OMBUDSMANSHIP IN ZAMBIA

A STUDY OF THE REDRESS OF GRIEVANCES IN ZAMBIA AND THE PLACE AND ROLE OF THE COMMISSION FOR INVESTIGATIONS IN THE ZAMBIAN ADMINISTRATIVE PROCESS.

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I, Stanley Kabamba Chisambwe Mumba do hereby solemnly declare that this dissertation or any part of it has not been submitted for a degree to the University of Zambia or to any other University or institution.

Signed:.....

Date:.....

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ABSTRACT

"Ombudsmanship in Zambia" is the title of this dissertation. This title has been chosen in preference to "The Ombudsman in Zambia" or the "Commission for Investigations" or some other similar title. The choice is not entirely arbitrary. It is to be understood as necessarily following from one basic premise of the whole study - that all too often the formal analysis of institutions, beginning with the legislation under which they were constituted and ending with an answer to the question "have the intentions of the Legislature been achieved?"-as if all this occurs in a vacuum, fails to yield meaningful results. An attempt has been made here to avoid that.

Accordingly this dissertation has aimed at putting the Commission for Investigations, Zambia's own version of the originally Swedish Ombudsman institution, in its right context in the administrative process.

The dissertation is in two parts. Part one is essentially a study of the processes for redressing grievances emanating from the administrative

process that existed prior to the adoption of the Commission for Investigations. In this part, a somewhat detailed study of Judicial control of administrative action, Parliamentary control of administrative action and Political and Administrative control of administrative action in Zambia is attempted.

Part two justifies the adoption of the Commission for Investigations in Zambia in the light of the conclusions drawn in Part one. Part two then states, considers, analyses and draws conclusions upon the developments leading to the adoption of an Ombudsman institution in Zambia, the form, powers, jurisdiction and constitutional status of the Commission for Investigations and the relationship of the Commission to the Executive, the Legislature and the Courts.

Although an earnest effort has been made in the dissertation to extricate the Commission for Investigations from its legal shell and study its broader aspects in their socio-economic, political and historic context, it has also been realised that since the Ombudsman as a remedial institution is not

peculiar to the Zambian legal order, a study of the Zambian Commission for Investigations can be greatly enhanced if its operation is compared to the operations of similar institutions elsewhere. Accordingly attempts have been made, (although care has been exercised to avoid the impression that this is basically a comparative study of Ombudsmen in three countries), to refer to the operations of the "Parliamentary Commissioner for Administration," Britain's own version of the Ombudsman institution, and the Tanzanian "Permanent Commission of Enquiry." The choice of these two institutions has been dictated largely by two factors: The British institution was created six years before the Commission for Investigations and much has been published on that institution. The adoption of the Permanent Commission of Enquiry in Tanzania in 1966 marked the first instance of the adoption of the Ombudsman institution in an underdeveloped One-Party African state.

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CHAPTER ONE

I N T R O D U C T I O N

"Modern government, which rubs ever more frequently against private citizens, probably adds to the sum total of human well-being, but it certainly adds also to the sum total of human friction."

Gellhorn, When Americans Complain (1966)

Liberal democrats have repeatedly stated their agreement with the general proposition that one of the most phenomenal developments of the last century had been the complete transformation of the "proper" concerns of government activity. This "revolution" is often said to be manifested in the provision by government in the modern state of elaborate social services as well as the regulation of most of the daily business of mankind. And yet, it is further said, only a century ago the state in economically advanced nations existed for very limited purposes:

defence of the state from external aggression, public order, and the administration of criminal justice, being the most repeatedly asserted.[1] Emphasising this development, Garner asserts that "laissez faire died with the dawn of the twentieth century and today the state has to concern itself with the welfare of its individual members."[2]

That this development has been generally accepted by all liberal democrats may be further confirmed by the observations of one English Law Lord in the case of Pfizer Corp. v. Minister of health.[3] In that case the court had occassion to decide whether the administration of medicines to patients through National Health Service hospitals was a use of the medicines "for the services of the Crown" within section 546 (1) of the Patents Act 1949. Willmer L.J., delivering judgment in the affirmative, said:

> "It is no doubt true that in the mid-Victorian times the treatment of patients in hospitals would have been regarded as something quite foreign to the functions of government. But in the years that have elapsed since then there has been a revolution in political thought, and a totally

different conception prevails today as to what is and what is not within the functions of government."

The present study is not intended to be a comprehensive and critical evaluation of this much discussed "movement" from the laissez-faire political philosophy, if it be one, to the welfare state. Rather it shall be adequate for the present purposes that we elaborate only slightly on this widely agreed upon development.

Classical eighteenth-century capitalism in furtherance of Adam Smith's[4] thesis, is said in this development to have been vitiated by government initiatives designed to guide the day to day lives of private individuals. Examples are all too often cited by references to the developments in the capitalist nations of the world. For example, in the United States of America, state intervention in "private affairs" beyond that previously stated came initially in the creation of the first federal agency, established by a statute of 1789 to "estimate the duties payable" on imports and to perform other related duties.[5] The second agency was established by the President pursuant to a statute of September 1789.

This provided for military pensions for "invalids who were wounded and disabled during the late war "to be paid" under such regulations as the President of the United States may direct."[6]

From that period to the present day Congress has been grinding out legislation creating new agencies. Various services including electricity, water, gas, public transport, telecommunications, schools and inter-state commerce, to name but a few, are today administered by federal and sometimes state agencies.

The United Kingdom is also cited as having undergone this trend, the major differences with the United States being said to be occassioned by historical factors. In particular, it is pointed out in stating these differences that up to the seventeenth century in England the crown had vast powers of oppression, having their historical origins in the country's feudal history. In the seventeenth century, so the argument goes, the Crown lost most of its powers of oppressing the subject. Only certain powers today refered to as prerogative powers remained vested in the Crown. In particular these powers include summoning and dissolving parliament, declaring war,

regulating the armed forces, concluding treaties with other states and conferring honours.[7] That the "poor relief" law of 1572, providing for the collectors and overseers to compel "voluntary" payments for poor relief and Elithabethan "old poor law" of 1601 could be found on the English statute books of the time is quickly dismissed as exceptional and insignificant. It is then stated that it was not until the end of the nineteenth century that the welfare state asserted itself in England, so that today

> "pensions, allowances hospitals and a state medical service, free legal aid, environmental hygiene with its emphasis on housing, sanitation, clean food, water and air.... and the education of the country's children and even its adult citizens...."[8]

are regarded as being within the ambits of the "proper" concerns of the State.

This usupation, if that be the right term, by the State of the responsibility of regulating the day to day business of its individual members is seen by liberal democrats as being the most fundamental

reason for resorting to the presently ubiquitous administrative process.

The administrative process has been said to be the "complex of methods by which agencies carry out their tasks."[9] This summation, albeit typically American in its reference to "agencies" rather than the more English "administrative authorities", is an adequate statement of the basic idea of the administrative process. It is the process of implementing government policies outside the legislative and judicial processes.

In fact the administrative process is seen to be different from both the legislative and the judicial processes. Indeed it is due to the inability of both these processes partly to cope with the process of government in the modern state or otherwise to redress all grievances arising in the modern state that the administrative process has gained prominence and favour. Whereas both the legislative and judicial processes are obviously too slow and dilatory, not to mention incompetent, to handle all the issues arising in the modern state, the administrative process is said to be both well equipped and speedy and can therefore effect government goals more effectively.[10]

The development stated here, particularly insofar as it stresses the rise of the administrative process is regarded as phenomenal. All efforts are made to avoid detracting from or vitiating to the smallest degree the significance of the administrative process. And yet because of that, the need is often recognised to emphasise that with this development, where government activity constantly touch everyone, bruises and scratches are inevitable. As Jaffe has stated, "government, whether by legislator, executive or judge, can only be accomplished through individuals. Each individual will have his own conceptions of public good and his own purposes, and so will be caught (sometimes quite unconsciously) in a conflict between proper and improper motives, between motives which the law allows and those which it does not. This is more likely to be true in the case of an administrator than a judge, because an administrator is usually given by law a greater scope for action and is under pressure from interested groups "to get things done. 11"

The removal of these individual irritations is socially desirable. To that end there exists in the modern state institutions, within the administrative

process and outside it, for remedying individual grievances. These remedial institutions are central in the present study. But prior to delving into a critical analysis of remedial institutions in Zambia, it is desirable to relate this development to Zambia's history and circumstances. This is particularly so because in order to effectively account for any successes or failures of Zambia's institutions for remedying grievances arising out of the administrative process, one has to get a firm grasp of the historical factors which gave rise, directly or indirectly, to the institutions.

THE WELFARE STATE, THE ADMINISTRATIVE PROCESS AND COLONIAL UNDERDEVELOPMENT.

The discussion has hitherto been concerned with stating, definitely not originally, the generally agreed upon evolution of government administration mainly resulting from the onset of the welfare state in the western countries. It would be in order to footnote this by observing that insofar as the theme has consistently been to point out how the administrative process has gained prominence, it would be true to associate this development to those states

that have undergone communist inspired revoluations in the present century.

One cannot assert with justification that central government administration in Zambia underwent any fundamental transformation simultaneously as it did in these countries, particularly the metropolitan countries. Indeed at the time at which writers and other observers claim to have marked the rise of the welfare state and consequently the administrative process (towards the end of the last century), there was no territory with defined boundaries and identifiable unitary government institutions that one could call Zambia, or Northern Rhodesia, as the country was called prior to its attaining political independence. At the time, the British were still active in colonising various adjacent tracts of territory which were later to be merged at the British's initiative to constitute the Northern Rhodesian protectorate. We might briefly follow the process of defining Northern Rhodesia from the early stages of colonialism through to independence before "fitting in" the administrative process.

Unitary government for the territory presently

called Zambia started to emerge towards the end of the last century. The British South Africa Company (B.S.A. Co.) at the time was instrumental in establishing the basic institutions for the government of the territory. The Company, through its ambitious central figure Cecil Rhodes (who was later to lend his name to the territory, obtained letters patent from the British Crown in 1889 granting a royal charter of incorporation to the company. The Company was given power to obtain territory by treaty from the rulers of the various nations that occupied the territory, to administer the areas so obtained and to engange in all forms of economic activity. Rhodes in his efforts to assert his ambitions, proceeded to conclude treaties. He sent Lochner to Barotseland and the latter concluded a treaty, or more correctly, persuaded Lewanika to sign a treaty the same year.[12] Other negotiators, including Sharpe and Thomson, concluded treaties with rulers in other areas. As a result of these agreements, the B.S.A. Co. gradually spread its sphere of influence over the rest of the country and provided the effective administration of Zambia in

two parts: North-Western Rhodesia and North-Eastern Rhodesia. The two adjacent territories were amalgamated in 1911 to form Northern Rhodesia.[13]

Company rule over Northern Rhodesia ended in 1924 when the territory became a direct British protectorate. It was henceforth ruled by a Governor (to represent the British Crown) and a small staff. In 1953 the territory joined Southern Rhodesia and Nyasaland, the former a self-governing British colony and the latter a British protectorate, in the ill-fated Federation of Rhodesia and Nyasaland. This marriage broke down a decade later. On 24th October, 1964, Northern Rhodesia secured political independence of the British Crown to become a republic with the name Zambia.

It is now appropriate to comment on the evolution of unitary government in Zambia with a view to ascertaining the nature and extent of the administrative process, and the ensuing consequences.

The B.S.A. Co. was primarily and mainly a business concern. It was concerned with the exploitation of the mineral resources which the prospectors believed to be in abundance in the territory. Accordingly, one of the major interests to the B.S.A. Co.

in the 1890 treaty was the acquisition of mining rights over the entire jurisdiction of Lewanika, which was erroneously construed to include exclusive rights in the exploitation of minerals in the rich Copperbelt province. Development expenditure by the company as the administrator was unknown, except in isolated cases like the construction of the railway. Even in such cases the motive was to facilitate easy exploitation of the mineral resources.

Some observers suggest that social welfare as a facet of development efforts, was to some degree effected by missionaries.[14] Two observations may be made here. Firstly, social services provided by missionaries cannot justify the conclusion that the Government of the day was a welfare state Government. Secondly, a consideration of the motives for the missionaries providing these social services shall vitiate their value. The motives for setting up schools and even medical centres was not the provision of social welfare services for its sake. As Mwanakatwe has correctly asserted, "the basic motive was evangelization of the indigenous people, their conversion to the Christian faith and reclamation of

their lives. The provision of schools and educational facilities by Missionaries was fortuitous or, at best, merely complementary to their much desired objective of increasing the numbers of their Christian followers."[15] Any argument for missionary-inspired social services to prove early colonial welfare state ought to contend with this fact.

In the final analysis, the fact is during the period of Company rule, government administration was limited to very few matters directly connected with the attainment of the commercial goals of the administrators.

Did the institution of direct British rule in 1924 alter the position? Historical data and observations by scholars are available and they suggest even on their most cursory examination that any changes that occurred indeed over the next half a century were minor and insignificant. As Adu has argued, in his able study of the Civil service in Commonwealth Africa (in which study the expression "civil service" is used, significantly, to denote "government"[16] this trend was discernible

throughout all the British possessions. He says: "In the social services such as health and education, the civil service was not initially directly concerned with their development."[17]

The implications inherent in Adu's argument invite some elaboration. The evolution of the administrative process in Zambia is best understood after some consideration of the nature of colonialism generally.

The nature of colonialism and its offshoot of underdevelopment for the colonised is a rich topic. Vast amounts of ink have been spilled over the subject. As Colin Leys has asserted, "A bibliography on the questions raised in this section (of colonial underdevelopment) would now fill a book."[18] We obviously cannot in the present study attempt to advance a comprehensive statement of what has been said on the subject. Nonetheless we are not prevented from stating a brief but coherent outline of the nature of colonialism and its offshoot of underdevelopment, with particular reference to Zambia.

Colonialism has been called a "One-armed bandit."[19] This analogy is appropriate to

describe the consequences of close to a century of colonialism in Africa. To quote one French saying, colonies were created "by the metropoles for the metropoles."

It is trite knowledge that there were two salient motivating considerations behind the assertion by the colonisers of their sovereignty over the colonies: The quest for new markets for the produce from their expanding capitalist economies and the thirst for the exploitation of the abundant natural resources in the colonies. Deliberate efforts were made in furtherance of both these objectives. Colonies began to be progressively incorporated into permanent relationships with these expanding economics.[20] The relationships were, as should be expected from the above, ones of dominance and dependence of the colonies by and upon the metropoles.[21] The colonial states, dubbed by one author on political economy of colonialism as mere sub-committees of the metropolitan states,[22] was instrumental in instituting and perpetuating this relationship. It did so at two levels: by actively and directly enganging in the economic exploitation of the colony by protecting the national interest against competition from other capitalists,[23] and by providing the

necessary estate structures to guarantee optimum conditions under which private companies could operate in Africa using cheap African labour to obtain maximum profits.[24] In Zambia the most basic legislative device for private enterprise was enacted on 20th October 1921 in the Companies Ordinance, enacted to provide for the "formation, management administration and winding up of limited liability companies..."[25]

The effects of this development were the same in all dominant-dominated relationships. Mainly, these were the extraction of the surplus in the production process in the colonies, to the metropoles, rather than its re-investment in the colonies. PROF. Seidman has correctly stated that "the economic surpluses earned from African productive enterprise rather than being invested in Africa, were shipped overseas to enrich investors in the home countries."[26] Lack of capital for re-investment led to the growth of colonies being confined largely to the sector or sectors producing primary products for exports - what Prof. Ann Seidman calls the "export enclave."[27]

Another major effect of colonial underdevelopment was the emergency of new relations of

production in the colonies. New social strata and social classes were either introduced by colonial settlement, or created from among the indigenous population. But it has to be noted that colonial underdevelopment in Zambia occassioned more marked and exclusive class distinctions on racial lines: the colonial state work-force and the colonial white settlers constituted the capital owning class while the indigenous population constituted the lower class.

Partly as an essential aspect of this colonial underdevelopment and partly as a necessary consequence of it, the colonial state in Zambia provided next-to-nothing in the areas of social services. Supposedly they constructed roads, the railway line, hospitals and the like. The truth is that these were only provided when they constituted the necessary infrastracture for the extraction of surplus value. Secondly the sum total of these services was exceedingly small. Thirdly they were provided on racial lines. Statistics, though not always in themselves conclusive, may throw some light upon this aspect.

The calousness with which the colonial government regarded any expenditure on social services is proved by the indifference of the government in one specific area: Education, a social service which is surely central in any "welfare state."

Primary education was introduced, as alluded to above, by missionaries as early as 1883.[28] This primary education was however, grossly inadequate, (besides what has already been said above about missionary education). The colonial government only came in to pay lip-service to education in 1925. This did little to improve the situation. In 1925, for example, the estimated number of African childdren for whom educational provision was required was 200,000. Of these, only 50,000 children were in any kind of school. Out of the 50,000 the government could only boast of having provided school places for 600 of them,[29] the rest being in missionary schools.

Secondary education was unknown to the indigenous population until after the second world war. After it was introduced the places available

were riduculously few. In 1946 the enrolment of African secondary school students was 143. The figure continued to rise at a painfully slow pace so that in 1963, the year preceding the year of independence for Zambia, no more than 7050 indigenous students were attending secondary school.

All the while such minimal efforts were being exerted on education for the indigenous population, relatively vast amounts of the territory's wealth were being spent on children of white settlers. If the point is not easily amenable to proof on the basis of empirical facts of numbers of school places, it is easily proved by the expenditure. In 1924, the year the government entered the arena of education, £348 was spent on African education, while £7,722 was spent on the education of the very few children of whites. In 1934, £20,319 and £27,146 was spent on African and European education respectively, the apparently large increase in expenditure on African education being attributtable mainly to grants from private institutions like the Barotse Trust fund. In 1945, £149,450 and £75,289 was spent on African and European education respectively.[30]

In the final analysis, the position of the colonial government regarding the provision of educational facilities can best be summed up as pathetic. As Dr. Kaunda has said, "the colonial government's policy was not one of widening the scope of education to cover the majority of the poeple of this country, but was meant to cater for very few to provide, as it were, clerical, menial and other services."[31]

What has been submitted regarding the activities of the colonial government in the way of providing educational facilities is equally applicable with regard to other social services. The two dominant themes in the process of colonialism, it should be emphasised, were the domination of colonies by the metropoles in the economic sphere on the one hand, and racial discrimination, resulting in social stratification on the lines mainly of race and economic status in the political economy.

It was institutions and state structures instituted for colonialism that the politically autonomous government inherited in 1964. The new government was not unaware of these legacies of

colonialism. For example, this awareness of the consequences of colonial domination was stated in the first ever Development plan for an independent Zambia. It was said:

> "Zambia presents among other features a dual economy in a most extreme form. By this is meant.... inherited structures by which economic activities (are) in the hands of a small privileged minority, while the rest are confined to subsistence agriculture or to providing a reserve for unskilled labour and a limited market for consumer goods."[32]

It was immediately realised that political independence was meaningless without economic independence and meaningful economic and social development. Not unnaturally therefore, and in fact in the fashion of political units elsewhere which had been subjected to brutal colonial underdevelopment (e.g:- The Arusha Declaration of the TANU party of Tanzania in its most widely quoted assertion, declared: "We have been oppressed a great deal, we have been exploited a great deal, and we have been disregarded a great

deal,"[33]) the government in Zambia sought to walk the socialist road. An ideology was adopted in 1967 to be the guiding spirit for the long walk towards economic independence and economic and social progress. Humanism, the ideology adopted in 1967 was declared to be "man centred."[34] But in effect it is proof of the government's commitment officially to socialism. Accordingly social welfare ranks high on the priorities. Bold and deliberate efforts were thus undertaken to introduce social services through state institutions. In the field of education, the one facet of social life we used to examine the nature of colonialism, altogether fourteen secondary schools were constructed in various districts in the country in a period of eighteen months from January 1965 to June 1966 under a transitional development plan. Two teachers colleges at Chipata and Kasama were also constructed under this plan.[35] Indeed even plans to construct a University in the country were speeded up so that by 1966 the University of Zambia became functional, not to mention numerous other educational institutions not being schools or Universities.

Under the First National Development Plan capital expenditure on education was committed to amount to £9,811,000 for 1967 and £39,426,000 for the

period 1967 to 1970, while recurrent expenditure was committed to be £1,655,000 for 1967 and £8,234,000 for the period 1967 to 1970. Phenomenal increases indeed, compared to expenditures on education during the colonial period.

Government initiatives towards the declared goal of socialism have continued and have in fact gathered momentum during the fourteen years of political independence. The government introduced state capitalism by capturing the commanding heights of the economy, the minining industry, other industries, manufacturing and trade and commerce, through economic reforms which commenced in 1968.[36] The government Statised the banking and other finance institution and tried to localize capitalism through further economic reforms in 1970.[37] Other types of reforms came in the area of Rent Control Legislation and legislation on freehold title to land.[38] The government further undertook to provide a plethera of social services like free education without racial discrimination, free medical services, a public transport network, social security schemes and numerous others which shall not be recountered for the sake of brevity.

Much may be said about the effectiveness of all these government initiatives in attaining the openly avowed objectives of economic independence and economic and social progress for the country. The Government cannot, at least, be accused of being totally blind to the difficulties of attaining these goals, given the fact that Zambia, once having been a colony, was dragged almost beyond redemption into the web of international capital and the neo-colonial status so often characteristic of the so-called "third-world." As President Kaunda has admitted, "There is an explosive time lag between the attainment of political sovereignty and effective control of the economy."[39]

However, our immediate concern is not with the degree of success or otherwise of government initiatives to extricate the new state from its neo-colonial status. Our immediate concern is slightly limited-although that is not to say is not concerned with the above, which would, of course, be a naive claim to lay. We are concerned here rather with the fact that the above development has entailed a tremendous increase in state institutions. Government has developed from a government of "a governor with a skeleton staff" to a

complex institution employing thousands of workers, among them skilled workers, semi-skilled workers and unskilled workers. As in the case of the advanced nations of the world, the expansion of the administrative process occassions more skirmishes between the rulers and the ruled. It is at this stage that one appreciates the efforts made earlier to delve in detail into stating the historical evolution of government administration in Zambia. The belated expansion of the administrative process may have had far- reaching effects upon the volume of grievances against administrative action, but it also had equally far-reaching effects upon the degree of success in remedying these grievances that has been attained by the remedial institutions in the legal system. Let us summarise the colonial legacies and so expand the present point.

The indifference to social welfare demonstrated by the colonial government had, among other consequences, the result of leaving the vast majority of the population in Zambia in a state of abject poverty at the time of the attainment of political independence. Seidman, without intending any abuse, said of the peoples of the underdeveloped world:

"Hunger haunts their days, malignant diseases is an overhanging threat, the spectre of early death lurks in their doorway."[40]

The conceivable consequences of this, although not always immediately apparent, include the following:

1. It is to be expected that since Zambia on attaining independence found herself with a meagre number of educated, let alone trained personnel in all fields of national life, those that had to take over the institutions of government were ill-trained for responsibilities. As Gupta has said:

"Owing to the scarcity of indigeneous talents, the first round of promotion and appointment was made almost wholly on political grounds. As a result, a large number of UNIP workers came to hold important official posts even though they were insufficiently equipped to discharge responsibilities."[41]

2. The existing remedial institutions, notably the courts, were, in principle, available for all aggrieved persons. In practice however, it would be a case

of expecting too much to insist that the people, while being in a state of abject poverty, could proceed to have their grievances against the administration remedied through the judicial process.

3. That social welfare became after independence the openly avowed goal of the state entailed the government taking up many other roles beyond enforcing criminal justice and collection of taxes. This has been discussed in detail elsewhere. It is repeated here to emphasise that the administrative process in Zambia expanded with very little competent manpower thereby increasing the possibilities of maladministration and abuses of power.

In the final analysis one is led to the conclusion that during the entire period of expansion of the administrative process in Zambia there are, and are emerging, more and more administrative authorities to create occassions for individual grievances while the remedial institutions were and are not readily available to remedy such grievances. That is the basic premise of the present study.

We are now able to apply the test of experience to the above thesis. This demands a study of judicial

control of administrative action, parliamentary control of administrative action and political and administrative controls of administrative action. We shall then consider, in the light of the successes or failures of these remedial processes to remedy maladministration, the institution of Commission for Investigations, being a form of Ombudsmanship, with the objective of identifying its place, role and impact in the administrative process in Zambia.

PART I

CHAPTER TWO

THE REDRESS OF GRIEVANCES IN ZAMBIA

One of the principle objectives of any government, and particularly a government in a newly independent and underdeveloped state, should be to develop a good and efficient administration to constitute the basis for effective co-ordination of the various objectives of the government. The existence of a good and efficient administration is dependent upon various and varied factors. Among them are the existence of an effective and responsible government capable of ensuring adequate social and economic conditions of life for the people, law and order and the existence of an effective system of checks upon and safeguards against abuses of powers by the executive and administrative organs of government.[1] The later condition usually receives lesser attention but it is of equal significance to the former conditions. As Wade has

correctly argued:

"Government under the rule of law demands proper limits on the exercise of power."[2]

Much has been written on various forums by students and scholars in political economy and in the field of the administration of criminal justice on the need for an effective government capable of catering for the social and economic needs of the people and capable of sustaining law and order as necessary conditions in society. Much remains to be said. But what do we, as students of administrative law, have to say about the existence of a system of checks upon and safeguards against abuse of administrative powers in a newly independent and underdeveloped Zambia? This dissertation intends to provide the answer to this question. Earnest efforts will be made to go beyond the statement of the various institutions or devices for keeping administrative power in check in the fashion of orthodox liberal democratic scholars as represented by de Smith, Garner, Wade, Jaffe and Davis, to name but a few. An initial premise in this study shall be the emphasis that in discussing the various institutions for redressing administrative wrongs in Zambia, most of which are a

colonial legacy, any honest and candid discussion will do much more than cast a cursory glance at the relationship between the legal principles as they are enunciated in statutes and judicial pronouncements and the socio-economic and political circumstances obtaining in society.

