal solution. This could be based on the Nigerian model. However, with the present constraints it is suggested that consideration be given to the introduction of a system whereby the Ombudsman (or his representative) would tour other major centres receiving complaints as normal. This would be on a regular basis lasting perhaps several weeks each year. The aim would be to reach aggrieved persons who otherwise might not know of, or be unable to communicate with the Ombudsman. If such 'safaris' were to prove successful, it would enable additional pressure to be put on Government to finally set up regional offices.

##### (b) Use of Members of Parliament

It was seen earlier that the concept of the Parliamentary Ombudsman has, in general, been rejected by African states. Thus the role that Members of Parliament play in, for example, the British system of bringing complaints of aggrieved persons to the Parliamentary Commissioner for Administration, has not been followed - with the exception of Sudan. It may well be time for Members of Parliament in Zimbabwe to take an active role of functioning as an additional channel through which complaints can be forwarded to the Office. Regular contact with their constituents involving the publicising of the Office and assistance to aggrieved persons in the form of ensuring that their complaints reach the Ombudsman could be a very real contribution to the successful expansion of the concept. This system could also be utilised by local councillors and senators.

The use of political parties at grassroots level is another possible method of gaining access to those living in rural areas. For example, the role of local ZANU (PF) organisations of assisting Government to educate workers and peasants and assisting the bringing of Government to the people could very well be utilised to publicise the work of the Ombudsman. This is certainly a more sensitive area bearing in mind that the suggestion made earlier that in due course political parties should fall within the jurisdiction of the Ombudsman. However, at this stage the priority must be to increase access in every possible manner and the active support of political parties in this area would surely be one of the most effective methods of achieving this object.

#### 6. CONCLUSIONS

The introduction of the ombudsman into Zimbabwe is encouraging as it signifies a willingness on the part of government to develop a more open administration. This article has sought to examine the office of the Zimbabwe Ombudsman in the light of the experience of other African nations and to consider in particular the problems facing the

institution. It has been seen that the Zimbabwean Ombudsman is experiencing many of the problems facing his colleagues elsewhere. Thus inadequate staffing and budgets appear to have hampered the development of the institution in a number of African states. To reach all citizens, many of whom are illiterate or highly suspicious of authority, is a daunting task. Only Nigeria, with its system of national and state level organisation and Tanzania appear to have been able to work effectively to try and tackle this difficulty.

If the Zimbabwean Ombudsman is to fulfill the role of assisting all members of society, these defects must be remedied. Even at this early stage, the number of complaints received reveal a genuine need for the institution and it is a need which must be met. It is important that the work and difficulties of the institution are widely publicised so that public pressure can be exerted to help bring about desired changes. If these are achieved, the Ombudsman will be able to play a vital role in protecting the rights of all Zimbabweans.



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