Without intending to tell the story from end to beginning, we may exemplify this argument by stating that such honest and candid discussion will do injustice to those adjectives if it fails to raise and attempt to answer the issue: To what extent is it true to suggest that "the review by the ordinary courts of the constitutionality or legality of legislative and executive acts, and of the propriety of administrative acts of a quasi-judicial nature is the main bulwark of constitutionalism in the Commonwealth.. ....."[3] given the palpable inability on the part of the vast majority of Zambians to invoke the judicial process? The present study intends to maintain fidelity to this approach.

The institutions for checking abuses of administrative power in Zambia have their roots in various developments. Dependent, among other factors,

upon these developments is the efficacy of the institutions.

With those general observations, it may be stated that the present chapter shall discuss judicial control of administrative action, parliamentary control of administrative action and the various administrative and political controls of administrative action other than the institution of Commission for Investigations. Upon ascertaining the proper role that these remedial institutions have played and continue to play in redressing grievances against administrative determinations, our discussion shall proceed to consider particularly the place and role of the institution of Commission for Investigations in the process of remedying public grievances.

The choice of isolating this institution and granting it particular attention is not entirely arbitrary. The choice is justified by many factors. Salient among these are: firstly, although the commission for investigations has been in existence for about four years, having commenced its task on 15th September 1974,[4] there still is not available any comprehensive assessment of any aspect of the institution, let alone the whole institution. Discussions

have been held on some aspects of the commission. Notable among these is the speech by Prof. Gupta to a law students convention on "Aspects of the 1973 Zambian Constitution" held in 1974. This Speech preceded the commencement of the Commission's work and was therefore brief. The various speeches by the first Investigator-General (Chairman of the commission) MR. Justice Chomba and his successor also lack depth: they are intended to publicize the Commission's work and functions and are aimed at the "general population." Secondly, the institution of ombudsman, of which the Zambian Commission for investigations is a variation, is today of universal significance. Rowat has rightly stated that:

> "In recent years the (Scandinavian) office of ombudsman has gained widespread attention in the democratic world as a device for controlling bureaucracy."[5]

In light of this development, all efforts at evaluating the true role of the ombudsman in the administrative process wherever the institution is adopted, are to be encouraged.

The ultimate objective of the dissertation shall be to place the institution of Commission for

Investigations in its proper context, historically, socio-economically, politically and indeed juristically; to ascertain the proper extent to which the institution has, if at all, supplemented pre-existing remedial institutions in the process of checking administrative high-handedness and to evaluate the future of the institution in the Zambia administrative process and legal system.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION.

The ardent English or American administrative law scholar shall be heard to insist that the role of the courts in controlling administrative action is fundamental and of very material consequences in limiting executive and administrative powers. Elsewhere we quote Prof. Nwabueze's bold proposition on the role of the judiciary as custodian of constitutionalism. (supra). S.A. de Smith, author of the foreword to Nwabueze's book, and an authority on judicial review of administrative action in the United Kingdom, has also argued that:

> "Over the past 10 years, and especially since 1967, there has been a striking

increase both in the frequency with which judicial review has been invoked and in the readiness of the courts to intervene.... If one looks merely at the figures for centiorari, prohibition and mandamus, the record reads as follows

		1966	1968	1971
(i)	Applications for leave to apply for the orders	47	87	227
(ii)	Orders finally granted	18	24	36"[6]

Another eminent English professor has asserted that "one of the main objects of administrative law is to provide a control over the administration by an outside agency.... Traditionally the place of this "outside agency" has been filled by the courts of law."[7]

Scholars of administrative law even outside the English legal system have asserted this supervisory role of the courts over the administration. Prof Gupta has stated that "history and tradition have stood in the way of any serious challenge to the supervisory jurisdiction of the judiciary."[8]

The Zambian judiciary, in all material respects, has its roots deeply embedded in British colonialism.

This has occassioned many consequences. One such consequence is that the courts in Zambia are looked up to as having the same role in adjudicating over disputes between the governors and the governed. Indeed as late as 1960 the High Court Ordinance enacted as follows:

> "The Court shall be a superior Court of Record and...shall...possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England."[9]

Need it follow from this that the role of the courts in Zambia is in fact similar to that of English courts in the way of providing remedies for administrative wrongs? Logically, the question should receive an affirmative answer. But since logic has been known to produce half-truths or untruths, this study aims at delving further into the issue. It has to be emphasised that the most significant consideration in answering the question is the ascertainment by empirical facts of the ACTUAL role of the Zambian courts in redressing administrative wrongs, and the factors that give rise to this. Also, just as "judicial review in England has significant roots in history...",[10] the study of judicial review of administrative action in Zambia

ought to be partly historical. Hoover, Piper and Spaldin, in their valuable contribution to the study of the judiciary in Zambia, correctly asserted that

> "almost every aspect of the courts... can either be traced back to an historical origin or can be accounted for as a later day attempt to be rid of some offensive aspect of the colonial administration of the courts."[11]

COLONIAL ADMINISTRATION AND THE COURTS SYSTEM: THE ORIGINS AND EVOLUTION OF THE JUDICIARY IN COLONIAL NORTHERN RHODESIA.

The Zambian judicial system in its present form, has its roots in British colonial rule. British colonial rule, although it asserted itself over the territory of Northern Rhodesia, now Zambia, by the end of last century did not introduce direct British administration until 1924. British colonial rule was prior to 1924 delegated to the British South Africa Company. This commercial concern was empowered by the British crown to administer the territory and engage in all forms of economic activity. This delegated authority included the administration of justice. Section 14 of the royal charter of October 29th 1889 enacted that

"In the administration of justice to the said peoples...careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong...but subject to any British laws which may be in force..."[12]

The territory was at the time consisting of two adjacent but to some degree independent units: North-Western Rhodesia and North-Eastern Rhodesia. Accordingly, the judicial institutions established after 1889 consisted of two hierarchies: one for each territory.

The Barotse North-Western Rhodesia order-in-Council of 1889 established the first judicial system for the territory of North-Western Rhodesia. Provision was made for the appointment of judges and magistrates,[13] to be nominated by the British South-Africa company, but appointed by the British High Commissioner in South-Africa.[14] The North-Western Rhodesia territory did not, however, acquire a High Court until 1906.[15]

The North-Eastern Rhodesia order-incouncil 1889 established a judicial system for North-Eastern

Rhodesia. Article 21 created a High Court of two judges and Article 29 created magistrates' Courts. As with North-Western Rhodesian courts, personnel for these courts were to be appointed by the High Commissioner of the British Crown in South Africa.

The years 1889 to 1911 saw an increase in colonial infrastructure and general administration over the two territories. Accordingly such changes to the two hierachies of courts as were deemed necessary were effected by proclamations of the High Commissioner, High Commissioner's notices and Government notices. By 1911 the colonial administrators realised the need to amalgamate the two territories. On 4th May 1911 the Northern Rhodesia order-in-council 1911 was promulgated, after which the two territories previously refered to as North-Eastern Rhodesia and North-Western Rhodesia became a single British possession called Northern Rhodesia.

Developments in what was now a unitary judicial system in Northern Rhodesia continued. The assumption by the British Crown of direct responsibility over Northern Rhodesia from the British South-Africa Company in 1924[16] brought about further changes. However, all these changes were minor, they affected the form of the judiciary rather than its basic idea

or content. One such minor charge (before 1924) came by way of empowering the High Court of Northern Rhodesia to hear and determine criminal matters either as a court of first instance or as a court of review.[17] A further development, after 1924, came in 1933. Then the legislative council of Northern Rhodesia reviewed every aspect of the High Court and reduced them to a single comprehensive code. This Ordinance, in its most significant provisions, clarified the High Courts position vis-a-vis the magistrates' courts and asserted the powers and jurisdiction of the court as being identical to those of the High Court of England.

No major developments in the administration of justice at the level of the High Court and subordinate courts were effected until the post-independence era, aside from the institution of a Federal Supreme Court for the Federation of Rhodesia and Nyasaland in 1953.

All the while these developments were taking place in the definition of a judicial system to administer received (or imposed) law that came as an incident to colonial conquest, a parallel development was taking place with regard to the administration of justice for the indigeneous population. Hoover,

Piper and Spalding have asserted that "from its inception, the system of judicial administration introduced by the British in Northern Rhodesia differentiated between Europeans and native Africans."[18] However, the manner in which the administration of justice for indigenous Africans was left to the indigenous Africans themselves is of no consequence for the present purposes. Article 14 of the 1889 Charter limited the jurisdiction of native courts to private customary law and administration of criminal justice relating to minor offences. All matters relating to public law were left within the jurisdiction of the High Court and the subordinate courts. Consequently, discussion of the role of "native" courts would be futile, although it is not to be denied that these courts contributed immensely in the administration of justice generally.

JUDICIAL CONTROL OF THE ADMINISTRATION AND THE COLONIAL COURTS.

We proceed to determining the role of colonial courts in limiting administrative action.

The subordinate courts were during virtually the entire period of colonial rule unable to exercise any control over administrative action. The major factor

occassioning this was the status; legal and factual, they occupied in the government machinery. The bench in the subordinate courts was constituted by colonial officers, the District officers and the Provincial officers, who, in their "other" capacities, occupied administrative positions. There was thus no separation of the executive and the judiciary at this level. It would therefore be redundant to even suggest that they played the least significant role in limiting executive and administrative powers, for their allegiance was more towards the execution of colonial policies rather than removal of administrative skirmishes in the process. As one writer asserts with authority:

> "The colonial service was essentially one which was constructed to prosecute the imperial policies in Africa, and its orientation and personnel were, therefore, suited to this purpose."[19]

Subordinate courts were thus totally ineffective as controls over administrative powers, and "it would have been naive for either administrators or natives to regard these courts as defenders of the people's rights."[20]

Judicial control of administrative action had to come, if at all, from the High court.

Control of the colonial administration by the Colonial High Court may best be studied by firstly discerning the limitations that existed upon its effectiveness. These are many.

Firstly, the High Court, (or High Courts before 1911) was inaccessible to the majority of the people who were affected by colonial administration. The inaccessibility was occassioned by geographical factors and lack of infrastructure attendant on colonial underdevelopment. Before 1911 the two High Courts created for North-Western Rhodesia and North-Eastern Rhodesia were domiciled at Kalomo (and later Livingstone) and Fort-Jameson (now Chipata) respectively. After the 1911 amalgamation the High Court remained at Livingstone and only moved to Lusaka when Lusaka became the Capital of the territory. Admittedly the High Court did commence a "circuit system" whereby it sat at various administrative centres like Mbala, Chipata, Solwezi and Mongu at some time during the year, besides the introduction of permanent sessions at Ndola, but the former development turned out to be aimed at facilitating the High Court to exercise its criminal jurisdiction more effectively.

It may conceivably be argued that during the entire period of British colonial rule the extent to

which government administration was felt by the people was minimal,[21] that therefore since the extent of government administration was minimal it would have been suferflous to have a High Court which was geographically accessible to the whole population. The validity of this argument is not to be denied, and no attempt shall be made. However this argument at best vitiates our earlier submissions without negating them. Colonial administration, laissez-faire in approach as it was, was replete with instances of far-reaching administrative powers at the district and provincial levels. The District Commissioners and Provincial Commissioners were very powerful men and their contact with Africans, if only in the collection of taxes and the enlistment of migrant labour, necessarily occassioned grievances for which a court with the proper jurisdiction may have been appreciated. To that extent it has to be admitted that the inaccessibility of the High Court during the period of colonial rule in principle derogated from its ability to control administrative authorities, subject, needless to add, to the ensuing considerations.

The second, and more consequential limitation upon judicial control of administrative action during

colonial Northern Rhodesia was the socio-economic factor. The vast majority of the population, in effect the entire African population, was incapable of invoking the jurisdiction of the High Court in administrative cases on account of poverty and ignorance. This again has intimate connections with the very nature of colonial underdevelopment in Northern Rhodesia. As has been argued elsewhere,[22] provision of social welfare facilities like education for the African population was not considered to be a worthy concern of the colonial government. The introduction of a money economy after the co[illegible]nt of the exploitation of the mineral resources in the territory in 1927[23] did little to emmancipate the ability of the African in particular to rely on the judiciary to protect him from abuses of administrative powers. President Nyerere of Tanzania stressed that it is idle to insist that an ignorant population can seek judicial pronouncements on the limits of government for ".... is there any point in talking about controls of executive power when most people are unaware that there are legal limits on the power of government or they have little or no idea how such limits may be enforced?"[24]

That judicial control of administrative action

by the High Court was virtually non-existent may be proved by reference to the law reports. This, however, is a difficult exercise because until 1938 it was not ".... the practice of this territory to publish annually or at all the judgements and decisions of the High Court."[25] In 1938 volumes one to four of the Northern Rhodesia law reports were published to include cases decided between 1931 and 1948.

Between 1931 and 1937 there were no reported cases of judicial control of administrative action. Between 1937 and 1948 there were three reported cases of this nature: George Stewart v. The Lusaka Management Board, Fisher and Shelmerdine Ltd. v. The Commissioner of Taxes and an application by Rhodesia Railways for an order of Mandamus.[26] Between 1943 and 1944 there was only one such case[27] reported. Between 1944 and 1948 there was again only one case of judicial control of administrative action.[28] During the period 1949 and 1954 there was a relatively large increases in cases of this nature. There were a total of eleven cases: the case of Attorney-General v. Marrapodi trustees[29] and ten other cases, all of which were instituted at the instance of plaintiffs of Asian origin. These ten cases make interesting reading. They confirm the large extent

to which administrative powers were vested and exercised by colonial administrators, for which there was such minimal control. All the Cases arose out of immigration laws. In all the cases, the complainants sought to enter or remain in Northern Rhodesia. They were required under s.3(2) of the Immigration Ordinance to undergo an English comprehension test.[30] In the case of Ismail Suleman Lunat six others v. the Queen,[31] the plaintiffs were given a passage to read from the English novel Treasure Island. They subsequently sat a comprehension test based on their reading but they failed to impress the immigration officer. The High Court held that the standard was too high. The Court stated, obiter, that the test ought to have been by way of asking the complainants to read an extract from an ordinary newspaper and write a precis of the extract.

The finding of the Court in the Lunat case was no deterrent on the administrators to exercise the same wide powers. Proof of this is to be found in the fact that subsequently nine similar cases came up for determination by the High Court.

It should be noted that if the cases refered to here are proof of judicial control of administrative action during the period at issue, then not only do their paucity confirm the earlier arguments on the ineffective-

ness of the judicial control device but the cases also confirm the large extent to which poverty and ignorance occassioned by colonial underdevelopment negated all hopes of having a powerful judiciary to check administrative abuses of power: all the cases hitherto refered to were instituted at the instance of complainants who were non-Africans and non-Zambians (non Northern-Rhodesians!).

The period of colonial rule after 1955 was a period of an increase in instances of invoking the judicial process against executive and administrative action. But this increase was NOT occassioned by a sudden end to poverty and ignorance among the masses of the people, nor was it occassioned by inexplicable motivating factors which compelled people who were aggrieved by administrative irritations to seek to invoke the jurisdiction of the High Court. What this increase means is that the administration multiplied its activities in certain specific areas to contain certain situations while certain particular communities in the territory sought to rely upon the Courts to counter the efforts of the administration. This development is best illustrated in the areas of judicial control of administrative action affecting political activities and judicial review of administrative action affecting immigration.[33] The case

of Banda v. Immigration officer,[34] an immigration case, provides interesting reading: It shows again the nature of the administrative action over which judicial control was lacking. Banda was declared a prohibited immigrant in the Rhodesia and Nyasaland federation. In declaring that Banda should remain in the federation the Court observed that "the applicant, although a prohibited immigrant, had not been lawfully ordered to leave the federation".[35] A similar pronouncement was made in the case of Re Zolo.[36] The two cases show that in exercising control over administrative action, the Courts were further limited by the nature of the legislation. This limitation on judicial control is significant. We shall deliberately avoid discussing it here for it shall be treated exhaustively at a later stage.[37]

The above analysis of the role of the judiciary in checking administrative action leads to the conclusion that the judiciary was, then, a "power next to nothing." It was unavailable when it was required to check individual grievances against the administration, due largely to socio-economic factors. Consequently there are very few cases in our law reports of judicial control of administrative action in colonial Northern Rhodesia.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION AND THE ZAMBIAN COURTS.

The discussion so far has adduced arguments to suggest that judicial control of administrative action during the colonial era was very minimal. On the incident of the attainment of political independence by Zambia, there is evidence suggesting lapse of some of the reasons for the failure by the colonial judiciary to act as the common-man's watchdog over the administration: inaccessibility of the High Court due to geographical factors and lack of infrastructure was surely cured by the provision of infrastructure and the institution of a "circuit" system for the High Court. Judicialisation of the subordinate courts by the creation of a Carrier magistracy and the Judicial service commission may be said to have enabled even the subordinate courts to exercise powers of review or control over administrative action. Finally wasn't poverty and ignorance as a reason for the ineffectiveness of judicial control of the administration vitiated or totally removed by State initiatives towards socialism, coupled with the encouragement of local enterprise?

It is difficult and obviously inadvisable to attempt to provide "hard and fast" answers to these questions as though they do not admit controversy.

It is suggested to evaluate judicial control of administrative action in Zambia by considering two general categories of factors that can conceivably militate against the judicial process as a device for checking administrative malpractice, namely: socio-political considerations and strict law. We shall, in the final analysis have answered the questions, and more; we shall be able to commit ourselves on the veracity of the contention that judicial review of executive and administrative acts is the bulwark of Constitutionalism in Zambia.

INDIGENISATION OF THE JUDICIARY AND JUDICIAL CONTROL OF ADMINISTRATIVE ACTION.

Before we argue the two categories of factors upon which successful judicial control of administrative action is dependent, it is important that the "Locus standi" of the courts in such cases be established.

Political independence in 1964 brought many changes in both the form of the judiciary and the law it had to administer. The most fundamental changes was occassioned by the adoption or promulgation of a constitution for the Republic of Zambia,[38] which henceforth became the source of authority of the entire judiciary,

directly as in the case of the Court of Appeal,[39] and the High Court,[40] or indirectly as in the case of the subordinate and local courts.[41] The Constitution empowered the President to declare that the Judicial Committee of the Privy Council would be a final court of Appeal for the Republic.[42] No such declaration was ever promulgated and consequently the provision lapsed.

The 1973 Constitution retained this hierachy of the judiciary but changed the name of the final court of appeal from Court of Appeal to Supreme Court.[43] The other courts were retained.[44]

The other major change affecting the judiciary was the introduction of a Judicial Service Commission,[45] generally regarded as a necessary requisite to the existence of an independent judiciary. The Judicial Service Commission was to exercise the powers of appointing and dismissing judicial officers at the level of the subordinate courts and local courts,[46] and to advice the President over appointments of judicial officers at higher levels.

Tenure of office of judicial officers was also secured after 1964.

The 1973 Constitution again retained the status quo with regard to the Judicial Service Commission and the security of office of the above stated judicial

officers.

The locus standi of the courts as defenders or advocates of the individual in his confrontation with the executive and administration may be seen in the following light:

Firstly, although the 1964 constitution at independence became the "basic norm" for the judicial institutions, this did not affect the remedies which the courts could previously provide for actions or causes brought before it. Section 2(1) of the Zambia Independence Act 1964 enacted that all pre-existing laws were to continue in Zambia, whether they were rules of law or provisions of statute. Section 4 (1) of the Zambia Independence Order 1964 also reiterated this provision. This enabled the courts to provide such remedies, like the orders of certiorari and mandamus and the writs of habeas corpus ad subjiciendum and prohibition as they could have provided before 1964. One important variation should be noted: The magistrates' courts had been empowered as early as 1913 to issue the writ of habeas corpus ad subjiciendum.[47] They have no such powers under the subordinate courts Act.

Secondly, the Court of Appeal (and subsequently supreme Court) was and is a superior court of record with

all the powers of such a court.[48] The High Court is a superior court of record with unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.[49] The subordinate courts, within the ambits of their jurisdiction, (which, apart from depending on the subordination of these courts to the High Court, also depended upon what class a particular subordinate court was) were and are able to assert their authority over administrative action. The same may be said of the local courts, albeit with little confidence, owing to the nature of the limitation upon the jurisdiction of the local courts that statute provides. The jurisdiction of the local courts is limited to the administration of customary law which is not "repugnant to natural justice or morality or incompatible with the provisions of any written law,"[50] the provisions of all by-laws and regulations under the Local government Act and the provisions of any written law which the particular local court is authorised to administer by the Minister.[51] The local court is very inactive in the exercise of its jurisdiction under the two latter provisions.

Thirdly, a novel feature of the independence

constitution of Zambia was the inclusion of a "bill of rights." This bill of rights purported to recognise certain fundamental human rights which were supposedly pre-existing.[52] These rights were, mainly, the right of every person in Zambia to life, liberty, security of person and the protection of the law, to protection of the privacy of the home and property, from deprivation of property without compensation and to the freedom of conscience, of expression and of assembly and association. The bill of rights has been retained virtually in total under the 1973 Constitution, together with the procedure for their protection by the courts. The procedure of the protection of the fundamental rights is contained in ARTICLE 29 (formerly Section 28), which reads:

> "29 (1).....if any person alleges that any of the provisions of Articles 13 to 27 (inclusive) (protective clauses), has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
>
> (3) If in any proceedings in any subordinate court any question arises as to the construction

of any of the provisions of Articles 13 to 27 (inclusive) .... the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court."

Clause 2 and clause 4 of the same Article explicitly confer jurisdiction in the courts as follows:

"29 (2) The High Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of clause (1);

(b) to determine any question arising in the case of any person which is referred to it in pursuance of clause (3)

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 13 to 27 (inclusive).

(4) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court...."

Fourthly, the courts have been conferred with powers of review in some specific instances under

statute. In this category may be placed the powers of the High Court and the subordinate courts to determine the rent payable for dwelling houses under the Rent Act 1972.[53] Further illustration of such jurisdiction are those enactments which, ex abundati cautela, confer the right of appeal to the courts from certain administrative determinations. Section 11(2) of the Town and Country Planning Act, CAP 475 of the laws, is a case in point. It enacts that "where any person who has appealed to the Tribunal... is disatisfied with the decision of the Tribunal, he may, within 28 days of (the) decision, appeal to the High Court...." It may conceivably be argued that such provision is necessary for the purpose of placing a limitation upon the period within which the appeal may be brought. This argument may have been valid were it supported by appropriate language in the actual statute.

The authority of the courts in invoking their jurisdiction over administrative Cases has thus been proved. This enables us to study the efficacy of judicial control, based upon the above provisions, in practice. This necessitates considering in detail the

two categories of factors that can conceivably militate against effective judicial control of the administration which were stated in the preceding section.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION: EXTRA-JUDICIAL FACTORS.

Extra-judicial factors that contribute to rendering the judiciary ineffective in controlling the administration are many and varied. They may operate to prevent aggrieved parties from invoking the judicial process or they may operate to prevent effective judicial control during the exercise of or after the courts have exercised their jurisdiction in administrative cases. The various factors shall now be examined in turn.

The most outstanding extra-judicial factor is the socio-economic factor. It have been argued in the earlier section of this discussion that the poverty and ignorance in which the overwhelming majority of the people languished during the colonial era had grave consequence in nullifying the abilities of the colonial judiciary to keep the colonial administration in check. The people were both too poor to seek judicial remedies and, in any case, ignorant of the very existence of such remedies. Consequently the cases cited for judicial

review during the colonial era were all brought by the very few members of the settler population and the Asian immigrants who were exempted from this otherwise valid generalisation.

The attainment of political independence, with the deliberate initiatives by the government towards the provision of social welfare may have introduced a large number of people to the money economy, (a process which no doubt commenced slightly earlier but was speeded after independence), may even have enlightened them towards the realisation that administrative powers are limited by pre-determined rules of law. It should be noted in this regard that in 1929 no more than 61,730 Africans were in paid employment in the territory.[54] This figure increased to 334,970 in 1969.[55] The population increase for the same period was from 1,298,651 in 1929[56] to 4,057,000.[57] This development may not reveal a marked increase in the number of Africans in paid employment over the period under reference in proposition to the increase in population. But for our present purposes it is of essence that the number of persons in paid employment increased over the period. Another relevant development is that the earnings of Africans and non-Africans

in paid employment have also risen during the same period. It is difficult to determine with precision this increase. Suffice to say in 1954 the African in paid employment earned £77 (K150), £191 (K380) in 1964 and £1117 (K2234) in 1977. The non-African in paid employment earned £1,237 (K2444) in 1954, £1647 (K4294) in 1964 and £2442 (K4884) in 1977.[58]

The figures quoted above shall not impress the economist in their accuracy. Indeed not only are they estimates, but they are based upon a consideration of only the major employers in the economy. But they are satisfactory in the effort to prove that there has been an apparent shift in the economic status of the Africans from a total lack of any financial power at all during the early stages of colonial rule to a position where more Africans are able to take paid employment and command a wage.

Are we to conclude that therefore the Zambian today is able to invoke the judicial process for all administrative determinations that offend him? A consideration of the judicial process dictates a negative answer to this question. This state of affairs is occassioned by many factors.

The apparent improvement in the financial

strength of the working Zambian from the colonial era through to political independence, is meaningless in the face of the financial requirements for setting the judicial process in motion. It is a notorious fact that securing audience before our judicial establishment is no inexpensive undertaking. The crucial majority of those negatively affected by administrative action cannot raise the K500 which may be demanded by practitioners to invoke the jurisdiction of the courts. Even those who can may consider this too high a price to pay just to secure the protection of the courts, particularly considering the nature of the judicial process - it is a gamble because the outcome of the judicial proceedings cannever be forecast with accuracy even by the most brilliant of advocates.

The administrative process in Zambia is ubiquitous. In the areas of immigration, preservation of public security and order, master and servant relationships (where the state or state agencies are the masters), licensing, enforcement of standards, administration of social security schemes (National Provident fund, Workmen's compensation and workers' pension schemes to name but three), rent control and many others where powers and functions are conferred and

vested upon state institutions, the state and its agencies are very active. To suggest that all these state activities are administered without occassioning grievances, given the unsatisfactory disposition of state administrative machinery would be naive. One judge, as if to confirm this, asserted that "government departments do not have a high reputation for efficiency".[59] And yet, in the fact of this, the judiciary in Zambia is least busy in the areas of judicial control of administrative action. This suggests that socio -economic factors in the form of poverty and ignorance have played and continue to play a very large role in reducing the effectiveness of judicial control of administrative action.

However, there is a feature of the Zambian legal system which demands some attention if the present submission is to escape all challenge. This is the Legal Aid scheme administered by the state.

Legal aid to persons who cannot defend a charge in court has, of course, always existed in Zambia. The High Court has always had the discretion to assign lawyers to defend persons who, on being charged with a criminal offence, were unable to provide a defence lawyer at their own cost. Indeed the Poor Persons Defence

Ordinance of 1957 made it mandatory for legal aid to be granted by and at the expense of the state for certain offences. But it was not until the passing of the Legal Aid Act of 1967 that legal aid was made available for litigants in civil cases. The Legal Aid Act was enacted to provide for the granting of legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them to engage lawyers to represent them.[60]

The Legal Aid scheme is administered by a department of Legal Aid headed by a Director and consisting of a small number of professional staff. The Department commenced its task in July 1967.[61] It presently has offices in Lusaka, Ndola and Livingstone.

Assistance of the department may be secured at the instance of an aggrieved person,[62] at the instance of the director[63] or at the instance of a court.[64] The director has invoked his powers to "invite" a person to apply for legal aid particularly in cases involving infant dependants who stand to benefit from fatal accident claims.[65]

The legal aid department too has recognised the negative effect that socio-economic factors have had upon the role of the courts as protectors of individuals

against the power of the state. The director has said in this regard that

> "there (is) an apathy in the pursuance of civil redress through the process of the courts due not to any tradition of non-litigiousness but to ignorance and lack of means."[65]

The efforts of the department in trying to "correct this situation" have been hindered by various problems.

Firstly, from its inception the department has been understaffed. The 1970 annual report of the department says at page 5: "The expansion programme of the department has been blocked by initial and recurrent under-staffing and by inability to recruit suitable personnel for professional posts, mainly because of competition for recruits and attractions offered by the private bar."

The consequences of this problem upon the department which in any case has a small establishment of 13 lawyers, have been severe.

Secondly, although the department has offices in three administrative centres in the country, Lusaka, Ndola and Livingstone, the department has nonetheless

been unable to cover the whole country due to transport problems. The department has always been allocated an average of only two landrover vehicles.[67] This has made it impossible for legal aid to be provided in outlying areas, assuming that the other factors had permitted it.

All the efforts of the department have, therefore, been directed at criminal cases. The reports of the department confirm the large gap between the activities of the department in criminal proceedings and its activities in civil cases, as may be shown in the following table:

	1970	1972	1974
Applications for aid - civil	623	786	623
Approved for proceedings-civil	274	222	262
Applications for aid - criminal	1436	2236	2375
Approved for proceedings-criminal	1036	1665	1297

Source: Annual Reports, 1970, 1972 and 1974

It ought to be noted that the efforts of the department in civil cases touching on judicial control of administrative action are even less than may be

assumed from the figures. The figures stated above do not differentiate between private law and public law - whereas our concern is with the activities of the department in public law.

In the final analysis, the contribution that the legal aid department can be expected to make, or indeed has made by way of invoking the jurisdiction of the courts towards judicial control of administrative action is minimal. More so in fact that there are further reasons beyond those cited here which are not easily amenable to quantification. In particular, the department has in some instances received little co-operation (during the necessary early stages before litigation) from some government department on the basis of the "common employer" notion. As a variation of this factor, it has not been unknown for some claims against the government being pursued by the department to be discontinued because of instructions from outside the department-this is within the writer's experience.

Apart from the socio-economic factors, there have been other factors, which we shall call socio-political, which have also militated against effective judicial control of the administration.

During the colonial era, the personnel which administered the law at subordinate courts level were

the colonial administrators themselves. This has already been stated. The High Court judges, on the other hand were trained judicial men with the same common law sense of justice as judges elsewhere in the common law world. Thus their sympathies cannot be said, from that point of view only, to have laid with the administration. But the sympathies of the High Court judges did lie with administrators in the latter's confrontation with private individuals by virtue of membership in the same ruling class. Robert Martin has correctly asserted that

> "judges are members of the ruling class by birth or assimilation.... and hired employees of the state who depend ultimately on the co-ercive power of the executive for the enforcement of their decisions."[68]

This is true of the colonial period and of the post-independence period. The personnel that administers justice and are supposed to champion the private individuals' cause in the face of vast administrative powers share common roots with the administrators. They all comprise the few learned men and women whom colinial rule's lip-service towards "social welfare" blessed with education in the late hours of colonialism. There is tacit mutual support.

This being the general rule, it admits exceptions. Where exceptions have been registered by way of judicial indiscretion to overlook this fact serious consequences have ensued. In 1969, for example a major confrontation occurred in Zambia between the Executive and the Judiciary. A magistrate had then convicted two Portuguese soldiers for illegal entry into Zambia and fined them heavily. On appeal, the High Court set aside the sentence, calling the offence a "trivial" one. Soon after the President of the Republic expressed sentiments of dissatisfaction with the High Court judgment. The two soldiers were thereafter detained. Chief Justice Skinner issued a "press release" supporting the High Court judges, and insisting upon the need for an independent judiciary. On 16th July 1969 members of the Zambia Youth Service demonstrated outside the High Court, shouting that the only good white man is a dead one, much to the apprehension of the judges who had locked themselves up in their chambers. Following this incident and further statements from President Kaunda announcing his intentions to Zambianize the judiciary (although Skinner, a white man, was himself a Zambian), the Chief Justice announced his resignation from the United Kingdom

where he had gone for a "holiday" immediately after the incident.

This brings us to another important aspect. It is that the courts' ability to control executive action is dependent upon the political climate prevailing at a given time, and many instances are available to demonstrate the point. For example two cases of Ranger v. Greenfield and Wood[69] and Att-Gen v. John Stanley Thixton[70] may be cited to illustrate the point. Both cases arose in the area of immigration law and were "on all fours" in facts. The Federal Supreme court and the Court of Appeal for Zambia arrived at exactly opposite decisions in such a manner as can "only suggest total judicial difference to the will of the Executive."[71] And it has to be emphasised that this executive action affecting the power of the judiciary is invoked more often than is often realised. It is also present in such actions as the permission of the entry into Zambia of a South-African lawyer for the purpose of defending a minister of state charged with an offence arising out of a shooting incident while an English Queen's Counsel is not allowed by the immigration authorities to enter the country for the purpose of appearing for an accused person.

Both counsel happened to have been duly qualified to practice in Zambia.[72]

Where it has proved difficult to bend any aspect of the judicial process in accordance with the political wind, the courts have not forgotten to apologise for the "unfavourable" judgements arrived at. In particular, whenever the courts have ordered the release of a person detained under the Preservation of Public Security regulations due to failure on the part of the detaining authority to comply with Constitutional requirements, the courts have assumed the role of advisors to the government (a role which they vehemently denounced in the case of Nkumbula v. Att.Gen.)[73] by advising the government that "it is open to the detaining authority.... to make another order (for detention)."[74]

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION: THE LAW.

Socio-economic and political factors have accounted for the inability of the judiciary to control administrative action to a very large extent. One might even venture to say they have rendered the judi-

ciary virtually irrelevant in the process of redressing administrative wrongs. The preceding discussion has emphasised this aspect. But much as we may be justified in arguing that judicial review is not the bulwark of constitutionalism in Zambia, it would be difficult to justify a claim that the judiciary is totally irrelevant in administering public law in Zambia. Cases have arisen and continue to arise in redressing grievances against administrative determinations. In the process of redressing such grievances - which phrase should be understood to mean no more than disposing of the grievances in accordance with law - the courts have had to interpret predetermined principles of law.

The present study shall now aim at exposing and analysing the extent to which judicial control of the administrative process has been affected by the very principles applied by the courts.

The law relating to judicial control of administrative action in the common law jurisdictions is extremely complex and intricate. de Smith an authority on the subject, has admitted as much. He says:

> "Judicial review of administrative action is an extremely complex subject with intricate ramifications. We cannot cover

every aspect, even in outline."[75]

The paucity of litigation in Zambia in this sphere of law does little to help the situation. We shall not, however, attempt to add to this state of affairs for the present thesis is not aimed primarily at arguing the case for, and the details of, judicial review in Zambia.

From the studies of administrative law in other common law jurisdiction and from studies of our legal system one might state that judicial control of administrative action may be invoked for different purposes. The most important ones are:

1. To get civil remedies for an alleged civil wrong committed by an administrative agency in the course of its official functions;
2. To have an administrative determination quashed or declared invalid on the ground that the administrative agency acted ultra-vires his statutory powers or that the determination contravenes the Constitution. The two celebrated cases of Kachasu v. the Attorney-General and Patel v. Attorney-General,[76] are instances of this;
3. To procure on appeal the reversal or variation of an administrative determination for error of law;
4. To obtain release from unlawful detention by applying for the writ of habeas corpus ad subjiciendum.

Litigation in Zambia based on this has been relatively frequent;

5. To secure an authoritative statement of the law governing a specific legal dispute by way of a binding declaration awarded by the court;

6. To secure the performance of a public duty, usually by applying for the order of mandamus or mandatory injunction; and

7. To defend oneself in proceedings which rely on the validity of an administrative act or order.

The authority of the courts and the grounds upon which the courts may provide the above remedies have already been stated and they cannot face any serious challenge. But it is necessary before we discuss the principles of law relating to judicial review of administrative action to comment on one further issue.

Many legal writers and judges argue that the availability of legal remedies for grievances against the administration is dependent upon the nature of the administrative act at issue. They argue that administrative action may be quasi-judicial, legislative or executive or administrative in character. One such writer is Garner who writes that:

"An act of an administrative agency may be purely administrative or executive in character, or it may be of a legislative or a judicial nature."[77]

de Smith has also discussed this classification. According to him "the functions of public authorities may be roughly classified as (i) legislative, (ii) administrative (or executive), (iii) judicial (or quasi-judicial) and (iv) ministerial."[78]

According to these same learned authors, this classification of administrative action is material in that the judicial remedies available" may well depend on the nature of the government function the particular exercise of which the court is asked to review,"[79] so that some remedies like certiorari and mandatory injunction are available only "if the function in question is a judicial or quasi-judicial one."[80]

It is today difficult to appreciate the value of this classification of functions. English administrative law scholars have been the first to concede the fact. de Smith says "the meanings attributed by the courts to the terms "judicial," "quasi-judicial," "administrative," "legislative" and ministerial" for

administrative law purposes have been inconsistent."[81]

The English bench has, ironically, been particularly uncomplimentary in challenging this classification of functions. In 1971 Lord Denning made what Edmund Davies, L.J. thought were "powerful observations

> "(On the criterion for complying to the principles of natural justice) it is now well-settled that a statutory body which is entrusted with a discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other hand, or what you will.. ....."[83]

The classification of administrative functions was also questioned in the case of Re K(H).[84] In that case K. was entitled to enter the United Kingdom if he could satisfy the immigration officer that he was at least 16 years of age. He was refused admission. K sought to have the decision quashed contending that the officer had been exercising a quasi-judicial function and had therefore been under an obligation to comply with the rules of natural justice. Salmond, L.J. stated that the officer had to act "fairly in accordance with the ordinary principles of natural

justice." Blain J. added that the officer had a duty to exercise his jurisdiction "whether it be administrative, executive or quasi-judicial, fairly." (emphasis added).

It is clear therefore that for one of the purposes which originally it was sought to distinguish various forms of administrative action-that of determining the applicability of the principles of natural justice - this distinction has been discarded and held irrelevant. It will be shown later that the other main purpose for seeking to classify administrative action, that of determining whether the courts may impugn the administrative action at issue by issuing one of the prerogative writs (e.g.:- certiorari does not lie unless the action being challenged is quasi-judicial in character.[85]) has also largely ceased to depend upon this distinction of functions.

In any case the very descriptions given to the various forms of administrative functions leave scope for uncertainties. de Smith describes the quasi-judicial function as "having the duty of making determination after investigation and deliberation upon questions affecting the rights and liabilities of individuals."[86] Are there, one might ask, any

administrative functions that do not invoke all the above elements? Is the entire administrative process therefore quasi-judicial?

That establishes a basis for discussing the legal principles that affect the effectiveness of judicial control of administrative action. These shall be discussed under two general headings. These are:

1. The legislative practice of inserting words into power confering or function creating Statutes which prevent the courts from reviewing the exercise of such power or functions, and

2. The legislative practice of conferring powers the exercise of which is discretionary upon the incumbent of the powers and are therefore largely beyond the jurisdiction of the courts.

These two broad headings shall now be considered in turn.

EXCLUSIONARY CLAUSES IN STATUTES.

The exclusion of judicial control of administrative action by the legislative practice of inserting "exclusionary clauses" in power confering statutory provisions is not new to the common law, neither is it perculiar to Zambia. It has posed a particularly

intriguing subject to many common law students for a long time. Wade has traced the origin of the problem to as far back as the Seventeenth Century. He says:

> "for three centuries ... the courts have been refusing to enforce statutes which attempt to give public authorities uncontrollable power."[87]

Generally speaking, exclusionary clauses have taken one of two forms. They have either been by way of enacting that a determination by a particular administrative authority under a statute at issue shall be "final" or that the determination "shall not be questioned in any proceedings whatsoever." But this is only a general rule. Section 14 of the citizenship of Zambia Act[88] enacts that:

> "The minister shall not be required to assign any reason for the grant or refusal of any application under this Act, and the decision of the Minister made under and in accordance with the provisions of this Act shall not be subject to an appeal or to review in any court."

But Section 11 (3) of the Lands Acquisition Act,[89] in excluding from judicial review the powers of National Assembly to determine the Compensation payable for land which has been acquired by the state, enacts that:

"No compensation determined by the National Assembly under this Act shall be called in question in any court on the ground that it is not adequate."

The approach of Zambian courts in the construction of exclusionary clauses cannot now be fully assessed due to the paucity of litigation (caused not by the exclusionary clauses, but probably by the factors discussed above). However it is submitted that the Zambian courts will in the event of being required to construe exclusionary clauses adopt the approach of other common law jurisdictions. It is that factor that justifies the ensuing discussion on exclusionary clauses.

Use of exclusionary clauses in statutes necessarily involves statutory interpretation on the "intention of the legislature." Invariably the intention of the legislature in inserting exclusionary clauses in power creating legislation is to "prevent all litigation over the matter."[90] One here ought to refer to the most important decision in recent history

in this regard; the judgment in the Case of Anismic Ltd v. Foreign Compensation Commission.[91] In that case, the Foreign compensation commission, a statutory tribunal constituted for the purpose of adjudicating claims on funds paid by foreign governments to the British government in compensation for the expropriation or destruction of British property abroad, dismissed a claim of £4m from anisminic Ltd. This claim had arisen out of the loss of a manganise mine in the Sinai Peninsula in consequence of the Suez hostilities of 1956. The claim was dismissed on the ground that Anisminic Ltd had sold their undertaking to an agency of the United Arab Republic government before the treaty (1959) under which the United Arab Republic paid £27.5m to the British government for distribution by the Commission, and had thus not complied with a provision of an Order-in-Council requiring that all claimants and their successors in title should be British nationals.[92] Section 4 (4) of the Foreign Compensation Act 1950 provided:

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."

That the intention of the legislature in inserting this exclusionary clause was to prevent litigation of any kind over the subject was emphatically stated by the government during the enactment of the Act. It was then stated that "the Commission was concerned mainly with making ex gratia distribution" and that since it needed to know "how much of the cake was left" for distribution to claimants, it would be very difficult for the money ever to be distributed in reasonable time if the whole exercise could be held up by substantial claims being taken to the High Court.[93]

The Anisminic case is regarded as a milestone in the incessant battle between the legislature and the judiciary on exclusionary clauses. It is regarded as the final proof that in the face of the manifest intentions of the legislature, the courts have "assumed" the authority to "lift the veil" and exercise some control, over administrative determinations. The justification for this is seen to be the fact that where judicial control is excluded, this exclusion is limited to the control of proper determinations under the statute. Put another way, a statute which makes an administrative power unquestionable does not apply to determinations outside the jurisdiction of the administrative agency at issue, since this is not a

"determination" within the true meaning of the Act. In the Anismic Case, Lord Reid said that an exclusionary clause protects every determination which is valid, but that we cannot construe the word "determination" as to include everything which purports to be a determination but which is in fact no determination at all. Lord Pearce added that by "determination" parliament meant "a real determination" not "a purported determination."[95]

In short, the courts will go behind any exclusionary clauses to challenge the exercise of an administrative power on jurisdictional matters. As correctly observed by the Master of the rolls Denning in Ashbridge Investments Ltd. v. Ministry of Housing:[96]

> "the court can only interfer on the ground that the Minister has gone outside the powers of the Act or that a requirement of the Act has not been complied with...."

Robert Martin has also clearly stated the position as being that:

> "...an exclusionary clause...is only sufficient to protect from review acts which are prima facie within the scope of the power granted. Where the limit

of the statutory power are exceeded, its purported exercise will be in law a complete nullity..."[97]

Having asserted thus, it becomes necessary to attempt an explanation of what matters are to be considered jurisdictional and what matters are substantive. This is not easy and legal writers on the subject have conceded as much. Indeed in the attempt to resolve the difficulty schools of thought have emerged with opposite contending views. The "purists" and the "conditionalists" are the two important contending schools. The purists regard errors as to character and constitution of the administrative determination and certain essential preliminary proceedings such as the need for certain administrative authorities to comply to the principles of natural justice, as the only reviewable matters. On the other hand the conditionalists argue that in addition to falsehood of the facts inquired into the amount of evidence given on these facts are reviewable under the general heading of jurisdiction.[98]

The battle between the two schools as to what goes to jurisdiction and what does not rages on.. Griffith and Street define the concept of jurisdiction as "the marking off of the area of power: something

ascertainable at the outset of a process, the conditions on which the right of a body to act depends."[99] In the meantime another case, that of Padfield v. Minister of Agriculture, Fisheries and Food[100] following in the fashion of the Anisminic Case went beyond the "pure jurisdiction" theory to reinforce the argument for "conditional jurisdiction."

It is clear, finally, that courts are not entirely powerless in the face of exclusionary clauses. But all the efforts put in by the judicial process to emphasise this position merely vitiate, but do not defeat, the contention that exclusionary clauses in statutes contribute to putting administrative action beyond and outside judicial control.

JUDICIAL CONTROL OF ADMINISTRATIVE DISCRETIONARY POWERS.

The Zambian administrative process, as indeed the administrative process everywhere else with equally or more complex state machinery, is replete with discretionary powers. Statutory power is today more often than not conferred in the form of discretionary power. Prof. Gupta has said "every phase of the present day administration presupposes the vesting of large discretionary power in the administrators."[101]

It is said that discretionary powers are indispensable to the present day administration. The multitude of areas over which the state seeks to assert itself, particularly in the present day Zambia with its social welfare approach, cannot permit the legislative process to predetermine all courses of action for the administrators - it has to concede large discretionary powers.

The vesting of discretionary powers is not, however, a new feature in our legal system. It dates back to the institution of government administration. Discretionary powers only increase with the development in structure and functions of the state. It is not difficult to identify discretionary Powers in statutes. A discretion is vested when a matter is left to an administrative agency to determine as he deems "appropriate" or "convenient" or "advisable" or "reasonable" or the opposites of these words, or if "in his opinion" it is "in the public welfare" or in any other language that would suggest the exercise by the administrative agency of his free will in deciding on the course of action.

The troublesome feature of discretionary Powers, far from being their justification, is their

control. Discretionary powers are not readily amenable to control, and least so by the judicial process. This stems largely from the fact that by definition discretionary powers are subjective. Prof Gupta is correct in asserting that "an administrative agency is said to have discretion in a matter when it has the power or liberty to choose between alternative courses of action and the correctness or incorrectness of the choice cannot be demonstrated."[102]

Be that as it may, courts have attempted to check the exercise of discretionary powers, ex post facto, by relying upon certain general principles, evolved by the judicial process. These principles may be classed into two broad categories: failure to exercise a discretion and excess or abuse of a discretion.

FAILURE TO EXERCISE A DISCRETION.

As a ground for invoking judicial control, the detailed ramifications of this principle are that

1. Courts may compel the exercise of a discretion under certain circumstances. No predetermined criterion has been agreed upon regarding what these

circumstances are. The only guide was that advanced by Cairns L.C. in the House of Lords judgement in the case of Julius v. Lord Bishop of Oxford.[103] He said:

> "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, [illegible], something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise the power when called upon to do so."

Two limitations are immediately obvious upon this principle. Firstly, the principle is a rather "weak" member of the category of principles under which courts may exercise control over "the exercise of discretionary powers": this ground goes to the securing of the exercise of a discretion rather than to its control. Secondly "the authority in which a discretion is vested can be challenged to exercise that discretion, but not to exercise it in any particular manner."[104] Courts have been particularly keen to comply to this requirement. In the case of Nalumino Sinioti,[105] Picket J. stated that "....mandamus

does not order a tribunal to adjudicate in a particular way."

2. A discretionary power vested in a particular administrative authority must be exercised by that authority without being directed by other institutions to which the authority may be subordinate. Further, in the exercise of the discretion the authority cannot delegate its power to an inferior body. In fact delegation of a discretionary power may be regarded as a total failure to exercise that power.[106] An Indian Case, Commissioner of Police v. Gordhandas[107] illustrates the exercise of a discretion under directions. In that case, the Commissioner of police had a statutory discretion to issue or revoke licenses for cinema houses. He exercised this power by granting the respondent a licence. Later on, the commissioner of police sent the respondent a note in the following words:

> "I am directed by the government to inform you that the permission to erect a cinema at the above site granted to you under this office letter... is hereby cancelled."

This was held to be bad exercise of the discretion and therefore no exercise at all.

This principle is not entirely reliable in its application. Firstly, it is a weak argument to advance in support of the contention for judicial control of discretionary powers. As with the first principle, this present principle goes to the definition of the discretion rather than its control. This, however, is a minor objection. Secondly and more seriously, it is an act of self-deception to ever imagine that an incumbent of a discretionary power can overlook the sentiments of institutions to which he is subordinate in exercising the discretion. If it be argued that there is a distinction between an incumbent of a discretion being directed and being influenced, and that the latter does not offend the principle while the former does, the answer to that shall be that the distinction between influence and direction is very thin indeed. Where, in order to avoid offending this principle, all that an administrative authority vested with a discretionary power has to do is omit pointing out that he is "directed to inform..." then the distinction between influence and direction is lost completely. All exercise of discretion shall then be valid (on the basis of this principle) unless the aggrieved party can overcome the momentous task of proving that there was direction.

3. The courts will insist upon the need to comply with the principles of natural justice in the appropriate cases. This is a difficult area, not so much because of any problems in determining the true implications of the two principles of natural justice: audi alteram partem (hear the other party) and nemo judex in causa sua (no one can be judge in his own cause) but because it is not entirely clear when the principles are required to be complied with. The old traditional approach (justified by the judicial origin of the principles) that all bodies exercising quasi-judicial powers ought to comply to the two principles,[108] has been abandoned.[109] However, no firm principle has emerged to state the criterion for applying the principles. One may seek to add merely that some broad criterion was laid down in the case of Durayappah v. Fernando.[110] That case stated that the correct approach should be to take into account the nature of the property or office held or status enjoyed by the complainant, the circumstances under which the "deciding" party is entitled to intervene and the sanctions the latter can impose. This criterion is vague. To some extent it might be argued that due to the vagueness of the criterion, the courts now have more

powers to challenge administrative action. That would be true in Zambia as it is in England were the Zambian courts to take advantage. Recent cases in Zambia suggest that Zambian cases are either unaware of the development of the law on the applicability of the principles of natural justice as a ground for exercising judicial control, or are not particularly keen on it. In the case of Chendaeka v. Luanshya Municipal Council,[111] the High Court for Zambia had to resolve the issue of whether the principles of natural justice had been offended by the Luanshya Municipal Council by throwing out Mr Chendaeka's application for a market stall licence without giving him an "opportunity to be heard." Gardner J. presiding over the case, dedicated a considerable effort to the issue of whether the Luanshya Municipal Council was a quasi-judicial tribunal or not, thus confirming the view that Zambian courts still rely upon the "old" criterion in determining the relevance of the principles of natural justice.

It is clear therefore that in Zambia, the principles of natural justice, although they potentially constitute a strong device for courts to rely upon to controlling administrative action, are limited

in their application due to the approach of the courts themselves.

EXCESS OF POWER.

It has been stated that "there is an excess of power when an administrative authority exercises a power not given to it by the statute upon which its action is purported to be founded".[112] This is a good summary of the implications of the principle of nullity of administrative action for excess of power. But this being a summary, it is necessary to expand the point by stating that the question of determining whether the power is vested by the statute involves statutory interpretation. Power may be vested expressly or by necessary implication.

In a country where the constitution has been reduced to a single code, such as in Zambia, a new dimension has been added to the grounds upon which an administrative act may be impugned in court: This additional ground may be that the act is in contravention of constitutional provisions which stipulate certain procedures and which seek to protect certain "fundamental rights," or that the administrative act is based upon statutory provisions which are "unconstitutional." In the case of Kangombe v. The attorney-

general,[113] the court had occassion to decide whether the power of the President under ART. 132 of the Constitution to appoint and exercise disciplinary action over persons in the Teaching Service, which power had to be exercised on his behalf by the Teaching Service Commission under clause of the same article except where he requires a matter which was under consideration by the commission to be referred to him could be exercised by the President and the Commission simultaneously. The High Court decided that ".... the exercise of the disciplinary power is in the alternative, not concurrent or cumulative." The Court of Appeal upheld this decision. The validity of administrative acts vis-a-vis the constitutionally protected fundamental rights was an issue in the case of Kachasu v. Att-Gen. A young girl was suspended from school for refusing to sing the national anthem and to salute the national flag as required by regulation 25 of the Education (primary and secondary schools) regulations 1966 made under an Act of parliament.[114] She challenged the validity of the act of suspending her from school and the statutory instrument that empowered this and the statutory instrument that required

school children to sing the national anthem and to salute the national flag. She argued that these provisions and the administrative act constituted hindrances of her enjoyment of the freedom of conscience which is constitutionally protected. The court found that her constitutional right had been contravened, but this contravention was "reasonably justifiable in a democratic society and was authorised by laws which were both reasonably required in the interests of defence and for the purpose of protecting the rights and freedoms of other persons..." (these being among the constitutionally justifiable contraventions.)

One of the biggest limitations upon the reliance by the courts upon the "excess of power" principle to control administrative action lies in the all so common legislative practice of vesting very wide discretionary powers upon administrators-what Garner calls "unfettered discretion."[115] Indeed it is doubtful whether the court could have upheld regulation 25 of the Education (primary and secondary schools) regulations 1966 had the statute been more explicit in conferring statutory instruments making powers than merely saying the Minister was empowered to "prescribe subjects for instructions..." Under

these circumstances, only the most flagrant excesses of jurisdiction are amenable to control by the judicial process.

Abuse of power, where this is [illegible] against constitutionally protected rights is particularly unreliable as a ground for challenging administrative discretion. In its present form, constitutional protection of fundamental rights is a "give and take affair" - the constitution gives protection of fundamental rights and takes it away by providing for very wide circumstances under which a contravention can be allowed. That an applicant who alleges that any of his fundamental rights have been infringed is further required to negate the possibility of the contravention being justifiable, as was held in the Kachasu case, renders the applicant's task truly pitiful. (The court said in that case that "... it is part of the applicant's case that regulation 25 is unconstitutional and invalid. The onus is on her to prove it, and as part of that onus she has to show that regulation 25 is not saved by any of the provisions of (Article) 21 (5) of the Constitution). The problem is heightened by the ease with which courts can succumbto declarations of good intentions by

legislators as a guide to determining whether an administrative act is to be upheld or not. In Kachasu case the fact that the legislature had declared the objective of the statutory instrument as being "for the purpose of promoting national unity,"[116] had a bearing upon the decision of the court to uphold it.

In conclusion, one might submit that constitutionally protected fundamental rights are a blunt weapon against excess of power.

ABUSE OF POWER.

Abuse of power has been construed to mean the exercise of a discretion on bad faith or for improper purposes, or from irrelevant considerations or without regard to relevant considerations or on a view of the law or the facts which can never reasonably be entertained.[117] Two cases decided by the High Court in Zambia are of particular relevance here. They are Nkumbula v. Att-Gen. and Winjberg v. Director for civil aviation. In the former case the Court was called upon to decide the validity of the exercise of discretion by the President in appointing a Commission of inquiry under Section 3 of the Inquiries Act[118] to consider the changes necessary in the constitutions of

the Republic and of the United National Independence (ruling) party to bring about a one-party state. Section 3 of the Inquiries Act empowered the President to appoint a Commissions of inquiry if "in his opinion" it was in the public welfare. Despite the argument of the applicant in the case, Mr Nkumbula, then leader of the strongest opposition party in the country, that it could not be "in the public welfare" to prepare to deprive the members of the public of their rights to form and belong to political parties which opposed the ruling party, the court held that:

> "the words 'in the opinion of the President' clearly (vested a discretion) and .. a decision made under a power expressed in such terms cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on extraneous considerations or under a view of the facts or the law which could not reasonably be entertained."[119]

The courts in Zambia have not addressed themselves directly to the analysis of these legal principles. The consequences have been unfortunate.

In the Nkumbula case, the court very correctly stated the grounds upon which the exercise of a discretionary power may be challenged, but proceeded therefore boldly to question the exercise of the discretion by the President on its merits. The court considered whether the introduction of the one party state in Zambia was in the public welfare. The Court took one meaning of public welfare and proceeded to answer the question in the affirmative. The Court said:

> "What is in the public interest... is a question of balance .... if the interests of society at large are regarded as sufficiently important to override the individual interests then the action in question must be held to be in the public welfare... For these reasons I am satisfied that the President.... was acting within (his) powers...."[120]

It is submitted that the Court had no jurisdiction to construe the expression "public welfare." It is interesting to contemplate what the judgement of Baron J. (as he then was) would have been had he found, on his criterion, that the matter was NOT in the public welfare. Baron J.'s judgement on this

point has been criticized by many observers.. PROF. Gupta has said that "the President was to judge whether an inquiry by the Commission was necessary for the public welfare... there was hardly a need for the Court to go into the question of the meaning of 'public' or 'public welfare.'"[121] .

This erroneous judicial approach suggests an unfortunate lack of understanding by the Zambian bench of the principles relating to judicial control of administrative action for it was repeated in the subsequent case of Winjberg v. The Director for Civil Aviation. In that case the Director for Civil Aviation was vested with the discretion to prohibit an aircraft from being flown in bad weather if in his opinion any instrument or gauge required to be fitted in the aircraft was not conveniently visible to the pilot. He prohibited the aircraft of Mr. Winjberg from being so flown because in his opinion, one of two altimeters required to be fitted was not conveniently visible to the pilot. Mr. Winjberg challenged the determination of the Director. Mr. Justice W.B. Scott, presiding in that case, after very ably stating the principles of law applicable in the case, afterwards went to sit in the cockpit of the aircraft for

purposes of determining whether the gauge was "conveniently visible," besides allowing evidence of other airmen on what their views were on the placing of this particular gauge. This flagrant traversity of the principles of law may have been comic, but it also set another unfortunate precedent.

However, in cases where the applicable principles of law have been construed correctly, it is apparent that what is bad faith, or improper purposes, or relevant considerations are not readily amenable to ascertainment. Bad faith, which may be said to include dishonesty, fraud and malice is "extremely difficult to prove..."[122] In numerous cases bad faith has been assimilated with improper purposes. Also, if proper purposes are to be found in the correct interpretation of the relevant statute, then this is a very unreliable criterion to rely on because the "intentions of the legislature" are almost always never agreed upon, or at least difficult to ascertain. The same comment would be true of the proper construction of the term "relevant considerations." It is never the case that all relevant considerations to the exercise of discretionary power are enumerated.

Finally, it is generally agreed that in seeking to control the exercise of discretionary Powers, courts are not to replace their discretion for that of the administrative authorities.[123] It appears therefore to be a contradiction to insist that courts can challenge the exercise of discretionary powers if the exercise of such powers was based on a view of the facts or the law which could not reasonably be entertained. To do this may be to allow what we expel through the front door to creep back in through the back door. The argument is fortified by the fact that in exercising administrative powers it is always the view taken by the authority at issue which is material. If this can be challenged on an objective criterion, this will negate discretionary powers. Hardly supprising therefore that this principle has found little favour with English courts.

JUDICIAL REMEDIES AND THE EFFECTIVENESS OF JUDICIAL CONTROL OF ADMINISTRATIVE ACTION.

Effective judicial control of administrative action is further dependent upon adequate remedies being available for the courts to provide where appropriate. The various purposes for which judicial control

may be invoked have already been stated. The remedies available for administrative high-handedness by and large correspond with these purposes for invoking judicial control. These remedies may be classed as follows:

1. Constitutional or statutory remedies. This is where the Constitution or statutes provide a procedure for checking excesses of administrative powers,

2. "Prerogative" remedies. These include the orders of certiorari, prohibition, mandamus and the remaining writ of habeas corpus ad subjiciendum,

3. Common law remedies, being the common law actions in tort and contract,

4. Criminal proceedings and

5. the equitable remedies of injunctions and declaratory remedy.

The efficacy of constitutional protection of fundamental rights is a complicated topic in public law. We cannot cover it all, least of all in outline form. For our purpose, it has at least to be stated that judicial guardianship of constitutionally protected fundamental rights is dependent largely on two factors: statutory interpretation and the form of the constitutional protection.

The negative effect of the principles of statutory interpretation upon constitutional remedies against administrative wrongs was clearly demonstrated in the case of Kachasu v. Att-Gen, quoted above. In that case the Court held that "there is...a presumption that the legislature has acted constitutionally..." Also it is unnecessary to repeat the argument advanced above regarding the negative effect upon judicial control of administrative action of the form in which fundamental rights are sought to be protected by the constitution, that is, the constitution provides for very wide circumstances under which a contravention of fundamental rights would be justifiable.

Statutory remedies consist mainly in the statutory rights of appeal within the administrative process. Consequently they are best discussed under administrative controls of administrative action rather than judicial control of administrative action.

The efficacy of the prerogative and equitable remedies shall now be evaluated.

Prerogative and to a lesser degree equitable remedies have their historical roots deeply embedded in English legal history. They have been said to be "of great antiquity."[124] The prerogative writs in

particular originated and evolved as part of the process by which the King's courts restrained courts of inferior jurisdiction from exceeding their powers. (Prior to 1938 the prerogative orders of certiorari, prohibition and mandamus were termed prerogative writs. The Administration of justice (miscellaneous provisions) Act 1938 converted these writs into "orders." In effect the only change came in the procedure for obtaining the remedies but not in their role.)

The orders of prohibition and injunction may be said to be the preventive compliments to the orders of certiorari and mundamus respectively: Certiorari and prohibition may issue "whenever 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."[125] But whereas certiorari will not lie unless something has been done which the court can quash, prohibition will not lie unless something remains to be done which the court can prohibit from being done. The two orders are complimentary to each other.

Mandamus and injunction on the other hand, are available to command a person or authority with

statutory authority to do or refrain from doing (respectively) a particular act according to law.[126]

The dependence of effective judicial control of administrative action upon the remedies is widely acknowledged. And yet it is these same remedies that have been the most widely criticized aspect of English administrative law. Professor Davis, that forthright American administrative law scholar with an intense devotion to the subject,[127] once said in very uncomplimentary language:

> "Either parliament or the Law Lords should throw the entire set of prerogative writs into the Thames river, heavily weighed with sinkers to prevent them from rising again."[128]

Another American administrative lawyer, Jaffe has suggested that "a study should be undertaken of available remedies in English, French and American law with a view to the clarification and simplification of the English remedies."[129]

That prerogative remedies in their present form are unsatisfactory is conceded even by English administrative law professors. Professor Wade is one among these. In his treatise "Administrative law" he has stated that certiorari, prohibition and mandamus

"work well, yet they have also inherited a legacy of imperfections, mostly procedural, for which there were valid reasons in the distant past, but which are out of place in the new spheres that these remedies have won for themselves."[130]

One hardly needs to make references to more opinions from learned authors to confirm the view that judicial remedies, that is the prerogative and equitable remedies are today very unsatisfactory. But it is necessary to state briefly what particular aspects of the remedies are offensive.

The orders of certiorari and prohibition are only available to quash a decision entered by a body which "acts judicially." There is a host of authorities on the matter, which include the cases of Chendaeka v. Luanshya Municipal Council,[131] In re Mailo,[132] where the court said a writ (order) of certiorari "can only issue to an authority that has legal authority to determine questions affecting the rights of subjects," and R. v. Electricity Commissioners.[133] The insistence that these two orders only lie when allegations of excess of jurisdiction by "quasi-judicial" bodies is based on the historical

origin of the orders, Since the distinction between judicial, quasi-judicial and administrative action is today clouded in confusion, as argued above, this necessarily draws the remedies into the confusion. The orders of certiorari and prohibition cannot be called in aid to quash administrative determinations which are manifestly and substantively incorrect but are given within the power granted to the authority.[134]

The order of mandamus, on the other hand, does not direct an authority on how to act or even give guidelines on how to act. It merely commands an administrative authority to act in accordance with the law.

Another general criticism of all the prerogative and equitable remedies is that they are tied down to obsolete forms of action. An applicant is required to plead a specific order. Courts are powerless to grant a remedy which has not been pleaded.

Finally, the case against prerogative remedies is sealed by the one general short-coming suffered by all the remedies-they are all discretionary. Thus even where a case discloses a good basis for the granting of one of the remedies, the courts may refuse to give the remedy if it is not disposed to.

Even the more modern declaratory proceedings remedy is not exempt from this criticism. But aside this criticism, the other short-coming of this particular remedy is that an applicant who secures it may encounter difficulties with enforcing it.

SUMMARY OF JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

This discussion has so far revealed incontrovertibly the existence in strict principle of judicial control of administrative action in Zambia. The discussion has, however, revealed more: It has revealed that judicial control over administrative action is in actual practice, very minimal. The limitations that occassion this have been identified as being primarily the inability of the substantial majority of those who are affected by administrative action to invoke the judicial process when they are aggrieved by the administrative process, due mainly to socio-economic factors. In the marginal cases where the jurisdiction of the courts has been invoked, administrative action has still remained largely beyond the scope of the judiciary to control due to socio-political factors, and due also to the principles of law upon which the courts can base their supervisory powers not permitting effective judicial control and lastly due to the

unsatisfactory nature of the remedies which the courts may provide for administrative high-handedness.

PARLIAMENTARY CONTROL OF ADMINISTRATIVE ACTION.

The view that the redressing of grievances against administration abuses and excesses of power is virtually synonymous with judicial control has lost favour among most administrative law students. As Gelinas put it ".... It is unfortunate that lawyers should have a tendency to under-value (political and administrative channels of control)."[135] Today, any serious study on methods of redressing grievances should attempt to consider also extra-judicial channels of redress. This section of the present study shall accordingly be discussing parliament as a channel of redress. The next section shall be centred on the administrative process itself and political institutions as channels for redressing administrative grievances.

Parliament has been defined by the Zambian Constitution as consisting of a National Assembly elected on universal adult suffrage and the President of the Republic.[136] The dual-constitution of the parliament is not without consequence. The roles

of the two components have to be realised fully. In this regard one may refer to Article 79 of the constitution which enacts that

> "Subject to the provisions of this Constitution, the legislative power of parliament shall be exercised by bills passed by the National Assembly and assented to by the President."

Other Constitutional provisions on parliament and the President as a component of the former go to determine the various relationships of the two components. These provisions are not strictly relevant here.

Any references in a study of the legislative process in the state is therefore understood to be a reference to the Parliament (National Assembly and President) as defined by the Constitution. This is strictu sensu the correct usage of the expression.

The present study is however not centred upon the legislative process in the state: The aim in the present discussion is to expose and discuss the role parliament plays in redressing administrative grievances. If, therefore it shall appear as though "parliament" shall be used in a lose sense to denote National Assembly or a standing or sessional committee of the house, the justification shall be that in

exercising its authority over the administration, parliament does not always act as parliament as defined under Article 63 of the Constitution.

As with the judiciary, a clear understanding of parliamentary power over the administration cannot be attained without dedicating some efforts to tracing the roots of the institution.

What is presently the Parliament of Zambia is a continuation of the legislative council that existed under British colonial rule. The first legislative council for the territory was established in 1924.[137] It consisted of 14 members: 9 officials (nominated by the Governor) and 5 elected members. The most outstanding feature of this institution, even superseding its size, was its composition. It was completely dominated by officials. This had a bearing upon its strength vis-a-vis the executive council and the administration. This legislative council had no power in practice to limit administrative powers. But then it was NOT intended to have any! Sir Herbert Stanley, the first governor of the territory of Northern Rhodesia told the council in his first address to the assembly that:

> "It is hardly necessary for me to emphasize that a council such as ours is not a parliament in the generally accepted sense of that term. It is constituted on a different basis which obviously places the government in a position to exercise effective control."[138]

The basis upon which this legislative council was established was said officially to be that since the bulk of the population was non-European, the council had to be established such that it ensured the "imperial trusteeship of backward people," by being effective by "associating the local population with government while avoiding the dangers of an irresponsible popular assembly".[139]

The bulk of the population in Northern Rhodesia was obviously non-European. But the claim that the legislative council established in 1924 associated the local population with government and so forth would provide a very interesting topic for debate. It is trite that the legislative council was established in Northern Rhodesia essentially to meet the demands of the settler population for representation in government - in short, to protect the interests of the settler population. In accordance with this, elected

members of the legislative council vehemently insisted that the council was a parliament. One member, Mr. Moore argued that

> "The differences between a parliament and this council are small... It is more like a parliament than it is unlike (one)... We are to all intents and purposes a parliament and likely to become a parliament."[140]

The legislative council was, in spite of the insistence of the elected members, merely an advisory body. This advisory role of the council was substantially unaltered in any material regard until 1945. In that year, the hitherto persisting balance between the settlers (unofficials) and the officials was altered. Four other European unofficials were nominated, three of them to represent African interests. Further changes came in 1948. In that year, the life of the council was extended from 3 to 5 years and the Governor was replaced as President of the council by an elected speaker. For the first time ever two of the unofficials were Africans, elected by the territory's African representative council (which was formed in 1945).[141] and appointed by the Governor.

The political upheavals that followed with the intensification of the struggle for political self-determination through party politics are obviously involved and cannot be analysised in a study of the present length. For our purposes however, it has to be noted that the legislative council increased in size so that by 1959 the legislative council consisted of 20 members; 14 Europeans and 6 Africans.[142]

Political independence came later in 1964 through further political contests fought on the legislative council forum: in the short period between 1958 and 1964 the territory had witnessed 3 general elections to the legislative council under 3 different constitutions.

The above is a very brief account of the birth and evolution of the predecessor of our Zambian parliament. It has shown that the legislative council during the colonial era was no more than an advisory body to the very strong executive council. Later it acquired the further role of being the channel through which political independence would be achieved in Zambia. Can an institution with such humble beginning ever attain authority over the executive and administrative organs of government? This section of our discussion advances an answer to the question.

The 1964 Zambian Independence Constitution created a parliament consisting of the President and the National Assembly. This composition and the powers of parliament has been retained, mutatis mutandis under the 1973 one party state Constitution.

The Constitutional status of Parliament in principle confers upon it some authority over the executive and the administration. The authority of Parliament to exercise authority over administrative high-handedness is proved by the following provisions:

1. Article 81 of the Constitution reads:

"Nothing in Article 63 shall prevent Parliament from conferring on any person or authority power to make statutory instruments."

and then Article 28 enacts in part:

"28 (1) whenever-

(a) a request is made in accordance with clause (2) for a report on a statutory instrument.

(b) .....

the Chief Justice shall appoint a tribunal which shall consist of two persons selected by him from among persons who hold or have

held the office of a judge of the Supreme Court or the High Court.

(2) A request for a report on a .... statutory instrument may be made by not less than twenty-one members of the National Assembly by notice in writing delivered-

(a) ..... to the Speaker...."

The tribunal appointed under this article considers the validity of the statutory instrument vis-a-vis the Constitution and reports to the President who may annul the statutory instrument for contravening the Constitution.

2. When the legislature delegates subordinate legislative powers, the delegate of these powers are sometimes required to account for the exercise of these powers. In particular, administrative authorities vested with the power to make "rules regulations and by-laws" have to "lay" these before the National Assembly under S.22 of the Interpretation and General provisions Act of the laws.

3. Constitutional offices and authorities are required to submit reports annually to the National Assembly. Two such constitutional offices or

institutions are the Commission for Investigations (ART. 117 (3)) and the Auditor-General (ART 128(4)).

4. Statutory boards and corporations such as the National Agricultural Marketing Board, Dairy Produce Board, Posts and telecommunications corporation and the Zambia Railways Board are required to submit, through the ministers under whom they fall, annual reports of their activities.

5. Other institutions, not being statutory boards or corporations, but accountable financially to parliament, such as the two mining companies Roan Consolidated Mines Ltd. and Nchanga Consolidated Copper Mines Ltd., The state trading holding company National Import and Export Corporation and the Rural Development Corporation are also required (by resolution of the National Assembly) to submit to Parliament annually reports of their activities.

6. Finally, the procedure of Parliamentary proceedings allows for questions from backbenchers to Government members of the house on any matter.

The above are what constitute the basis of "Parliamentary control of administrative action." The issue is, to what extent can we assert that the administrative process in Zambia is kept in check by

Parliament through the above processes? We shall attempt to answer that question. It is not necessary for that purpose however to scrutinize the Six processes stated above in their turn.

PARLIAMENTARY PROCEDURE AND PARLIAMENTARY CONTROL OF THE ADMINISTRATION.

Articles 92 and 93 of the Constitution empowers the President to summon and prorogue Parliament. They further provide that there should be a session of Parliament at least once in every year and that no period of 12 months should entervene between the last sitting of one session and the first sitting of the next session.

Parliamentary sessions in any one year are relatively short. For example during the year 1975 Parliament sat from 17th January to 21st March for the first sitting, from 7th July to 13th August for the second sitting and from 2nd December to 18th December for the third sitting-a total of 117 days.[143] The length of Parliamentary sittings are approximately equal in length for all the sessions of Parliament.

Article 90 of the Constitution empowers the National Assembly to "determine its own procedure."

In accordance with that provision National Assembly determines its procedure through Standing Orders. A "Standing Orders Committee" consisting of the Speaker and 7 members of the House appointed by the Speaker is constituted at the Commencement of every session[144] for this purpose.

According to the Standing Orders of the House, the days and hours of sittings of the House are as follows:

> 10.30 HRS to 18.00 HRS on Tuesdays, Wednesdays and Thursdays and 9.00 HRS to 18.00 HRS on Fridays; Mondays, Public holidays excepted.[145]

The daily routine of business in the Assembly has been stated to be as follows:

1. National anthem;
2. Prayers;
3. Introduction of new members;
4. Announcements by Mr. Speaker;
5. Private business;
6. Questions to the Ministers;
7. Statements by Ministers;
8. Applications for leave to move the adjournment under Standing Order 30;
9. Presentation of Government Bills;
10. Motions relating to the Business of the house;
11. Motions for leave to introduce Bills other than

Government Bills; and

12. Public business.[146]

It is apparent that from this daily routine of National Assembly, Parliament can only exercise any meaningful control over administrative action at two stages: Question time and private members' Bills. These two may now be considered in turn.

QUESTION TIME IN NATIONAL ASSEMBLY.

Members of Parliament have not hesitated to utilize the "question time" in National Assembly to put government members to task on specific issues of government administration and policy. During the 1975 session of Parliament a total of 256 questions were asked by private members in the 117 sitting days.[142] "Question time" as a device of Parliamentary check on administrative action is, however, of litle effect for many reasons. Firstly, the majority of the questions asked at this stage touch not so much at the propriety of particular administrative determinations but on Policy issues. They include questions on Government policy regarding importation of cars, absentee landlords, loans for squatter compounds in rural areas,

Government plans on opening of new health centres, police posts, immigration posts and so forth. One questioner in 1975 wished to know whether the Government had any plans as yet for the filming of a film on Zambia's history.[148] Questions of this nature, although without doubt valuable for other purposes, do not enhance the argument for Parliamentary control of administrative action. Their value in this regard is further viated by the responses they receive from the Government members: Almost always Government members respond to private members' questions in such a manner as to suggest that the latter ask the questions from ignorance. Perhaps this hostile approach of the Government members is to be justified partly by the fact that private members do show a substantial degree of triviality in approach when asking questions. In any case the private members are only able to bring out very few grievances against maladministration due to illiteracy and ignorance of the masses and lack of contact between the elected and the electorate.

Finally, questions asked in Parliament receive conclusive answers; no "follow-ups" are ever made. For example, in 1975 a private member sought information on the trustee schools run by the mining Companies. During the course of providing the answer the

Minister of State for Education conceded that the situation with regard to the proportion of Zambian as against children of expatriates was "unsatisfactory." He then advanced a very vague, but conclusive, statement that "everything is being done to put it right",[149] which appeased the questioner!'

PRIVATE BUSINESS IN THE HOUSE.

The right of private members to introduce legislation is not, strictly speaking, a device for Parliament to check administrative action. The initiatives may be occassioned by some features of the administrative process, but the private member's bill, like any other bill, is intended legislation. It intends to alter the authority of administrative action. It intends to vest new powers and deprive existing powers. Therefore the private member's bill does not control administrative action, it redefines administrative powers. Only to a limited degree can we therefore call this device a device for controlling administrative action.

Private members proposals for resolutions are, however, proper devices for attacking administrative action.

There are two obvious limitations upon the efficacy of private business in the house as controls over administrative action. Firstly, private members are inactive, due to ignorance, and financial inability, in the way of relying upon their right to introduce private business. Therefore private business in the house is virtually totally absent. Secondly, the few times that private members have tabled proposals for resolutions, it has become apparent that the efforts of the house have been directed at "policy matters" rather than at individual irritations between the Governors and the Governed. In March 1978 one Private member had moved a motion to condemn "the attitude of the press" towards the leadership.[150] After a whole days debate Parliament was unable to agree to pass a resolution as proposed.[151]

THE SESSIONAL COMMITTEES OF THE HOUSE.

Parliamentary control of administrative action is not, in principle, limited to the proceedings of the House. In principle the House may exercise control with the assistance of one of its sessional committees; the sessional committee on delegated legislation. The

other committees of the house deal with matters which one might term "internal."

The committee on delegated legislation, as constituted under Standing Order 141B, consists of members appointed by the Speaker and having a legal background and experience. The committee scrutinises all subordinate legislation made under the authority of Parliament to ensure that the subordinate legislation is

(a) in accord with the Constitution or the Parent Act;

(b) not in contravention of personal rights and liberties;

(c) not of the effect of making the rights of citizens dependent upon administrative decisions.

(d) concerned only with administrative detail and does not extend to policy matters (over which Parliament has a monopoly) and;

(e) not contrary to the philosophy of humanism.[152]

As is stated above the terms of reference of this committee limits the powers of the committee to that of only considering administrative action which is legislative in character. All discretionary powers of an executive character wielded by administrators

is left outside the sphere of influence of this committee.

In any case, it is a general criticism of parliamentary control of subordinate legislation that the very reason for requiring Parliament to delegate law-making power is because Parliament lacks the time and competence to legislate on all the spheres of life which today require legislation.[153] It would be surprising therefore if Parliament which initially was incapable of legislating on all the issues in detail in the administration of the state, should suddenly acquire the time and competence to control subordinate legislation. In the year 1975, as against 296 pages of principal legislation, Statutory Instruments covering 728 pages of the Government Printer's paper were issued.[154] Given the short sitting hours and sitting days of Parliament (supra) it would have been impossible for Parliament to exercise meaningful and effective control over administrative action in this field.

Finally, the sessional committee on delegated legislation itself is a recent innovation. The first members were appointed by the Speaker on 21st January 1975.[155] The Committee has hitherto been totally inactive.

SUBMISSION OF ANNUAL REPORTS TO NATIONAL ASSEMBLY.

It has been suggested that through the right of Parliament to scrutinize annual reports of various state institutions Parliament may exercise its authority over the administration. In practice however no grievances against administrative high-handedness have ever been remedied through this process. Apart from the annual reports of the Commission for Investigations, all other annual reports furnished to the house are wanting in detail. In the case of the Commission for Investigations, it cannot be said that Parliament is any more able to remedy grievances against this institution because detailed as these reports are, they do not touch on the administrative workings of the Commission.

Further, the actual reason for demanding that statutory and other bodies (as enumerated above) should table annual reports before National Assembly is because these bodies are financially accountable to the tax-payer. Consequently, all annual reports have laid stress on financial and policy issues, leaving administrative issues completely beyond the jurisdiction of Parliament. It cannot be said therefore that Parliament can remedy grievances

against the administration through tiis process.

ADMINISTRATIVE AND POLITICAL CONTROLS OF ADMINISTRATIVE ACTION.

A. V. Dicey, writing in the 19th Century, vehemently denied that administrative wrongs could ever be remedied within the administrative process. To him, the French droit administratif, (which he translated literally to mean "administrative law", but which should properly be defined as a body of specific legal provisions being part of internal public law concerning the organisation of administrative authorities and the relations of public administration with the citizens.[156]), was anethma to the rule of law.[157] He argued that "in England, and in countries which, like the United States of America, derive their civilisation from English sources, the system of administrative law... are in truth unknown."[158]

Today, it is in fashion to refer to Dicey for the sole purpose of criticizing him. It is quickly pointed out by English common law scholars that the welfare state has compelled the state to acquire new duties and along side this development to expand its

functions. Dicey's critics often omit to say Dicey himself did concede this point, albeit belatedly when he said in an appendix to his book that "the imposition upon the Government of new duties inevitably necessitates the acquisition by the Government of extended authority. But this extention of authority almost implies . . . the transference of departments of the central government."[159]

The function of the administration of exercising the so-called quasi-judicial functions is not to be denied. In the United Kingdom there are said to be "nearly 2000 established tribunals."[160]

The role of administrative tribunals in redressing administrative wrongs in Zambia shall now be examined.

Administrative tribunals may be classed into two categories: administrative tribunals proper, and special tribunals.

An administrative tribunal is said to be constituted when an administrative authority within a particular department,(like a minister),is vested with adjudicatory powers to hear and determine appeals arising within that department. An administrative tribunal is invariably involved in the usual

administrative process within the department or ministry.

A special tribunal is also a body within the administrative process. But it is also a body solely established as a body to hear and determine appeals arising from the administration within a specific department or ministry. The Town and Country Planning tribunal and the Industrial Relations Court are two good examples of special tribunals. Special tribunals may be permanent (as are the two above) or ad hoc, but this is of little consequence.

Were the criterion for judging the practical importance of administrative and special tribunals in Zambia to be their ubiquity, the conclusion would have had to be drawn that they are far more important than the judiciary and Parliament in the process of providing remedies for maladministration. The Constitution of Zambia creates Six special tribunals, most of them, admittedly, ad hoc. Statutes create tribunals with even more ease. Most of the statutes which create and vest powers that affect private individuals' interests also create administrative tribunals by conferring upon "the minister" appeal jurisdiction. For example, the Professional Boxing and Wresting

Control Act, which creates a board and vests upon it the duty to register boxers, wrestlers and others who are involved in these activities in accordance with certain requirements enacts:

> "Any applicant for registration whose application is refused and any person whose certificate for registration is cancelled may, within 30 days . . . appeal to the Minister.[161]

Special tribunals are created largely to hear and determine appeals in technical fields of government activities. The Rates Tribunal which may be constituted ad hoc by "the Minister" to hear and determine appeals against determinations of rates by Railways Board is one such special ad hoc tribunal.[162]

In principle it is true to say that administrative and special tribunals are conducive to the effective removal or redressal of much of the incessant administrative irritations. The perculiar attributes they possess make them more able adjudicators over administrative cases than the courts and the legislature. Although they are termed "administrative" their approach is in fact judicial (e.g.:- they have to comply to the principles of natural

justice) because they have to "decide facts and apply rules to them impartially."[163] And yet they are not slow and costly as the courts are.

In the case of special tribunals, it may further be observed that these institutions enjoy the best of both worlds due to one consideration: their composition. To cite two examples; the Town and Country Planning tribunal consists of a President who is a qualified lawyer appointed by the Judicial Service Commission and two other members one of whom has to be a charterd planner of the Town Planning Institute of the United Kingdom.[164] The Rates Tribunal of the railway industry consists of 3 members; a chairman, who has to be, or qualified to be, a judge of the High Court, and two other members, one of whom has to have wide experience in the railway industry with particular emphasis on determination of rates and the other of whom has to have wide business experience.[165]

Much, however, as we may argue the case for administrative tribunals in the way of how conducive they are to effective redressal of administrative wrongs by observing them in principle, we cannot learn as much as experience shall teach us. We

endeavor to consider the effectiveness of administrative and special tribunals from a practical point of view.

Administrative tribunals, as a channel for redressing administrative wrongs, is more of a political control rather than an administrative control, for reasons that shall be advanced later. We therefore postpone discussion of Administrative tribunals at a further stage.

We shall study special tribunals by considering the working of one typical special tribunal in our legal system: the Town and Country Planning Tribunal.

The Tribunal is established under section 6 of the Town and Country Planning Act. As stated above, the Tribunal is a synthesis between the judicial and the administrative processes: It is manned by experts in the judicial process and in the field of town planning, it may call such witnesses as it may deem necessary in assisting it to come to a decision regarding any matter before it, its decisions are subject to appeal (by any parties affected) to the High Court and in its procedures it is empowered to adopt such elements of the judicial process like

administering oaths, as may be conducive to the better performance of its tasks.

Cases that have been brought before the tribunal reveal that to some degree the tribunal is more flexible in its approach than the courts. In the case of Ball v. The Western Planning Authority[166] the tribunal demonstrated this by accepting evidence which an ordinary court could have refused to accept. This was evidence amounting to expert evidence but from a person who was not an expert on roads and road traffic. This was an application to the Western Planning Authority to build a bar in a predominantly farming area which received two objections on the grounds that the bar would introduce road traffic problems in the area and also would prejudice the provision of amenities by the local municipal council. In another case, that of Caltex Oil Zambia Ltd. v. the City Council of Lusaka[167] the flexibility of the tribunal was amply demonstrated by the ease with which the tribunal decided to call a witness who had not been called by the two parties. The evidence of this additional witness the tribunal found to be "impartial, professional, constructive, straightfoward and of great assistance to the tribunal."[168] The tribunal once

again did not hesitate to proceed to examine a particular site the subject-matter of the case of which was based upon it.

It is clear therefore from these and other cases decided by the tribunal that there is evidence to justify the conclusion that special tribunals are better able to adjudicate over and determine cases arising in their areas of jurisdiction than courts. But special tribunals are not without their own limitations.

Firstly the claim that special tribunals are less costly than courts is very often exergerated. In virtually all the cases one may refer to decided before the Town and Country Planning tribunal, the parties have been legally represented. For example, in the cases of Ball v. Western Planning Authority,[169] Malin v. Municipal Council of Ndola,[170] Patel v. Municipal Council of Livingstone,[171] Sichone v. Southern Planning Authority,[172] Papenfus v. the Lusaka City Council[173] and Caltex Oil Zambia Limited,[174] all the parties applying to the tribunal were legally represented. If therefore, the costly nature of judicial proceedings is a limitation upon effective judicial control of administrative action, and we have

earlier submitted that it is, then special tribunals do little to redress the anomaly.

Secondly, it is a myth to argue that special tribunals are invariably "Speedy." The appeal to the tribunal in the above quoted case of Ball v. Western Planning authority was lodged in March 1964 but it was decided in October 1964. In fact the other cases quoted above all confirm the fact that special tribunals are no less dilatory in their procedures than courts of law.

Thirdly, it is a valid criticism to make of special tribunals that they are beyond the reach of most of the people who are negatively affected by administrative determinations which fall in the jurisdiction of one or other of the various special tribunals because they are ignorant of their existence. The number of people who are aggrieved in the area of town planning is, or should be expected to be, far in excess of the number of appeals determined by the tribunal.

In conclusion, it is contended that without doubt special tribunals in Zambia have lightened the burden on the constitutional judicial process in their respective areas of jurisdiction in strict principle.

But it cannot be said that special tribunals have made any noticeable impact in the process of redressing administrative wrongs, nor that they have to any material degree effectively supplemented judicial and parliamentary remedies for maladministration.

ADMINISTRATIVE TRIBUNALS AND POLITICAL CONTROLS OF ADMINISTRATIVE ACTION.

The ideal approach in determining the effectiveness of administrative tribunals in protecting the private individual against illegal administrative action would, of course, be to undertake a massive survey of the role played by Ministers (in their role as administrative tribunals) in the administrative process. That would be a momentous task, and it cannot be attempted here. And yet it can be said that Ministers, in Zambia's government stracture, are political figure-heads in the various ministries. They are concerned with the implementation of government policy rather than minute administrative details. It would be naive therefore to expect that ministers where they are constituted as administrative tribunals can effectively redress individual grievances. Indeed only the extreme cases of administrative abuses of power are ever brought to the attention of the

Ministers, largely because of the "beaureacratic red tape" and ignorance on the part of those people that may be affected by administrative wrongs. As administrative tribunals therefore, Ministers are of little consequence in the process of checking maladministration.

The political and government stracture in Zambia however admits to other stages at which administrative wrongs may be remedied. These may include Members of the Central Committee, provincial political Secretaries and Party functionaries. Largely the limitations upon these institution as Champions of the peoples' cause lies in their close associations with "the administration." Perhaps before such a sweeping and conclusive generalisation can be taken, it would be worth-while to isolate one particular institution within the government and party stracture and evaluate its ability and actual role in redressing administrative wrongs. For its ubiquity, the institution of district governor constitutes the best representative of these institutions.

The institution of district governor is among the most widely known (to the majority of the people)

among the political institutions in the country. Its history dates back to the President's initiative towards attaining a decentralized government administration in 1969. The charges and general instructions relating to the duties and status of district governors were set out in cabinet circulars.[175] Thus district governors have no statutory authority.

The principal tasks of the district governors include to ensure constant contact between government institutions at a higher level and the people, and to ensure effective implementation of government objectives, free of unnecessary beaureacracy and with minimum maladministration. Probably due to the vague manner in which the duties and powers of district governors are spelt out, and the absence of statutory authority, the district governors are capable of wielding authority over administrators and protecting the ordinary people from power drunk or ignorant administrators. Do they actually do this?

It is difficult here, probably more than anywhere else to ascertain with any degree of certainty the influences exerted by district governors upon administrators in getting the latter to act within the letter and spirit of the law. However, as we

have done elsewhere, we may state some factors which may be of consequence in resolving the above issue.

The biggest role, of district governors, despite what was stated in principle, has emerged to be that of promoting the interests of the ruling party. Indeed where it has proved necessary to override legal provisions to attain this objective, district governors have not hesitated to do this. The very eptome of all efforts in this direction has been the vigorous efforts put in by district governors (among others) to persuade the people to vote for the present incumbent of the office of President. On 5th April 1978 a district governor" warned students that if they wanted to die in thousands, they should vote for a different candidate other than President Kaunda...."[176] Of course it cannot be denied that lip service has been paid to efforts to protect helpless individuals against a very powerful state machinery. For example on 4th April 1978 one district governor put to task party officials who were charging a fee to applicants for national registration cards for "introductory letters."[177] This is no doubt an initiative towards political control of administrative action. Such efforts however, remain the exception.

District governors, as a general rule, are not particularly able, for want of adequate education, to redress administrative wrongs. According to one survey two typical district governors went as far in formal education as "old" standard V and "old" standard VI respectively (which they claimed to be equivalent to the modern Form II and Form III respectively).[178] In fact the criterion for appointing district governors has appeared to be the contribution made by one or one's relatives (e.g.: parents) to the political processes in Zambia. One of the two district governors refered to above owed his appointment of the death of his father during the struggle for independence.[179]

In the final analysis, district governors, much as they try in "controlling individual injustices and administrative abuses of powers or authority...." are limited in what they can do. Only those administrative wrongs that came to their attention can ever be redressed, the other factors permitting. So that district governors are by and large available for those in society with power and influence and are unavailable for the "ordinary person."[180]

PART TWO

CHAPTER THREE

OMBUDSMANSHIP: AN OVERVIEW.

The elimination of grievances against the exercise of administrative powers is socially desirable and we can hardly over-emphasise this. It is towards the attainment of this objective that the remedial institutions discussed in Chapter two are regarded in strict principle as vital. And yet it should be beyond dispute at this stage that the redress of grievances against the exercise of public power through the courts, the parliamentary process and the administrative and political devices considered in the preceding chapter is not satisfactory. The problem is of such universality that the most ardent advocates of "liberal democracy," "from whose pens the phrase 'rule of law' flows with such smooth and frequent regularity..."[1] have eventually been heard to concede this obvious futility of relying upon these "traditional"

remedial institutions. One among them is K.C. Wheare. *Arguing the case for Ombudsmanship, he asserts that* "the case for establishing the Parliamentary Commissioner *for Administration rests upon the assertion that* there was in Britain a gap in the arrangement that existed for redressing grievances or remedying maladministration."[2] One might further refer to the assertion by the (British) Frank Committee on Administrative *tribunals and Enquires of 1957 that "over most of the* field of public administration no formal procedure is provided for objecting or deciding on objections..."[3]

The problem in the underdeveloped states should be expected to be even more acute. This is because on the one hand in these states there is an official commitment to the attainment of rapid social and economic development within the social-economic and political stractures which have been rendered by colonial underdevelopment not to be conducive to these ambitious objectives. On the other hand the (not unnaturally) increased skirmishes between the wielders of authority and the individuals in the state are less likely (than in the industrialized states) to be redressed because the remedial institutions are logistically and socio-economically and politically beyond the reach of most

of those who are aggrieved by administrative action.[4]

There has accordingly over the last half century been concerted efforts in all states of the world in the search for institutions to effectively limit maladministration. Scholars in the common law jurisdictions have looked to the French Counsel d'etat (Council of State) as a plausible alternative.[5] Possibly due to the echos of Dician thinking, this has been quickly dismissed as being "evidently out of harmony with common law."[6] Rather courageous innovations have been attempted in some jurisdictions. The Constitution of the Union of Soviet Socialist Republics establishes a Procurator-General to exercise authority over all administrative agencies in their exercise of administrative powers.[7] The Yugoslavian method of controlling administrative powers is by having a general body of law "regulating administrative procedures to which all administrative agencies must conform."[8] Indeed one might mention that the American efforts in the Administrative Procedures Act of 1946, enacted to "improve the administration of justice by prescribing fair administrative procedure"[9] is further proof of the Universality of the

search for remedial devices for administrative high-handedness.

One device for controlling administrative powers and redressing grievances against the same which has gained favour and prominance in, for example, jurisdictions which are geographically so apart and jurisdically and constitutionally so unlike each other as Canada and Tanzania, has been the originally Swedesh institution of Ombudsman. In its native state, the Ombudsman was first adopted as far back as 1713 by Swedish King Charles XII as a representative, an "Ombudsman", "to keep an eye on the royal officials of that day."[10] At that time, the Swedish King was probably just responding "to the passing moment's need," for he was enganged in" endless campaigns at the head of his army and in diplomatic negotiations that followed".[11] Later, this initially temporary device became a permanent feature of the Swedish system, under the title of Chancellor of Justice. The success of this royal institution over the succeeding century inspired further experimentation. Since this Chancellor of Justice was a royal institution, the other arm of Government, Parliament, demanded to have its own man too, as a safeguard against royal officers' disregard of the Law. The

1809 Swedish Constitution thus provided for a watchman who, unlike the pre-existing King's Ombudsman, would report directly to Parliament. This office was named "Justitieombudsman."[12]

The institution of Parliamentary Ombudsman was perculiarly a Swedish institution for the next century. In 1919 a similar institution was adopted for the first time outside Sweden, by Finland under her 1919 Constitution. Another thirty-five years elapsed before Parliamentary Ombudsmanship interested Constitution makers elsewhere. In 1954 Denmark enacted a statute creating the office of Parliamentary Commissioner.

The length of the period that passed between the appearance of the first Ombudsman in Sweden and its adoption elsewhere is attributable largely to the complex nature of the constitutional stracture of Sweden. Consequently, it was only with the adoption of the institution by Denmark in 1954 and the "missionary zeal of the first Danish Ombudsman, Professor Hurwitz that the idea of the institution started taking big strides outside the Scandinavian countries."[13] After the idea had left the Scandinavian countries, there was no stopping it; it appealed to the desperate

searchers for new weapons against officialdom. Among the most significant additions to Ombudsmanship were the New Zealand Parliamentary Commissioner for Administration (1962), the Norwegian Parliamentary Ombudsman for civil administration (1963), the British Parliamentary Commissioner for Administration (1967), the Tanzanian Permanent Commission of Enquiry (1967) and the Zambian Commission for Investigations (1973). Other countries in which the institution has been statutorily adopted or interest has been officially expressed in it include the states of Alberta and New Brumswich in Canada, Hawaii, Guyana, Mauritius, India, the United States of America, Australia, Malaysia, Ireland, Switzerland, Austria, Israel, Ceylon (Sri Lanka), Jamaica, Hong Kong and Ghana.

In virtually no instance has there been a wholesome adoption of the Swedish Ombudsman in its every facet. In fact it is ubandantly evident that some very fundamental modifications have been effected to Ombudsmanship in certain instances. One may state a few such departures. The Danish Ombudsman, and, notably, all other Ombudsmen thereafter, have no power to deal with judicial administration. This exception is a major departure from

the Swedish prototype.[14] The Finish Ombudsman is required to be "a person distinguished in Law."[15] The British Parliamentary Commissioner, on the other hand has to be a man of administrative experience. Indeed the British Commissioner has been known to work without a single lawyer on his staff. Perhaps more serious is the departure from traditional Swedish Ombudsmanship shown by Tanzania and Zambia. In these two jurisdictions, the "Ombudsmen" are completely dominated by and subordinated to the executive. A weak relationship only exists between the Ombudsmen, in the two states, and Parliament.

This necessarily raises issues of principle. Ombudsmanship as it is known to the Swede or those jurisdictions which have adopted institutions closely resembling the Swedish Ombudsman entails certain fundamental attributes. The Ombudsman has to be a delegate of Parliament, appointed by and accountable to Parliament, he has to have powers to investigate specific complaints against the administration from aggrieved parties and report to parliament, but he should not have powers to override or reverse administrative action. Any departures from the essential elements of Swedish Ombudsmanship, the above

three being the most salient, entails a departure altogether from Ombudsmanship, or so Rowat has said: "any kind of new complaint or appeal officer in any kind of organisation is now likely to be mistakenly dubbed an Ombudsman in order to gain popular support for his activities."[16]

It is true to say the trend is discernible in certain jurisdictions to dub any appeal institution as an Ombudsman. Rowat himself, in the work required to above, cites instances in the United States of America, where there at one time was "Ombudsmania" (and as one commentor put it: 'the word this year is Ombudsman!'), the idea had charmed Americans to the extent where so-called Ombudsmen were being proposed and appointed for Universities, schools, boards and other public and private organisations.[17]

A number of observations may be made not only about Rowat's warning but also about this trend stated above.

Firstly, it is important to note that the efficacy of any remedial institution that is adopted in a state to supplement the courts, the representative institution and the pre-existing administrative

and political institutions does not depend upon whether it is called Ombudsman or whatever other name: indeed the name given to such institution is not a material consideration in ascertaining its efficacy. The United States of America, with its Ombudsmania, still had and has other remedial institutions or watchdogs over the administrative machinery which were not called Ombudsmen but which did not because of that fact prove unworkable. Professor Davis, in an article in which he refers to a dozen official critics of administrative action as Ombudsmen for the sole purpose of supporting his argument that "the Nordic countries have no monopoly on thinking about Ombudsmen,"[18] argues that "Quite independently.... we Americans have come up with numerous constructive ideas about official critics of administrative action. We.... have in Washington various arrangements having something in common with the Ombudsman..,"[19] but the workability of which least depends on the name given to them. Among them are the office of Administrative Procedure in the Department of Justice, adopted in 1957 and the sub-committee of the Senate Committee on the Judiciary, adopted in 1959 to make a full and complete

study and investigation of administrative practice and procedure within the departments and agencies of the United States in the exercise of their rulemaking, licensing and adjudicatory functions.[20]

Secondly, Rowat by necessary implication attacks the reference to every institution for controlling the exercise of power as an Ombudsman as being retrograde. This is wrong. The Scandinavians have not taught the world a tremendous lot. If in their institution of Ombudsman they inspire the realisation that all remedial institutions in all jurisdictions should be as functional as their Ombudsman (which is suggested by the American Ombudsmania), surely that is a very welcome development indeed.

Thirdly one cannot legislate on the proper meanings of words. Neither can a scholar deny that an institution is an Ombudsman if language usage dictates otherwise. In the case of those institutions which are radically at variance with the Swedish Ombudsman but in their jurisdictions are widely accepted and refered to as Ombudsmen, a scholar has little choice in the matter. If eventually all institutions anywhere which are available to entertain individual complaints from individuals or groups of individuals

shall be called Ombudsmen, Rowat cannot halt this development.

Finally, Rowat's suggestion has been extended by some writers to mean even those institutions adopted to investigate individual complaints from members of the public in single party states (as opposed to multi-party states) are not Ombudsmen because they are dominated by the executive rather than the legislature. One might say on this argument that the form in which an institution like Ombudsman is to be implemented in a given state is determined largely by the balance of power in that state and the manner in which state power, or sovereignty, is exercised in that state. This is an important aspect of our study and we ought to dwell on it further at a later stage. Suffice to state here that whether an institution is an Ombudsman or not, and whether it is workable or not is not to be decided solely by looking at the institution or arm of government to which it is subordinated.

It is not to be denied that in the institution of Ombudsman the world has learnt an invaluable lot from the otherwise enigmatic Scandinavians. Before

we study the Zambian Commission for Investigations however, it is important to state in broad outline the form in which the institution has been implemented in two jurisdictions, namely the United Kingdom and Tanzania. This is for two main reasons: Both the British Parliamentary Commissioner for Administration and the Tanzanian Permanent Commission of Enquiry preceded the Zambian Commission for Investigations and were material in the decision of the form to be given to the latter. Secondly Tanzania, like Zambia, is an underdeveloped one-party state. Evidence of success or otherwise of the Tanzanian institution, so similar as it is in all respects, should interest the student of Zambian Administrative law. As Gellhorn has said, "scholarly work builds on foundations others have laid."[21]

THE BRITISH PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION

The Swedish institution, particularly after its adoption by Finland and Denmark, aroused a lot of interest in the United Kingdom in the fiftees. Probably the earliest committed proposal came from

Professor F.H. Lawson who in 1957 published a short memo in public law proposing that an Investigator-General of Administration should be appointed to investigate complaints of maladministration. The person appointed would "like the Comptroller and Auditor-General, almost inevitably be a higher civil servant nearing the end of his carrier "and as such "would, while preserving impartiality and independence not only have experience of administration, but be able to speak to officials and departments as one of themselves."[22]

One other proposal in support of this idea came from Blom-Cooper who asserted that "cases both in and out of the courts have demonstrated the inability of the citizen to obtain redress for his legitimate grievances."[23] This author proposed the creation of a "Parliamentary Counsellor" who, according to the Learned writer of that article, should work in corroboration with the High Court judges who would make thourough investigations before handing a report to Parliament. This would "(combine) the virtues of the Ombudsman with his wide investigatory powers and the traditional British regard for the Judiciary."[24]

All the while such ethusiasm was being registered for the establishment of a British Ombudsman, skepticism was also being shown. Mitchell, writing in his article entitled, significantly, "the Ombudsman fallacy," argued that ".... the wrong problem is being attacked. . . what is lacking in our society is any proper system of public law...."[25] In the end though, even Mitchell concedes the need for "(an) Inspector-General-Ombudsman-call him what you will."[26] Blom-Cooper, while proposing the adoption of Ombudsmanship in the United Kingdom, warned that the problem ought to be approached with caution. He warned that "it is good that a civil servant should be aware of a public watchdog over his acts, but a bloodhound sniffing around as the civil servant makes his decision would be greatly inhibiting on government action. Therefore the Ombudsman must be a known man of absolute integrity in the eyes of the public ... If he ever became a department the value of the institution would disappear. A bureaucracy upon a bureaucracy spells inaction."[27]

More meaningful progress in the direction of adopting an Ombudsman in Britain came with the publication of the report entitled The Citizen and the

Administration by the organisation JUSTICE (refered to usually as the Whyatt report after the name of the JUSTICE director of research Sir John Whyatt). The report dealt with the control of decisions and acts made by administrative authorities in cases where no appeal or review provisions existed. The report conceded that Parliament was "the most important Channel for making representation" but argued that Parliamentary procedure would be more effective if it were "supplemented by machinery which would enable such complaints to be investigated by an impartial authority if the Member (of Parliament) requested it."[28] Therefore the report proposed the establishment of an office to be known as the "Parliamentary Commissioner" to receive and investigate complaints of maladministration against government departments."[29]

The (Conservative) Government then in office turned down the proposals, arguing that: "..... the appointment of a Parliamentary Commissioner would seriously interfere with the prompt and efficient dispatch of public business,"[30] and further invoking the age old doctrine of ministerial responsibility as precluding all justifications for introducing Ombudsmanship in the United Kingdom. This doctrine has been

said to mean that each minister is responsible to Parliament for the conduct of his department and that "the act of every civil servant is by convention regarded as the act of his Minister."[31]

The subsequent change of government from a Conservative to a Labour party Government revived the interest in the idea however. The Government issued a white paper in October 1965[32] proposing the establishment of a Parliamentary Commissioner for Administration. Although the Government was satisfied with its proposals, as exemplified by the Prime Ministers suggestion that the institution would "humanise the administration and.... improve relations between Westminister and Whitehall... and the individual,"[33] they were criticized by a large spectrum of Commentators. The Economist said that "The Government has chosen the weakest and clumsiest way of fulfilling its promise. ..... the most startling thing (was) how much the Government wants to leave out of the Parliamentary Commissioner's field of action . . . This makes the whole exercise almost pointless."[34] Professor Rowat recorded that the Parliamentary Commissioner was described (due to what was considered as insufficient powers) as

being "a muzzled watchdog" "a crusade without a sword" "an Ombudsmouse" and so forth.[35] Professor Mackenzie said that "the civil service has been badgered a good deal and will not be much changed by more badgering."[36] All these criticisms and many others not cited here were occasioned by the fact that the Parliamentary Commissioner was very limited in his jurisdiction. Among others he could not investigate complaints against local Government administration, abuses by the Police, Nationalized Industries, the Prices and Incomes Board, and the postal services of the General Post Office. Also the fact that he could not investigate complaints submitted to him directly, but that these had to be furnished through a Member of Parliament (the "M.P. filter," as it is refered to) was another aspect that occassioned the criticisms.

Anyhow, the Parliamentary Commissioner Act of March 22 1967 was the result of the White Paper. Briefly the status, powers and jurisdiction of the Commissioner may be summarised as follows:[37] The Commissioner is regarded as being on the same level as the Comptroller and Auditor-General. Indeed the first Parliamentary Commissioner, Sir Compton was

prior to his appointment a Comptroller and Auditor-General. He is appointed by the Crown and holds office during good behaviour and may be removed by an adress from both Houses of Parliament. He has power to investigate complaints against such government agencies as the Act refers to, but such complaints have to be refered to the Commissioner by a Member of Parliament, such complaint must allege that injustice has been occassioned as a result of maladministration.

The Act stipulates restrictions on the area within which the Commissioner can investigate, the restricted areas of which examples have been given above.

Next there is a general restriction to the effect that the Commissioner shall not investigate any complaints in regard to which there exist other appeal provisions, provided that the Commissioner may override this restriction if he is satisfied that in the circumstances of the particular case it was not reasonable to expect the complainant to resort to the remedy at issue.

It is difficult to ascertain with precision the success of the British Ombudsman. However, writers

have advanced arguments that the publication of the investigations in the "Sachsenhausen Case"-over which much has been written - established the reputation of the office at the outset.[38] Further it is suggested by others that the fact that Government announced the intentions of establishing a Health Service Commissioner was acceptance by the Government that the office was a contribution to British administration. Wheare has ventured the opinion that "perhaps the most striking feature in the search for more effective remedies for maladministration in the last twenty years has been the discovery of the Ombudsman or his Equivalent."[39]

THE TANZANIAN PERMANENT COMMISSION OF ENQUIRY.[40]

The adoption of a variant of the Ombudsman in neighbouring Tanzanian, preceding, as it does, the adoption of a similar institution in Zambia, should be regarded with more than merely casual interest by any student of the Zambian Commission for Investigations. Accordingly, this study shall now proceed to recount, in the fashion of the earlier initiatives directed at summarising British Ombudsmanship, the developments leading to, and the actual adoption of

the Permanent Commission of Enquiry in Tanzania.

The starting point in this regard should be to comment on the all-too frequent argument, raised earlier on, against Ombudsmanship in One-party states like Tanzania and Zambia. Not too long ago there appeared an interesting debate in the Journal of African Law. One writer advocated the establishment of Ombudsmen even in African one-party states. He argued that an Ombudsman could serve two functions, that of redressing grievances and secondly to create a confidence between the administration and the ordinary humble citizen.[41] E.V. Mittlebeeler argued against the appropriateness of Ombudsmen in an African one-party state. This, he argued was because such institutions depended for their success among other factors on a "strong and responsible legislature."[42] N.M. Hunnings rejoined that the success of an Ombudsman did not depend necessarily upon his responsibility to a strong legislature, indeed he could be successful even though he is responsible to the executive.[43]

It is strongly contended, further to what has been asserted earlier on in the present chapter, that those who argue against Ombudsmanship in one-party

states basically because they fear that the executive in one-party states shall dominate the institution miss the essential point. This is that in the final analysis even the decisions of the High Court, indeed of any other remedial institutions in the State, equally as much as those of the Ombudsman, depend for their enforcement upon the executive. It is not a valid conclusion to draw from the inevitable domination of the Ombudsman by the executive in African one-party states that they can therefore not be effective. One oughts to look elsewhere for considerations determining the effectiveness of an Ombudsman in one-party party states, or any other states for that matter, for this only reflects and is based upon the balance of power in the given state. Were the arguments by Mittlebeeler and others aimed at challenging any claims by institutions like the Tanzanian Permanent Commission of Enquiry as being Ombudsmen, then probably such arguments may have been more tenable. But then they would have to contend with earlier arguments adduced in the present chapter that the language used in refering to any particular state institution cannot constitute a viable topic for

discussion.

Finally, we may close the present debate by echoing the words of McAuslan and Ghai that "it is generally recognised that Governments and methods of controlling them can exist without formal opposition parties - as in a one-party state."[44]

Having disposed of that preliminary, but nonetheless significant matter, we might now state the developments in Tanzania leading to the adoption of the Permanent Commission of Enquiry.

The starting point in this exercise is the Presidential Commission on the Establishment of a Democratic One-Party State. The Commission, appointed as a step towards the establishment of a de jure One-Party system in Tanzania,[45] observed as follows:-

> "In a rapidly developing country it is inevitable that many officials... should be authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have most serious consequences for the individual..."[46]

The Commission thus recommended that

> "the new constitution should provide for a permanent Commission to be appointed by the President, with a wide jurisdiction

to enquire into allegations of abuse of power by officials of both Government and Party alike."[47]

President Nyerere endorsed these recommendation when he addressed National Assembly on the proposals of the new Constitution. He argued, by way of further justification of the need for the Permanent Commission, that

"Our recent history and the educational backwardness of the majority of the people, means that automatic checks on abuse of power are almost non-existent."[48]

The subsequent Constitution gave effect to these proposals. The Permanent Commission of Enquiry Act 1966, Act No. 25 of 1966 provided the details regarding the Commission. The investigable institutions included the Commissions, corporate bodies, institutions, organisations and public authorities and boards set out in a schedule to the Act. The Commission commenced its task immediately.

A prediction was ventured by McAuslan and Ghai that "the Commission will find government and party officials less than enthusiastic about its activities."[49] This prediction did, in fact, materialize.

The Commission reported in its first annual report that in the initial stages of the existence of the Commission, it was coldly received by some leaders. The Commission says "leaders responsible for convening meetings were apprehensive ... some thought that the Permanent Commission of Enquiry was going to attack them .... (Some leaders) planted informers to report back to them what we were doing (and) who have come to complain to the Commission."[50]

Fortunately the Commission also reported that this problem ceased with time.

THE REDRESSAL OF GRIEVANCES BY THE BRITISH PARLIAMENTARY COMMISSIONER AND THE TANZANIAN PERMANENT COMMISSION OF ENQUIRY AND OMBUDSMANSHIP IN ZAMBIA.

The present chapter has so far recounted in some detail the developments leading to the adoption of institutions which are variations of the Ombudsman institution in the United Kingdom and in Tanzania. The question, at the end of the day, arises. How is this relevant?

It is a major assumption or premise in the present study that a discussion of the Zambian Commission for Investigations which does not "fit the

institution in its proper context" as it were, by evaluating the economic, historic, political and indeed juristic circumstances obtaining in the country at its adoption, achieves little. In recognition of that fact, the study deliberately dwelt at some length on these aspects in chapter two. But then it has also to be conceded that our understanding of the Commission for Investigations in Zambia can be substantially enhanced by making references to the experiences in jurisdictions where similar institutions were adopted earlier. For reasons suggested already, the British and Tanzanian versions of Ombudsmanship provide perhaps the best reference points in a study of the Zambian Commission for Investigations. Hence the considerable detail delved into in the preceding section.

CHAPTER FOUR

ESTABLISHMENT AND FORM OF THE COMMISSION FOR INVESTIGATIONS:

DEVELOPMENTS LEADING TO ESTABLISHMENT OF COMMISSION FOR INVESTIGATIONS.

The adoption of the first 'Ombudsman' institution in an African country, the Tanzanian Permanent Commission of Enquiry, was occassioned by a recommendation of the Tanzanian Presidential Commission on the Establishment of a Democratic One-Party State, which reported in 1965. Whether by coincidence or by design, the earliest roots of the Zambian Commission for Investigations, her own variant of the Ombudsman institution, lie in the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia.

This Commission was appointed by President Kaunda in 1972[1] under section 2 of the Inquiries Act to "consider the changes in (a) the Constitution of

the Republic of Zambia; (b) the practices and procedures of the Government of the Republic; and (c) the Constitution of the United National Independence Party necessary to bring about and establish One-Party Participatory Democracy in Zambia."[2] The Commission, under the chairmanship of Mr. Chona, the then Vice-President of the Republic, reported on 15th October, 1972. Among its many recommendations was one suggesting the establishment of "the office of Ombudsman." This recommendation, due to its importance, shall be quoted in full. The Commission said:

> "A number of petitioners called for the establishment of the office of Ombudsmen to investigate abuse of power and corruption in all its forms in the Republic. Some of these petitioners alleged that some individuals had acquired and accumulated considerable wealth and property through dubious means in so short a time since Independence. We considered the petitioners' views on this matter and came to the conclusion that there was a need to establish an office which would investigate such allegations and other related matters. In addition we were of the opinion

that the establishment of such an office would have the following advantages:

(1) the Ombudsman would be looked upon as an independent and impartial man;

(2) complaints raised by aggrieved persons could be presented informally and without cost;

(3) the Ombudsman might consider the field in which a complaint arose by allowing flexibility in investigating complaints which is not possible with an ordinary court of law;

(4) the Ombudsman would be of tremendous value to the administration

(a) by informally advicing, reminding and reproving;

(b) by soothing public feeling over reports of outrageous practices by the very fact that their complaints were receiving his attention;

(c) by rejecting unjustified complaints.

We therefore recommend-

(1) that the Constitution provides for the creation of the office of Ombudsman who shall be called Investigator-General;

(2) that the Investigator-General shall have the same qualifications as those of a High Court Judge and wide administrative experience;

(3) that the Investigator-General be appointed by the President in consultation with the Judicial Service Commission;

(4) that the Investigator-General be assisted in his work by three Commissioners, who together shall constitute an Investigations Commission;

(5) that Commissioners be appointed by the President for a term of three years which should not be renewable. The term of office of the first three Commissioners be men of high standing in society; (sic)

(6) that the Investigator-General investigates any matter of individual injustice or administrative abuse of power or authority involving corruption, tribalism, nepotism, intimidation and all other forms of discrimination taken by or on behalf of

(a) any department or Ministry of Government;

(b) any statutory corporation set up entirely or partly out of public funds, or funds voted by Parliament, including institutions of higher learning;

(c) any member of the Public Service;

(d) any officer of the Party;

(e) any officer in the security forces;

(f) any officer of any court of law;

(g) any other organisation within the Republic; and

(h) any other person being an action taken (sic) in the exercise of the administrative functions of that department, Ministry, corporation, Party, authority, organisation or person, since Independence;

(7) that the Investigator-General shall not investigate:

(a) any matter which is sub judice; and

(b) any matter relating to the exercise of the prerogative of mercy.

(8) that subject to the provision of the Constitution establishing the office of the Investigator-General, an Act of Parliament be enacted to:

(a) specify the matters in detail which shall be subject to investigation by the Investigator-General;

(b) set out the procedures for the lodging of complaints in respect of:

(i) the furnishing of information and production of documents to the Investigator-General;

(ii) the attendance and examination of witnesses;

(iii) the institution of proceedings and the making of recommendations for appropriate remedies; and

(c) generally provide for the purposes of enabling the Investigator-General to perform the functions conferred upon him by the Constitution or any other law;

(9) that the Investigator-General, among other things, submits an Annual Report to the President and the National Assembly which shall contain a summary of the matters investigated and the action taken or recommended by him;

(10) that Parliament initiate moves for the investigation of any allegations leading to the removal of the Investigator-General by two-thirds majority decision of all members followed by the establishment of a tribunal appointed by the Chief Justice, consisting of:

(a) a chairman;

(b) One member of the public;

(c) a person who holds or has held high judicial office; and

(11) that the report of the tribunal be presented to the President for action."[3]

One month later, to the day, summary of the recommendations of the One-Party Commission which had been accepted by Government was published. The Government had accepted the recommendations of the One-Party Commission in toto.[4]

The Commission for Investigations was subsequently established under the 1973 Constitution. The form in which it was established however in some important regards was different from the form that had been suggested by the One-Party Commission and accepted by Government. Notably, the variations were in the status of the Investigator-General, the qualifications of the Investigator-General and the submission of reports to the President and the National Assembly: Whereas the One-Party Commission had suggested and the Government had accepted that the 'Ombudsman' was really going to be the Investigator-General (this being necessarily implied in the

emphasis on the Investigator-General rather than the Investigations Commission in the One-Party Commission's report quoted above), the Constitution appeared to reduce the status of the Investigator-General to being merely a member of the 'Ombudsman institution' albeit its chairman. On the qualification of the Investigator-General, the Constitution did not insist, (or even provide) on any "wide administrative experience", as suggested by the One-Party Commission. Under the Constitution, the Investigator-General has to be qualified to be appointed a judge of the High Court.[5] With regard to the submission of reports, the Constitution departed from the recommendation that the Commission for Investigations submits annually reports to the President and to National Assembly. It provided, rather, that the Commission had to submit a report to the President after every investigation and to National Assembly annually.[6]

Anyhow, the Commission for Investigations as established under the Constitution comprises an Investigator-General, appointed by the President in consultation with the Judicial Service Commission, who is the chairman, and three Commissioners,

appointed by the President. The requirement of consultation with the Judicial Service Commission with regard to the appointment of the Investigator-General is necessitated by the requirement that the Investigator-General has to be a person "qualified to be appointed a judge of the High Court."[7]

The Investigator-General may vacate office under two provisions: Firstly, on attaining the age of sixty-five years, unless the President permits him to continue in office for such period as is necessary to complete any outstanding investigations commenced by him before he attained that age. Secondly, he may be removed from office for inability to perform the functions of his office whether such inability arises out of infirmity of body or mind or from any other cause, or for misbehaviour. Under the latter procedure for removing the Investigator-General, a resolution on two-thirds majority by National Assembly, followed by an affirmative finding by a tribunal of three appointed by the Chief Justice, two of whom (including the chairman) shall be persons who held or have held high judicial office, is necessary. During the deliberations of this tribunal the Investigator-General may be suspended

from office by the President.[8] The tenure of office of the Investigator-General is thus Constitutionally protected, along the fashion of Ombudsmen in Tanzania and the United Kingdom.

With regard to the Commissioners, the Constitution provides that their term of office shall be three years. They may be reappointed, but only after the expiration of three years since ceasing to hold office.[9]

The Investigator-General and the Commissioners are all full-time Constitutional office holders. They are required to vacate any office that they hold on their appointment to the Commission if such office is prescribed by an Act of Parliament or is an office in the Party. No Act of Parliament has hitherto prescribed which offices may not be held contemporaneously with membership to the Commission, but in actual fact the Investigator-General and the Commissioners are full-time officers and they do not hold other offices in the public service, in the Party, the local authorities, para-statal institutions, other Commissions, nor indeed any other institutions where they would have to exercise public power. It may not be of

consequence at this stage, but Parliament would be well advised to exercise its legislative powers and prescribe the offices which may not be held simultaneously with membership to the Commission. This may be ex abundanti cautela, but this is certainly better than permitting loopholes to go unsealed. Indeed the Tanzanian Permanent Commission of Enquiry Act 1966 does, in its section 4, prescribe such offices.[10]

Thus with the enactment or adoption of the 1973 Constitution in Zambia, the Commission for Investigations was legally established. Justice Chomba was appointed the first Investigator-General in December 1973. Immediately on his appointment Justice Chomba, formerly a Judge of the High Court, undertook to familiarize himself with the institution of Ombudsman. He visited New Zealand, India and Tanzania to observe the operations of Ombdusmen in those jurisdictions and learn from them. He spoke highly of the assistance rendered to him in those countries.[11]

The Commission for Investigations Act,[12] enacted to provide for the powers, privileges and immunities of the Commission, was assented to on

9th August 1974. The Investigator-General and the Commissioners were sworn in on 12th September, 1974,[13] and on that date the Commission for Investigations commenced its task.

PRELIMINARY TASKS OF THE COMMISSION.

The investigation of individual allegations of abuse of administrative powers is without doubt the central commitment of the Commission. But during the initial formative stages, the Commission had two other formidable tasks: To publicize its existence and to campaign for the necessary support and confidence of the population. Thus even before the Commission was fully constituted, the Investigator-General issued a pamphlet entitled: An explanation of the functions of the Commission for Investigations (Ombudsman). In it the Investigator-General argued the case for Ombudsmanship in Zambia. He wrote:

> "When you come to think about it you will realise that the idea of receiving complaints, investigating them, and finding any warranted remedy for them is by no means new. Courts, tribunals,

Members of Parliament, administrative agencies etc., have all along been engaged in this exercise... However, Courts can be dilatory in their procedures, expensive to employ and only persons claiming a right sustainable in law or equity may be entertained. Moreover, the adversary system . . . engenders acrimonious relations between the opposite sides . . . Members of Parliament and the responsible Minister have insufficient time to devote to this exercise . . . Administrative agencies . . . . will undertake investigations, but, since in order to arrive at the required answer they have almost invariably to rely on their own officers, the investigations they conduct lacks that detached interest which is conducive to *impartiality*. *Tribunals sometimes function* on lines similar to those followed by courts of law and therefore what has been said about courts may equally apply to tribunals.

> It will be noted from the foregoing that, when you contrast its attributes with those of other complaint - handling bodies, the Commission for Investigations (Ombudsman) institution will ... provide a better service in that it will ensure that a speedy remedy is secured for the complainant, it will be impartial and objective in conducting investigations, the atmosphere in which the investigations will be held will be congenial and all that service will be provided at no cost."[14]

This pamphlet, which, besides justifying Ombudsmanship in Zambia in the above quoted paragraphs, also outlined the form, powers and jurisdiction of the Commission for Investigations, was widely circulated. It was distributed in the first instance to Members of Parliament, ~~Counsellors~~ Councillors in Local Authority Councils, members of the armed forces and the Police force (and even immigration officials) high ranking officials of the Party and its Government and executives of para-statal organisations. It was also made available to any member of the public who wished to

obtain a copy. The pamphlet was translated into Bemba, Nyanja, Lozi, Tonga, Kaonde, Lunda and Luvale - the seven semi-official local dialects regarded to be representative of the Seventy-two "tribes" in Zambia.

Besides these initiatives by the Investigator-General, he also undertook to make tours of the provinces and address public rallies. However, limitations of time and transport only permitted him to tour the Southern, Western and North-Western provinces.

The Investigator-General and the Commissioners have, since the inception of the institution, made themselves available to address audiences of whatever constitution whenever invited - or indeed on their own insistence! The Investigator-General in particular has delivered at least sixteen formal addresses ("at least" due to the vagueness of the word "formal"!). His audience has included the Law Association of Zambia (26/3/74), Army Officers (19/2/74), the Student Christian Movement (19/8/75), the Zambia Institute of Personnel Management 3rd Annual Conference (10/1/76), Journalism students at the President's Citizenship College (18/2/76) and Police Officers at the Lilayi Police Training School (24/5/78).

Countless informal addresses have been given by the members of the Commission.

PUBLIC RECEPTION OF THE COMMISSION.

From the documentary evidence available, it would be a fair comment to make that the Commission was well received by those who knew, or have come to know about it. During the debate in National Assembly of the Commission for Investigations Bill, the majority of those who spoke welcomed it. In fact one speaker argued that "the Commission for Investigations is long overdue."[15] He proceeded to justify the establishment of an Ombudsman in Zambia by arguing that ". . . . there have and will be certain people in positions of authority who have abused their positions .... this has happened to people because they are ignorant of their legal rights, or perhaps they have been afraid to take their cases somewhere.... or they had no money to hire solicitors. But this Commission will actually help poor people."[16] Another member Mr. Mumbuna supported the Bill by arguing that "it is a necessary Bill in a country like Zambia where in some cases power can be misused or public funds can be misused...."[17]

The Commission's public rallies were also well-attended. We may suppose from this that even Party leaders in the areas visited by the Commission had few misgivings about the proper role of the Commission in the administrative process. In that regard reference may be made to the incident during the Commission's tours at Livingstone. The Commission was scheduled to address a public rally but unfortunately only a handful of people turned up. The District Governor for that particular town asserted that he was not going to "tolerate poor attendance to such an important meeting." He accordingly directed the members of the Youth League of the Party to close the shops in the area so that people could attend the rally. The youths only refused because they were aware of the limits of their powers.[18]

Evidence is available to suggest also that even members of the public reacted with enthusiam to the establishment of the Commission. Letters containing complaints for the attention of the Commission were received as early as 3rd January 1975,[19] nine months before the Commission actually commenced its task. Further, letters containing statements such

as "for a long time I have been denied justice but with the creation of your Commission I am now hopeful that I shall obtain a redress" were not infrequent.[20] The 1974 annual report of the Commission also relates a moving incident in Mwinilunga - a remote town in the North-Western province. The Commission had just delivered an address to publicize itself. It was then announced that any persons who had individual complaints against an administrator or an administrative authority could remain behind to lodge their complaint. A long queue immediately formed, although it was late in the afternoon. By about 20.00 hrs an old man walked into the complaint-lodging room. He was invited to inform the Commission of what grieved him. He said he had nothing to complain about, but added, "I am very happy to see you my children. On behalf of the people of this district I thank President Kaunda for creating your Commission... I shall pray for you so that you may continue doing your good work." With that he walked out.[21]

The evidence of the enthusiam from the members of the public towards the establishment of the

Commission appears to have continued during the four-year period in which the Commission has existed. It is worthwhile to state instances of this. In the 1975 report of the Commission we are told of an instance where an old night watch-man had his complaint of delay by an administrative authority to give him compensation for having been attacked and injured by robbers while on duty investigated by the Commission and an acceptable remedy given. This old man wrote to the Commission to thank them for their efforts and in the letter enclosed K2.50 as a token of appreciation. The Commission was at pains to persuade the old man to receive back the money because the services of the Commission were rendered ex gratia.[22] Also, the Commission in the third annual report has included two letters received from complainants in which the complainants were quite dramatic in expressing their appreciation of the efforts of the Commission. One writer lamented that he was "even failing to thank" the Commission for the action taken. He decided therefore to beg "the Lord of Grace" to bless the Commission and to bless also the President for having established the Commission. The other writer was overwhelmed. He was

so impressed with what the Commission had done that he decided to pray for the Commission:

"I am asking you to join me in prayers on 27th March, 1975, the date chosen to pray for you and your Commission, that God may help you in all problems you get in your work; and that God may extend your days on earth and give you more wisdom so that people may know your work. Your prayers will start at 17.30 hrs and you will not have chance and time to join me as I know you are always busy, but I ask you to put a sign of the cross before your face."[23]

A dramatic gesture indeed, but given in earnest.

Much as one may argue that there were all these occurances to suggest that the Commission for Investigations was well received and that it has the confidence of the people, it would be incorrect however, to insist that there were or have hitherto been no expressions of reservations on the establishment of the Commission. One speaker in National Assembly during the debate of the Bill actually asserted that the Commission would be an "establishment without functions."[24] He arrived at this conclusion on two considerations; Firstly that the Commission would be completely dominated by the

Executive and secondly that the Bill did not include any provisions to protect a complainant whose complaint is proved to be unjustified. According to him, such a complainant may be persecuted or even arrested for lodging a substantively unsupportable complaint.

Another speaker during the same debate repeated the most common reservation that Parliamentarians have against Ombusdmanship; that the Commission will usurp the powers and functions of the Members of Parliament. The member hastened to overrule his own reservation by suggesting that the fear by Parliamentarians is unjustified because the Commission should be seen as a supplement to Parliament as a forum for seeking redress for grievances arising out of the administrative process.[25]

These and other reservations expressed at the time of establishing the Commission for Investigations in Zambia did not, evidently, constitute challenges against Ombudsmanship in Zambia. They did not argue that an Ombudsman would be unnec[illegible] or superfluous. Rather they were expressed ma[illegible] because few people could have claimed to kno[illegible]

essential attributes of Ombudsmanship. It remains a fair comment to advance that in Zambia the establishment of the Commission for Investigations was well received by those who knew about it.

THE FORM OF THE COMMISSION FOR INVESTIGATIONS.

The adoption (and adaptation) of the institution of Ombudsman in Tanzania in 1967 and Zambia in 1973 also marked the most fundamental departure from the traditional approach to Ombudsmanship. In Sweden, Finland, Denmark, New Zealand and the United Kingdom and other jurisdictions where the institution existed prior to its establishment in Tanzania and Zambia the Ombudsman was an individual officer assisted by other staff. In Zambia's case particularly, the Investigator-General, who has been refered to erroneously by some observers as "the Ombudsman" is in actual fact merely the chairman of "the Ombudsman institution." The Ombudsman in Zambia is actually the (whole) Commission for Investigations. This has occassioned the need for a redefinition of Rowat's definition of the Ombudsman as "an officer of Government...." Mr Justice Chomba, Zambia's first Investigator-General has

attempted to redefine the word "Ombudsman" to suit the form in which it has been implemented in Zambia. At an address to the Seminar on Society and Law Breakers at the Mindolo Ecumenical Centre, he defined an Ombudsman as "an institution consisting of one or more Government officials whose duty is to receive complaints from citizens or anybody for the time being resident in the country in which the institution operates, who alleges that he has suffered an injustice as a result of maladministration perpetrated by public officials in the execution of their duties."[26]

Two issues emanating from the form of the Commission for Investigations shall be considered. These are the constitution of the Commission and the qualifications of the Investigator-General and the Commissioners.

With regard to the constitution of the Commission, it has been stated elsewhere that the Commission consists of four members. How conducive is this structure to effective redressal of grievances? It may be supposed that because of this arrangement the process of investigating complaints and recommending remedial action may be slowed down. The supposition may

be warranted. The Commission cannot take a decision on whether to proceed with investigations in an individual case or not or on what recommendations to make after concluding an investigation unless there is a formal meeting of the Commission at which a quorum of three is constituted.[27] This may have the effect of delaying the process where a quorum cannot be raised due to any one or more of many reasons. In any case there have been occassions where the Commission has not been fully consistituted, (i.e. where there have not been three Commissioners appointed by the President)-the 1976 Annual Report of the Commission was only signed by the Investigator-General and two Commissioners. In these circumstances, the absence of one Commissioner only incapacitates the Commission completely.

Some reservations have also been expressed with regard to the term of office of the Commissioners. The reservations are not that if the three Commissioners' terms of office expire simultaneously and three others are appointed to the Commission, the initial period during which the latter are getting acquainted with the tasks of the Commission will negatively affect the operation of the Commission. That danger was identified at an early stage and

was prevented by the Constitutional (Amendment) Act 1974. This amendment enacted that the first three Commissioners shall vacate office after the expiration of one year, two years and three years respectively as may be specified in their respective appointments.[28] The reservation with regard to the three-year terms of office of the Commissioners was well stated by one Member of Parliament during the debate of the Commission for Investigations Bill. He observed, on the appointment of the Commissioners, that "the first year will be spent on learning the type of work that they are going to do, and by the end of the second year they will be trying to implement what they learnt. By the time they are ready to get their teeth into the work the third year will be ending."[29]

Empirical evidence is unavailable to prove that it takes a whole year for a Commissioner to learn the essential attributes of Ombudsmanship. And yet it may quite justifiably be argued that too frequent retirements from and appointments to the Commission may affect the efficacy of the institution. The effect of the Constitutional amendment refered to above has been logically that every year one

member of the Commission is retiring and a new one is being appointed to fill the gap (if the full establishment is to be maintained, which admittedly, is not always the case as observed above, but which fact only reinforces the present submissions). It is contended that the term of office of the Commissioners should be lengthened from three years to five years. There may be nothing particularly appealing about the suggested five years but it is as good a reason as any that at least the terms of office of some of the Commissioners will then coincide with the length of one Parliament. This same problem was identified in Tanzania at an early stage and it was solved by increasing the term of office of the Commissioners.[30]

The qualifications of the Investigator-General and the Commissioners may now be considered. With regard to the latter, no criterion or criteria has been laid down with regard to their qualifications. Of necessity however, they have to be men of integrity and awe-inspiring personality who can command the confidence and respect of the people who are effected by the work of the Commission. This is a

matter of fact to a large measure, and little else may be said here.

The qualifications of the Investigator-General invite more elaborate comment, if for no other reason than that the Constitution has stated what these should be. In any case debate has been incessant on the subject "who makes the best Ombudsman, the judge or the administrator?"

The One-Party State Commission recommended that the Investigator-General must be a man who is qualified to be a judge of the High Court and must have vast administrative experience. Although the Government accepted this recommendation, it was modified in the Constitutional provisions. In Zambia the Investigator-General only needs to be legally qualified as above. The first Investigator-General had had, up to the time of his appointment to that office, a career in the judiciary up to High Court Judge. The incumbent Investigator-General was a Resident Magistrate, Senior Resident Magistrate and Permanent Secretary in the Ministry of Legal Affairs before his appointment to his present post.

The argument that legal training vests skills in an individual which can enable him to be a better Ombudsman has been attacked by some prominent scholars and personnages. The first British Parliamentary Commissioner for Administration insisted that his office did not need a lawyer - indeed his staff does not include any lawyers at all![31] When legal issues arise they are refered to the Treasury Solicitor. Professor Gupta has also advanced some strong points in furtherance of this argument. He says ".... the legal training of a person, particularly one who has been a judge for some time, is likely to be more of a hindrance than a help in the discharge of the functions of the office. Not only a judge is not likely to be as familiar with administrative arbitrary behaviour as an administrator of long standing and experience but also because form and formal procedures become very much a part and parcel of a judge and he tends to develop a sort of an attitude 'the charge must be established beyond all reasonable doubt.'"[32]

The most usual argument adduced by those who advocate that judges make better Ombudsmen (to which camp belongs the first Investigator-General of

Zambia) is that the legal training and experience on the bench of the judge imparts upon him a high sense of impartiality- He is going to be impartial and will repremand an administrator where the situation demands, while he will not hesitate to repremand a complainant for bringing a trivial complaint or for being influenced by sinister motives if this be the case.

It must be conceded that strong submissions have been made on both sides. One might suppose that it is because of the various positive attributes of legally trained persons and administrators as argued above that the One-Party State Commission in Zambia decided on a synthetic course by recommending that the Investigator-General has to be both legally trained and an experienced administrator. One might further suppose that it may have been due to the fact that the attributes of legally trained persons and those of administrators are contradictory in some areas that the Constitution abandoned the insistence on administrative experience.

However, all too often arguments on what qualifications an Ombudsman needs overlook the one basic truism - that in the last analysis the success of the Institution largely depends upon the

perculiar qualities and attributes of the incumbent and his personal ability to win the confidence of those whom his functions affect. The truth is legal training does not always vest upon every individual an unshakable sense of impartiality. Neither is it universally true that all administrators do not insist on proof of a fact beyond reasonable doubt before they make their determinations. Finally, it is to be remembered that the history of the State in Zambia and the State structures is such that so far as the private individual was concerned, the judiciary and the administration was one and the same.

The present submission is, therefore, that the qualifications of the Investigator-General are not particularly crucial vis-a-vis the success of the institution. If the present Constitutional provisions will result in the appointment of persons who are already well-known as men of integrity (as individuals, not as members of any particular profession) as was the case with the first Investigator-General Justice Chomba, then they augor well with Ombudsmanship in Zambia.

THE COMMISSION FOR INVESTIGATIONS IN OPERATION.

The Commission for Investigations commenced its functions on 12th September, 1974. In terms of Article 117 (3) (b) of the Constitution as read with section 20 (b) of the Commission for Investigations Act which require the Commission to submit to National Assembly as soon as may be after the 31st December in every year a report covering that particular year, the Commission has submitted to National Assembly three such reports. These reports have covered the periods September to December 1974, the whole of 1975 and the whole of 1976. Their submission to National Assembly has also constituted their publication. The reports have therefore simultaneously with their submission to National Assembly been made available for purchase by any person, at 30n for the 1974 report and 70n each for the two other reports. They have been published in English only.

The annual reports have included some vital statistics regarding the operation and even form of the Commission. It would be advisable to state some of these statistics at this stage in our discussion so that they may constitute the basis for the ensuing discussion.

The figures relating to the complaints received by the Commission during the periods covered by the three Annual Reports are as follows:-

For tne period September to December 1974:[33]

1. Total complaints received 236
2. Total complaints declined 160
3. Total complaints investigated 17
4. Total complaints justified 9
5. Total complaints unjustified 8
6. Pending 59
7. Percentage of justified complaints to investigated complaints 52%

For the year 1975:[34]

1. Total complaints received 550
2. Total complaints declined 367
3. Total complaints concluded 48
4. Total complaints in which decision passed.. 22
5. Total complaints justified (out of 4) 15
6. Total complaints unjustified 7
7. Pending 95
8. Percentage or justified complaints to investigated complaints 69.5%

For the year 1976:[35]

1. Total complaints received 530
2. Total complaints declined 231
3. Total complaints taken 299
4. Total complaints justified 13
5. Total complaints unjustified 5
6. Total complaints discontinued 85
7. Total number of complaints brought forward from 1974/75..... 137

   of which:

   (a) 44 were declared justified

   (b) 23 were declared unjustified

   (c) 19 were discontinued

   (d) 51 were brought forward to 1977

8. Pending 180

The establishment of the Commission for Investigations is small. In addition to the four members of the Commission there is an administrative sector. This sector was originally planned to have the following staff:[36]

1. Secretary of the Commission and Chief Executive;
2. Deputy Secretary;
3. Legal Officer;
4. Two Clerical Officers;

5. One Personal Secretary to the Investigator-General and

6. Two typists.

In actual fact however, this establishment of the Commission has never been fully constituted, particularly the lower ranks of the administrative sector. The Commission does not have any power to appoint any of the members of staff, the same being seconded to the Commission from the civil service. The Commission has viewed both the size of its establishment and the fact that in any case it has never been fully constituted, as being largely responsible for the shortcomings which the Commission faces. In its first Annual Report, the Commission stated that "it might not be a misplaced observation to state that the Commission is being crippled by the lack of positive, or any, response at all in respect of these vitally required additional appointments."[37] The problem was repeated in the two subsequent Annual Reports. In the 1976 Report, the Commission actually pointed to the "perennial manpower limitations" as being partly responsible for the late publication of the Annual Reports. This is a vital point, and it must be dwelt upon further.

Article 117 (3)(b) of the Constitution read together with section 20(b) of the Commission for Investigations Act enact that the Commission shall "as soon as may be after 31st of December in every year submit to the National Assembly" a summary of all the reports on individual investigations which it had, during the course of the year, been submitting to the President. The Commission for Investigations has taken the view, rightly too, that these words mean that the report shall be submitted to National Assembly when the facilities are there. In the words of the Commission ". . . the report has to be produced as soon as possible after the 31st of December of each year, taking into account all commitments that the Commission has on hand and the urgency with which any one or all of such commitments have to be dealt with."[38]

The three Annual Reports produced by the Commission so far have been presented to National Assembly rather belatedly. For example, the 1976 Annual Report was not presented until April 1978. According to the Commission this is to be blamed upon the critical manpower shortage faced by the Commission since its inception, and the lack of office equipment.

Now it has to be conceded that one of the weapons available to the Commission for Investigations in its fight to "humanise the administration" is publicity. Scholars of Ombudsmanship elsewhere have repeatedly asserted this argument; In essence that the Ombudsman remedy is there partly to expose cases of maladministration and criticize the government department at issue. In the Zambian case this seems to be lacking basically for two reasons: the belated submission of the Annual Reports to National Assembly and the reluctance of the mass media to give publicity to many cases reported in these Annual Reports. This aspect of Ombudsmanship in Zambia is significant enough to merit a proposal. Accordingly, a proposal is being made that a provision ought to be included in the Constitution and the Commission for Investigations Act to empower the Commission for Investigations to publish reports of such cases as the Commission considers merit publicity. In this regard the mass media also ought to be implored to give as wide publicity as possible to such cases and indeed to cases reported in the Annual Reports. This publicity ought not to be

limited to newspapers but also to radio- in both English and local languages. This will play the function (in addition to the one stated above) of enlighening the members of the public to bring forth similar complaints.

Naturally one has to contend with the argument that the present proposal if implemented will result in animosity between the Commission and the government departments. This argument has in its turn overlooked the fact that surely the very fact of investigating government departments ought to have, on this argument, resulted in this same animosity. There is no evidence that this is a serious problem so far. In any case the proposal is not suggesting that <u>every</u> case ought to be widely publicised, but merely those which are based upon justified complaints and reveal very serious cases of maladministration or abuse of power. This proposal, if implemented, could conceivably reduce the number of what the Times of Zambia called "little Napoleons" in the administration.[39]

Finally, in support of the proposal, it may be stated that this proposal is in no way inconsistent with the practice of Ombudsmanship elsewhere -

indeed the reverse is the case. Ombudsmen every where have relied upon the weapon of publicity as their strongest weapon. The British Parliamentary Commissioner Act of 1967, in its section 10 (3) enacts:

> "If, after conducting an investigation under this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case."[40]

The laying of such special report constitutes it publication too. The British Ombudsman has exercised this power. In his first three years of operation he published three "special reports."[41] Some observers argue that this practice gave the British Ombudsman impetus.

The proposal made here would, evidently, enable the Commission for Investigations to be more effective.

CHAPTER FIVE

THE COMMISSION FOR INVESTIGATIONS

Having stated and considered the developments leading to the adoption of the institution of Commission for Investigations in Zambia and the form in which it was implemented, we may now turn to discussing the Commission in operation. The present discussion shall be divided into the following subheadings: Powers and procedures of the Commission, jurisdiction and the relationship of the Commission to the courts.

POWERS AND PROCEDURES OF THE COMMISSION.

Article 117 (2) of the Constitution enacts:

> "... the Commission shall inquire into the conduct of any (person) whenever so directed by the President and may, unless the President otherwise directs, inquire

into such conduct in any case in which it considers that an allegation of misconduct or abuse of office or authority by any ... person ought to be investigated."

This provision is also contained in the Commission for Investigations Act.[1]

There are thus on the proper construction of this provision two methods of invoking the jurisdiction of the Commission: Under a directive from the President and on the basis of an allegation against an administrative authority to whom the Act applies. It is necessary to expand on this.

INVESTIGATION UNDER DIRECTIVE.

This procedure for bringing into motion the powers of the Commission is further proof of the subordination of the Commission to the President. Indeed one might say the form of Article 117 (2) is indicative of the possibility that the intention of the legislature was to make this the principal method of instituting investigations by the Commission. The implications of this relationship between the Commission and the President have been

discussed elsewhere. One might wish to add here merely that even the first Investigator-General in Zambia conceded this point. He said that "the Commission is designed to be the President's agent in ensuring public officials observe correct administrative rules, regulations and procedures."[2]

Ironically, the President has invoked his powers under this provision very sporadically. The reason, one may suppose, is that the President in Zambia is the Head of State and Chief Executive of Government. He is also President of the sole political party, Commander-in-Chief of the Zambia National Defence Forces, Chancellor of the only University and an active diplomat. All in all, the office of President is a busy office. The incumbent is unlikely to know of the intricacies of government administration and accordingly to know where there has been some possible high-handedness. Consequently only such allegations of abuse of office that become notorious are bound to come within his knowledge.

Notwithstanding this however, the Commission remains available to the President to use as he may feel disposed to.

INVESTIGATION ON THE BASIS OF AN ALLEGATION.

There was once an interesting debate between a scholar and teacher of administrative law in Zambia, Dr. Gupta, and the first Investigator-General in Zambia on the meaning of the words in Article 117(2) which we have identified as the second procedure for invoking the jurisdiction of the Commission. The former contended that the Commission cannot investigate an administrative authority unless the allegation has actually been submitted to it - though not necessarily by someone who has locus standi.[3] The Investigator-General on the other hand, argued that the Commission may investigate even on the basis of a newspaper report and in any case without the allegation being taken to it. In an address to a seminar on society and law breakers, be refered to investigations instituted by the Commission "of its own motion."[4] In fact the Investigator-General did implement his view. According to the Secretary to the Commission, in 1974 the Commission initiated one investigation. In 1975 it initiated one and in 1976 it initiated two investigations.

The question at hand is whether the Commission can investigate where there has been no allegation submitted to it.

The matter is surely concluded by section 8 of the Commission for Investigations Act. This section enacts:

"(1) A complaint or allegation under this Act may be made by any individual, or by any body of persons whether incorporated or not.

(2) Any such complaint or allegation may be made orally or in writing and shall be addressed to the Secretary who shall, in the case of an oral complaint or allegation, reduce the same to writing.

(3) Every complaint or allegation shall be signed or thumbprinted by the person making it.

(4) No complaint or allegation shall be received by the Commission unless it is made within a period of two years from the date on which the facts giving rise to any such complaint or allegation became known to the person making the complaint or allegation:

Provided that the Commission may in its absolute discretion receive complaints or allegations not made within the said period.[5]

It is submitted that the Commission for Investigations has no powers to investigate any allegations unless these allegations are submitted to the Commission as stipulated by section 8 of the Act. Consequently, the Commission acted ultra-vires its powers when it investigated the four cases refered to above.

Now it is one thing to conclude that the Commission has no power to investigate allegations not submitted to it. But it is quite another to say the Commission ought to or ought not to have such power. There is good reason to argue that the Commission ought to be given the power to investigate any allegation it wishes to investigate. The reason is that we may try hard to provide devices to ensure that the Commission is available to all persons who are affected by the exercise of public power in Zambia, regardless of the social class to which they belong. We may do so by publicising the Commission in all parts of the country, removing any insistence upon <u>locus standi</u> in any complaints and providing that a complaint need not necessarily be written, to name but three methods. However, it remains true that, to use Nyerere's word: "We must

not forget that the Permanent Commission of Enquiry receives complaints only from the most literate, aware or energetic and courageous of our citizens; its Reports understate rather than overstate the problem."[6]

Therefore, to empower the Commission legally to initiate investigations even without there being an allegation submitted to it would be a further device to ensure that as many instances of maladministration as possible may be redressed through Ombudsmanship in Zambia.

Arguments may be adduced against the present suggestion. In particular it may be argued that the Commission should not be allowed to investigate any administrative authority unless the allegation has been submitted to it because doing so would be a sure way of putting the Commission on the path to being a "super-administrator," a "bloodhound sniffing around as the civil servant makes his decision."[7] Further, it may be argued that the Commission for Investigations has repeatedly complained of a shortage of manpower. Therefore to allow it to investigate such allegations would only worsen the situation. In any case, the argument would proceed,

the Commission has turned down numerous allegations which have not been "clearly stated" (five instances in 1974 Report alone)[8] without taking follow up action.

However, all these observations, the first one being the strongest, go not so much to negating our submission, but necessitating its modifications. It remains a valid submission to make that the Commission ought to be empowered legally to investigate any allegation even though it has not been submitted to it. But in exercising this power it ought to satisfy itself that the reason for the allegation not being submitted to it was illiteracy, ignorance or lack of courage. Also it ought to satisfy itself that there is a prima facie case in the allegations.

PROCEDURE DURING INVESTIGATIONS.

We are living in an age of administration. Of necessity therefore, attention ought to be paid to the manner in which the most humble of policies are implemented. A study of the procedures adopted by an Ombudsman is as important as any other aspect of the study of the institution.

The British Parliamentary Commissioner for Administration has an elaborate procedure for effecting control over administrative determinations. To start with, a complaint ought to pass "ten jurisdictional tests" to determine whether it is within the Commissioner's jurisdiction or not. This test is administered by a "Screening Unit" of the Commissioner's staff. The complaint if it is within the jurisdiction of the Commissioner, goes to an Investigations Unit i.e. one of the Investigations Units established to cater for complaints arising from the various departments of Government. The Investigations are in two stages. Only after the two stages of investigations have been completed is the case given to the Commissioner for his "personal conclusion".[9]

The Zambian Commission for Investigations does have a somewhat predetermined procedure too. However, it is not strictly followed. The Commission for Investiations Rules provide:

"(3) (1) The Commission shall in conducting investigations be guided by these Rules

(2) Notwithstanding anything to the contrary contained in sub-rule (1), the Commission shall conduct an

investigation in such manner as the Chairman may consider appropriate in the circumstances of the case."[10]

We might observe that there has in fact been a movement from providing that the procedure shall be determined by the Investigator-General to providing that the procedure shall be determined by the Rules. Because Rule 3 in its original form enacted that

"(1) The procedure for conducting an investigation shall be such as the Chairman considers appropriate in the circumstances of the case.

(2) Without prejudice to the generality of sub-rule (1), the Commission shall in conducting investigations be guided by these Rules."

How then do the rules or the Chairman of the Commission as the case may be, determine the course of an investigation?

By way of answer to that question, it has to be emphasised that the procedure to be recounted here is only a general outline. In practice the

Commission departs from it when the circumstances, in the Commission's opinion, demand such departure.

In accordance with s.8(2) of the Commission for Investigations Act, all complaints are received by the Secretary to the Commission. They may be written or oral. If they are oral the Secretary reduces them to writing and secures the signature or thumb print of the complanant. The Secretary then submits the complaint to the members of the Commission who have to decide the first preliminary but important issue: jurisdiction. The legal Officer's advice is sought whenever there is need.

If a complaint is found to fall outside the jurisdiction of the Commission then the complaint is either refered to an appropriate body which has jurisdiction over the case, or the complainant is adviced himself to take his grievance to such other body.

If on the other hand the complaint is found to be within the jurisdiction of the Commission, then the Commission communicates in writing to the Permanent Secretary or head of the Ministry or organisation from which the complaint arose, or rather in which the official complained against works,

notifying him that an investigation is to be undertaken and also notifying him of the subject matter of the investigation. An additional notice is given to the official complained against so that he may, if so disposed, make comments on the allegations.

When the comments are received from the Permanent Secretary or head of the institution and the affected official, it can then be decided by the Commission whether the complaint is amenable to "summary disposal." A complaint capable of summary disposal is one which can be disposed of at this (relatively) early stage. Case number 285/75 serves as an example. In this case the complainant worked at a girl's camp of the Zambia National Service. He was one of a number of workers that were laid off in 1975. He did not receive his last pay-and neither did the other workers. On receiving notice of institution of an inquiry, the Commandant of the Service replied explaining the delay in paying the redundant workers. The explanation revealed that there had been some errors in preparing the payment vouchers and so this had to be done all over again. This had been done about the same time

that the complainant had lodged his complaint. He later confirmed to the Commission that he had since got his last pay. The Commission found the complaint justified, but since it had been redressed the Commission had nothing to recommend except "that the camp commander be directed to ensure, if similar redundancy recurres in future, that any payment voucners submitted to the Commandant's office were correctly prepared."[11] This is an example of summary disposal of a complaint. The investigation in the vast majority of such cases is done entirely through correspondence.

Where a complaint is not amenable to summary disposal, the next stage is to summon the complainant and his witnesses, if any, to the Commission's Offices to give evidence in support of the complaint. In the case of investigations under a Presidential directive the Commission will summon to give evidence any person who the Commission deems to be in possession of information essential to the proper determination of the inquiry.

The next stage will be to consider whether or not the complaint is sufficiently weighty to require the "defendant" to be called to give evidence in

rebuttal. If the Commission decides that the complaint is not justified, it then draws up its conclusions and recommendations and then transmits these to the President. If the complaint is found prima facie to be justified the Commission then summons the official whose conduct is under inquiry personally to appear before it, with his witnesses, if any. In this case it is only after the official has concluded his case that conclusions and recommendations are drawn up.

The procedure as enumerated above is largely, but not comprehensively, determined by S 17 (2) of the Act. This section enacts:

> "(2) No person shall as of right be entitled to be represented by a legal practitioner or to be heard:
>
> Provided that where the Commission proposes to conduct an investigation pursuant to a complaint or allegation under this Act, it shall afford to the principal officer of the department or authority concerned, and to any other person who is alleged to have taken or authorised the action complained of, an opportunity to

comment on any allegations made to the Commission, and no comment that is adverse to any person department or authority shall be contained in a report to the President unless such person, department or authority has been afforded the opportunity aforesaid."

The proceedings at the inquiry are held in camera,[12] and no person other than the members of the Commission and such of the Commission's staff as may be required for duty are present. Evidence is given on Oath. The rules of evidence as similar to those applied in the courts of law but the Commission is free to depart from them.[13]

Inquiries by the Commission are held at the Commission's premises in Lusaka. However, where there are witnesses whose places of residence are outside Lusaka, then the Commission either deligates powers to one of its members or travels to such places to gather evidence. Where it is deemed necessary for the witnesses in outlying areas to travel to Lusaka then the Commission gives witness allowances which seem, as many other aspects of life, to be graduated to coincide with a man's station in life. A professional man, if he is a witness, is

entitled to a minimum allowance of K6.00 per day and a maximum of K16.00 per day. A "peasant, labourer and person of similar status" is entitled to a minimum allowance of 30n per day and a maximum of K1.50 per day.

At the end of the enquiry the file is submitted to the President with conclusions and recommendations.

The file shall, on its return, be endorsed upon by the President in one or more of the following respects:

(a) Whether he has accepted the recommendations or not,

(b) If he has accepted then the directives regarding the redress if any to be given to the complainant,

(c) If he has not accepted then directives of what is to be done and

(d) directives to the Commission on what steps the latter shall take to ensure that the decisions made by the President are complied with.

In virtually all the cases submitted to the President and published in the Annual Reports the

President has accepted the recommendations of the Commission. In cases where the President has deemed the "punishment" to a defaulting administrator to be inadequate, he has not hesitated to increase it. An example may illustrate the point. The Commission investigated an allegation of favouritism and nepotism by one X, a senior officer in a Ministry made by a complainant to the effect that this senior officer had by favouritism and/or nepotism decided to have one A appointed to a supernumerary senior post as a result of which A superseded the complainant. After a long and thorough inquiry, the Commission found that the complainant's charge of favouritism had been amply supported. The Commission also found further breaches of administrative procedures committed in the course of securing A's appointment, which breaches culminated in maladministration. The recommendations of the Commission were that (a) the senior officer be reprimanded, and be given a new assignment, (b) since A was doing well in his supernumerary appointment which he had held for almost one year, he be allowed to retain the disputed post in the interests of the department concerned and (c) the complainant be transfered to another ministry

or department and such transfer be on promotion to a rank equivalent to the disputed post. The Commission's recommendations were accepted in full as far as (b) and (c) were concerned. But regarding (a), the President decided that the Senior officer should also lose seniority, and that he should be downgraded for at least one year so that he is given a new assignment, and he should be reprimanded.[14]

Another vital aspect regarding the procedures of the Commission is the implementation of the directives of the President. The procedure at this stage is, briefly, as follows. The President considers the recommendations of the Commission and takes a decision or decisions on the same. He then informs the Commission of his decision or decisions and directs the Commission to implement these. The Commission is then required to inform the complainant, the officer complained against and the department of Government or institution where such officer works of the outcome of the case. At the same time all such departments of Government and institutions as may be required to act in any particular way to implement the decision of the President are informed and directed to act accordingly. According to the

Secretary of the Commission Government Ministries and departments and all other institutions are very cooperative in this regard. However, at the inception of the Commission, the rare cases were encountered where an officer did not act according to a directive from the Commission. The Commission was at a loss with what to do to such a recalcitrant officer since the enabling Statute at the time did not contemplate such eventualities. This situation was remedied by the Commission for Investigations (Amendment) Act[15] of 1975, which enacted by its section 7 that

> "The principal Act is amended by the repeal of section sixteen and the substitution therefor of the following:
>
> 16(1)....
>
> (2)....
>
> (3) Where the President issues any directions to the Commission with regard to any matter inquired into and reported by it, the Commission shall, in so far as may be necessary to give effect to such directions, be competent to give orders to any person, body or authority concerned with such

matter, to take such action and within such time as may be specified by the Commission.

(4) Failure on the part of any person, body or authority to comply with any order given by the Commission under subsection (3) may be investigated by the Commission and reported to the President, as if it were an inquiry conducted under the provisions of this Act."[16]

It is interesting that the Commission had never had to invoke this power since it was vested with it. We can only suppose that the enactment of this Amendment Act ipso facto had a deterrent effect upon recalcitrant administrative authorities.

A different aspect from the above but in some regards related to it, which may require a comment is the fact that since the institution of Commission for Investigations is not only new in Zambia but in its operations seems very much to trample upon the bureaucracy it can be expected that some administrators may feel aggrieved as a result of the Commission's inquiries and consequent directives. Refusal to execute the Commission's directives is

not the only conceivable way of showing hositilies against and disrespect for the Commission. One other way would be to victimize the complainant. This is not merely an imaginary fear. Indeed, as the President conceded,[17] there are still some people who may choose to remain anonymous when submitting a complaint for fear of "victimisation." A case where victimisation of a complainant for lodging of a complaint with the Commission was actually alleged was Case No. 13/75. In that case the complainant had lodged his first complaint with the Commission. Subsequently on 13th January, 1975, he received a letter terminating his employment. He was aggrieved and lodged another complaint. He felt that he was being victimised because of the earlier complaint he had lodged. This was a serious allegation. But surprisingly, the Commission, after finding that the General Manager involved had "misused his power, in that he summarily dismissed the complainant without following the disciplinary code, and he took the disciplinary action instead of the Area Manager" only recommended (and the President accepted) that the complainant should be

re-employed if he was still out of employment and if the vacancy was still available! It should be emphasised that the Commission is a novel institution in Zambia. The task it has of asserting its authority is bigger than that faced by the other older remedial institutions. The Commission should treat such challenges to its authority seriously. Two recommendations may be made here. Firstly, the Commission for Investigations Act should be amended to provide for the investigation of such "reprisals" against complainants as though they are cases arising under the Act. Secondly, the Commission should be adviced to take such challenges seriously.

The procedure adopted by the Commission and outlined above need some comments.

One of the most remarkable aspects of the procedural part of Ombudsmanship in Zambia is the constant contact maintained throughout the process of the inquiry between the complainant and his complaint and the Commission. The Commission determines the jurisdictional issue of the complaint, pursues all the necessary steps in the inquiry and makes the recommendations. For an institution like the

Commission, with largely indefinite principles upon which to base its conclusions and very indefinite procedural requirements, it is imperative that the actual persons who draw the conclusions and make the recommendations should have constant contact with the complainant and all the witnesses. The procedure adopted by the Commission ensures that this is so. This is as opposed to the procedure followed by the Parliamentary Commissioner in the United Kingdom where the Commissioner is often not involved in the actual investigations. He only decides from the documentary evidence adduced by his subordinates. Like the appellate court judge, he is denied the opportunity to personally observe the witnesses and the complainant. Thus the conclusions he draws are not as "personal" as would be required by the complainant.

Another result following from this constant contact between the Commission and its "clients" is that the Commission wins the confidence of the people in general and the complainant in particular-knowing as the latter do that the Commission directly attends to the complaint.

It may further be argued that this aspect can help guarantee the success of the Commission because it cannot be supposed that the Commission's staff is immune from the all-too-common maladministration found in Zambia. (Chapter One). Therefore, were the Commission to delegate powers to its civil servant staff, situations could arise where the Commission's staff themselves might commit abuses of their powers; as for example by taking bribes while they investigate, or exercising favouritism or depotism in their work, or simply committing minor administrative wrongs like misplacing files or letters while investigating.

For these reasons, the procedure adopted by the Commission is to be commended as being preferable, in Zambia circumstances, to that adopted by the British Ombudsman.

However, even in the face of this conclusion, it must be conceded that surely the procedure is dilatory: If the Commission has at every stage of an inquiry to be involved (which means calling meetings and so forth), this may, logically, have the effect of lengthening the time required for one single inquiry. This is, generally speaking, true.

However, the delays caused by this are not serious - they do not, for example, amount to the same degree of seriousness as those delays caused by volume of work. But since the delay is nonetheless present, it may be suggested here that the delay could to some degree be reduced by changing the procedure in one respect. Instead of the jurisdictional issue of each complaint being determined by the whole Commission, this function must be left to the Legal Officer. On this recommendation, the investigation will be speeded up because all the complaints to be submitted to the Commission will already be within the jurisdiction of the Commission. In any case this proposal if adopted, does not detract from the positive attributes of the procedure of the Commission as stated above. This proposal could improve the working of the Commission, especially when one considers that in 1975, out of the 550 complaints received, 367 complaints were declined on jurisdictional and related grounds.[18] In 1976, out of a total of 530 complaints received, 231 complaints were declined.[19]

From the discussion of the procedures of the Commission also flows the popular belief that because

the Commission has to make recommendations to the President and wait for the decisions of the President, this necessarily causes delays in the process of redressing grievances.

According to the Secretary of the Commission, this fear, although popular, is erroneous. Delays, whenever they are apparent, are for justifiable reasons. For example, the recommendation may be that a particular complainant must be reinstated in his job. The President may wish to accept the recommendation but may wish to consult with other Government institutions on matters such as where this complainant should be "fitted in." In the process, a "delay" will become apparent-but this delay is for the advancement of the Commission's work! Otherwise, the Secretary to the Commission has asserted, directives from State House on the recommendations forwarded there by the Commission have been received by the Commission as early as one week after being sent there! This is indeed quick, considering how busy the Zambian President is. And yet it should not be concluded that the President does not consider the merits of the

recommendations - if he did not, then surely there would be no cases where he would alter the recommendations of the Commission.

One issue emanating from the powers of the Commission upon which some comment must be made is the power of the Commission to issue what in the judicial process are termed interlocutory orders.

One advantage an institution enjoys for being preceded by similar institutions is that of being able to learn from the experiences of those other institutions. The Commission has this advantage over its Tanzanian counterpart. The statute which created the Tanzanian Commission did not vest upon it any executive (or judicial) powers to prevent "continuing injustices." In their Annual Report for 1977-8 for example, the Tanzanian Commission illustrated the problems occasioned by this omission by referring to a case where seven people were locked up and they reported the matter to the Commission. The person who locked them up had no power to detain anyone for more than forty-eight hours. The Commission received the complaint after the persons had been in custody for a week. The Commission was powerless to secure their release even during the investigations.[20]

One writer, agreeing that this was a serious problem, made the proposal that the Permanent Commission ought to be empowered to apply to the High Court on behalf of the complainant, for disposition of the complaint.[21] For the reasons discussed in Chapter Two of the present study, the same writer conceded the limitations inherent in this proposal.[22] He then went on to suggest that "the only real alternative would be to, in effect, turn the Permanent Commission of Enquiry itself into a court."[23]

In fact the last stated proposal is the one adopted by the Zambian Commission for Investigations Act. It enacts in its section 11 that

> "Where it appears to the Commission that any of its powers... are likely to be frustrated by any action taken or about to be taken by any person to whom this Act applies, the Commission may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of conducting any investigation, and any such order, writ, or direction shall have the same force as an order, writ or direction of the (High Court."

Whether by coincidence or otherwise, the Zambian Constitution does not vest the "judicial power of the Republic" in any one institution (as does the United States of America Constitution which vests the judicial power of that country in the Supreme Court.[24]) Therefore, the enactment in the Commission for Investigations Act of empowering the Commission to issue "judicial orders" does not detract from any Constitutional provision.

The next issue is to determine the use to which the Commission has put this power, if ever. There is a problem in this regard in determining the meaning of the expression "continuing injustice." Where a person is dismissed from employment, the injustice (assuming that the original dismissal was "unjust") is continuing so long as the person is not reinstated. And yet it cannot be said that every time the Commission receives a complaint which alleges a continuing injustice is this nature it ought to invoke its powers under section 11. This, the "flood-gate argument" aside, would be wrong in principle. Interlocutory orders have never been issued on such reasoning.

The powers of the Commission under section 11 are only to be invoked, it is submitted, in instances where if an administrative action or determination was permitted to stand, it would render irrelevant any subsequent recommendation of the Commission. An example would be where an administrative authority decides to demolish a person's house. If under these circumstances the person approaches the Commission to challenge the decision of the administrative authority, and the Commission invokes its powers under section 11, this would be a justified invocation of these powers. The criterion ought to be whether a court would have issued an interlocutory order.

According to the three Annual Reports available, there has been no instances where the powers of the Commission under section 11 have been exercised. One may suppose that either the Commission has not felt disposed to exercise its powers, or no occassion has actually necessitated this. The Reports do not reveal any cases where interlocutory relief may have been necessary.

That concludes the discussion on the powers and procedures of the Commission.

THE JURISDICTION OF THE COMMISSION

Discussion in this section shall be under the following sub-titles, that is to say (1) investigable institutions, (2) Investigable matters and (3) refusal to investigate.

INVESTIGABLE INSTITUTIONS.

The Ombudsman is, as has been repeately asserted a check upon the exercise of public power. In accordance with that, the Ombudsman has wherever it has been adopted been limited to the checking of administrative authorities.

The institutions which are subject to investigation by the Commission were originally enumerated by Article 117 (4) as to be

(a) any person in the service of the Republic;

(b) any person holding office in the Party;

(c) the members and persons in the service of a local authority;

(d) the members and persons in the service of statutory corporations, bodies or boards, including institutions of higher learning, established wholly or partly out of public funds;

(e) the members and persons in the service of any Commission established by this Constitution or any Act of Parliament."

This was also included in the Enabling Commission for Investigations Act.[25]

However, it became apparent to the Commission during its first one-and-a half years of operation that there were going to be too many grievances against administrators in Zambia which would not be remedied through the Commission on jurisdictional limitations. The Commission said in its 1975 Annual Report:

> "....Owing to the situation in the country at the time of the inception of the Commission, it was clear to us that it had been the intention of the Party and Government to bring the main mining companies, namely Roan Consolidated Mines Limited and Nchanga Consolidated Copper Mines Limited, within the jurisdiction of the Commission. Moreover, quite a few persons did in fact lodge complaints against one or the other of these companies. However, an examination of the

Act showed that Section 3 thereof..... did not embrace these mines. It consequently became necessary to amend Section 3....."[26]

Indeed during 1975 a total of Sixteen complaints were received from complainants alleging abuse of office by employees of Nchanga Consolidated Copper Mines and Roan Consolidated Mines Ltd.[27] They were all declined on grounds of jurisdiction.

This situation led to amendments to both the Constitution and the Act. Article 117 (4)(d) of the Constitution and Section 3(d) of the Act were removed and replaced by the following provision:

"the members, and persons in the service, of any institution or organisation, whether established by or under an Act of Parliament or otherwise, in which the Government holds a majority of shares or exercises financial or administrative control."[28]

Now it ought not to be inferred from the anxiety (leading to an Amendment of the law) expressed by the Commission in the 1975 Report on the pre-existing limitations upon the jurisdiction of the Commission that the Commission seeks to campaign

for "more power." Evidence suggests otherwise: The Sunday Times newspaper of the 26th February, 1978 suggested that the Investigator-General had, during an interview with the newspaper's reporter, called for the extension of the Commission's jurisdiction to include private companies. The Commission took great exception to this "misquotation" and wrote a strong note to the publishers to state that at no time had the Investigator-General called for such extension of the Commission's jurisduction, least of all to include private companies; how could he, with the shortage of staff on the Commission and while the members of the Commission like those who have studied Ombudsmanship elsewhere knew that an Ombudsman basically is there to control the abuse of public power.[29]

Much earlier than this, in fact, even before the Commission had been fully constituted, another newspaper had misquoted the Investigator-General as having insinuated that the Commission would be investigating corruption and abuse of office by employees in private commercial institutions, among other things.[30] The Investigator-General was so vehement in his denial (for fear that he be misunderstood for

campaigning for "more power") that he erroneously denied that the Commission would ever be investigating corruption cases![31] The newspaper had to withdraw their story.[32]

The anxiety of the Commission in the 1975 Annual Report is therefore to be seen as evidence that the Commission was aware of the need to redefine Public Law. Public law today is more than just the law regulating the relationship between the Central and Local Government and the individual. As was said in the introductory Chapter, the administrative process is the complex of methods by which the State implements its objectives and policies. State stractures in Zambia take one or more of various forms: they may be Government departments, Local Authorities, Statutory bodies, or even "private" commercial institutions. In these circumstances, an Ombudsman, if he is to control all facets of public power, ought to be empowered to investigate all such institutions. The 1975 amendments were for this reason.

The Commission has no powers to investigate the President.[33] It is not necessary to delve into detail at this stage regarding why this is so.

A consistent theme of this study has been to emphasise that Ombudsmanship in Zambia can succeed only if, among other factors, it is backed by the very strong Executive. Accordingly the Commission has been subordinated to the President. Since, therefore, the Commission is merely an arm of the President it would be futile and politically unwise to empower the Commission to investigate the President. One might also wonder to whom the Commission would submit its conclusions and recommendations were this the case.

By way of comparison, we might state that the Tanzanian Permanent Commission of Enquiry has no jurisdiction over the President and the Prime Minister (due to the Constitutional stracture of that country).

We shall conclude this section by observing that the Commission has had to decline to investigate the President on one occassion.[34] It is unfortunate that we are unable to determine from the available sources all the circumstances sorrounding this complaint against the President. The Annual Report for 1974 merely states the fact of declining to investigate.

INVESTIGATE MATTERS

We have to quote again Article 117 of the Constitution. This Article enacts:

> "There shall be a Commission for Investigations . . . which shall have jurisdiction to inquire into the conduct of any person to whom this Article applies in the exercise of his office or authority, or in abuse thereof.
>
> (2) Subject to the provisions of this Article, the Commission shall inquire into the conduct of any such person as aforesaid whenever so directed by the President and may, unless the President otherwise directs, inquire into such conduct in any case in which it considers that an allegation of misconduct or abuse of office or authority by any such person ought to be investigated."[35]

We have had to emphasise some words in the quotation because it is these words which are most material in determining the matters which are investigable. The equivalent section in the Tanzanian Interim Constitution of 1965 which introduced

the Permanent Commission of Enquiry was phrased in identical language as our own Constitution.[36]

Since the Commission for Investigations started operating in Zambia, the nature of the conduct which it has investigated has varied. Such conduct has included allegations, or actual proven instances of termination of employment without reasons or without sufficient benefits, harassment of junior staff by senior staff, non-promotion, denial of employment even after passing requisite examinations, nepotism, tribalism, favouritism, wrongful detention by senior police officers, arbitrary termination of contract, and even use of office to seduce another man's wife! The list of matters which have had to be investigated by the Tanzanian Permanent Commission of Enquiry would very much be like the one above.

Probably following after the fashion of Ombudsmen elsewhere the Commission for Investigations and the Tanzanian Permanent Commission of Enquiry have at various times attempted to construe the Constitutional provisions by generalising the nature of the conduct which they investigate. We may quote a few instances of the many when the first Investigator-General in Zambia summarised the variations of

the conduct which is investigable. Before the Commission commenced functioning the Investigator-General said the Commission would "investigate complaints which are prima facie genuine and which allege official misconduct of an administrative nature. The complaints may be in relation to maladministration arising from official bias, neglect, nepotism, in-attention, delay, incompetence, arbitrariness in performing their duties, etc."[37] On 20th March 1975 he advanced another list of investigable matters. He said then that the functions of the Commission would be to check abuse of administrative authorities arising from "arbitrariness, over-bearing attitude, laziness, ignorance, misinterpretation of rules, corruption, favouritism, nepotism, tribalism, oppressive or unfair laws, rules or practices etc."[38] Finally, in an address at a conference the Investigator-General said: "The abuse of authority or maladministration about which my office is concerned may take various forms, eg.: corruption (bribes, favouritism, tribalism etc), harshness, misleading a member of the public as to his rights, failing to give reasons when under a

duty to, using power for wrong purposes, failing to consider relevant facts, failing to reply to correspondence, causing unreasonable delay in doing desired public acts, etc."[39]

There is a striking similarity in the words used by the Investigator-General in Zambia and the Permanent Commission of Enquiry in Tanzania and the Parliamentary Commissioner for Administration in the United Kingdom. The Tanzanian Commission even went to the extent of basing its jurisdiction fundamentally on "injustice as a result of maladministration,"[40] which are the words used by the British Parliamentary Commissioner in defining his jurisdiction. It is reasonable to infer that Ombudsmen in Tanzania and Zambia have been influenced by the British institution. And yet one cannot say even in Britain there is any degree of agreement on what matters are investigable and what matters are not. The earliest attempt to classify investigable matters was made by the leader of the debate for the Government during the debate of the Parliamentary Commissioner Act. He advanced what today is widely refered to as "the Crossman catalogue," after his name. He said maladministration means "bias, neglect, inattention, delay,

incompetence, ineptitude, perversity, turpitude, arbitrariness and so on."[41] The Parliamentary Commissioner said of this definition: "In many ways the most important part of those words is "and so on" and went on further to submit: "Nobody can define maladministration in plain terms."[42]

It is apparent that there are obvious difficulties in attempting to draw clear-cut hard-and-fast limits of what constitutes investigable conduct whether in the United Kingdom, in Tanzania or in Zambia. Following from that some observations may be made.

Firstly, if the efforts of the Investigator-General towards providing a summary of conduct which is investigable under the Act is aimed at publicising the Commission and informing the public of the nature of the problems that the Commission deals with, with a view to inviting complainants, then his efforts are commendable. However, if on the other hand, in those efforts the Investigator-General attempts to state the criteria for invoking the jurisdiction of the Commission, with the underlying notion that a complaint in order to be entertained must "fit into"

one of those aspects of maladministration, then that will inevitably spell the end of the Commission. It will eventually become another Common law court where a complainant has to rely on a specific writ or form of action or go without redress. The Commission ought not to lay any stress upon whether a particular complaint has satisfied any predetermined standards of what constitutes maladministration. It should, rather, and along the fasion of Ombudsman institutions elsewhere, proceed by "identifying maladministration by example"[45] as it comes across it.

It is, secondly, gratifying to note that in its Reports the Commission does not necessarily state that it has found maladministration in any one of the various forms. This is evidence that probably the Commission is avoiding the danger refered to above.

Thirdly, one other danger of too elaborate and academic discussion on what constitutes maladministration or abuse of office is that maladministration may be construed narrowly at the British Parliamentary Commissioner did to exclude, for example, bad decisions (or unreasonable decisions). During his first year

of operation, the British Parliamentary Commissioner denied himself jurisdiction to investigate complaints based on "bad decisions" or "bad rules" because of the narrow meaning he took of maladministration.[44] This distinction was criticised both by Professor Wade[45] and by the House of Commons.[46] After that the Commissioner extended his definition of the term maladministration.

In the case of the Zambian Commission, its three Reports are replete with cases in which the Commission may have refused to investigate had it followed the original approach of the British Parliamentary Commission in construing the term maladministration. In case No. 24/74 the complainant alleged that he had been underpaid since his appointment in the Dairy Produce Board. The Commission found that the complainant had not been underpaid. But it went on to state that the administration in the Board was "haphazard" and therefore recommended that the Board be directed to work out a scheme of salary scales which could not be easily abused by unscrupulous officers.[47]

Finally the Commission must be commended for avoiding a strict and legalistic approach towards the

construction of the expression "abuse of office" because then it can expose areas in the administrative process where government policy is defeated.

Instances where the Commission has exposed weak areas of the Zambian administrative process, which areas may not have been exposed had the Commission adopted too strict a construction of "abuse of office" may best be illustrated by the following three cases:

I. In case number 352/75, the complainant alleged that his contract of employment had been terminated unfairly. He had been recruited by the Ministry of Education a Secondary School teacher, from abroad. After a troubled stay in the country, during part of which he had to travel every morning from one town to another for work, thereby incuring the displeasure of his Headmaster; and he had to stay for a long time without suitable housing accomodation, he was found unsuitable for a teaching career in Zambia by the Teaching Service Commission in that he could not express himself clearly in English. From previous experience he was only a temporary teacher, teaching Hindi only. The Teaching Service Commission then

terminated his contract. The Commission for Investigations made the recommendations inter alia: (1) That the Ministry Officials responsible for the abnormal recruitment be reprimanded because the Government had incurred a heavy financial loss; and (2) that the Permanent Secretary in the Ministry of Education be directed to warn his Officers that recruitment of teaching personnel particularly from overseas should be left to the Teaching Service Commission.[48]

2. In this case No.105/74 a contract expatriate teacher, working at the material time as a Secondary School teacher, interrupted a Cabinet Minister during the latter's address to all teachers at the School at which the teacher worked. The Minister felt offended and despite numerous apologies from the teacher, the Minister refused to excuse the teacher. The Minister on return to Lusaka, directed the Teaching Service Commission to terminate the contract of this teacher. This the Commission did. On this case the Commission for *Investigations found the following: (a) the Minister* had grossly abused his authority and he therefore deserved to be disciplined; (b) the complainant

teacher should be allowed to return to Zambia and (c) The Teaching Service Commission acted like a puppet of the Minister. According to the oath they took, members of this Commission are supposed to execute their functions without fear or favour. Accordingly they should be reminded of that and of the fact that they are an independent body.[49]

3. The third case, number 93/74, arose in Zambia Airways, a statutory Corporation. The complainant in this case had been sponsored by Zambia Airways to train as a pilot in the United Kingdom, on the understanding that on qualifying he would be engaged as a pilot to fly Zambia Airways passenger airliners. He successfully completed in training and got a very good report from the institution where he had gone. He came back to Zambia in 1972 and was appointed a second flight-officer of Zambia Airways. But unfortunately he was given no opportunity to fly. He was sent back to the United Kingdom in October 1972 for two other courses. On his return to Zambia he was put on conversion training under a Captain. At the end of this course he was examined by the Chief

Training Captain and found to be unsuitable on the ground that "he had no aptitude for flying." The complainant then resigned and joined the Zambia Air-Service Training Institute as an assistant instructor. In this capacity he was helping to train some of the pilots who were eventually going to fly Zambia Airways airliners.

During the inquiry, witnesses adduced evidence of racial discrimination in the "flight operations division" of the Corporation which was dominated by white expatriates. The Captain who had failed the complainant was said particularly to be "anti-black." He himself was a white man. The Commission found that the complainant had "suffered remediable injustice resulting, principally, from (this particular) Captain's anti-black attitude." The Commission recommended that the complainant, and all other black-Zambians who had suffered the same fate should be given a chance at qualifying as Zambia Airways pilots.[50]

These three cases cited here are merely examples of the numerous instances where the Commission's inquiries exposed weak areas in the administrative process. They show that in fact state

institutions do not always work as anticipated. The third case particularly is a serious one because had it not been exposed by the Commission the entire economy of the country could have been negatively affected.

It is submitted therefore that in the light of the above and other reasons already referred to, the Commission ought to desist from any tendencies at advancing predetermined criteria for what conduct is investigable. Rather, the Commission ought to proceed as it started by identifying "abuse of office" as it comes across it.

REFUSAL TO INVESTIGATE.

From the establishment of the Commission, its jurisdiction has been limited by Constitutional provisions and by provisions in the enabling Statute. The Constitution, by its Article 117(5) enacts as follows:

> "the Commission shall have no power to question or review any decision of any court or of any judicial officer in the exercise of his judicial functions, or any decision of a tribunal established

by law for the performance of judicial functions in the exercise of such functions, or any matter which is sub judice, or any matter relating to the exercise of the prerogative of mercy."

This provision was also included in the enabling Act.[51] The Act, in another class of limitations upon the Commission's jurisdiction, also provided as follows:

"9(1) The Commission shall not conduct an investigation under this Act in respect of any of the following matters, that is to say —

(a) any matter in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any law;

(b) any matter in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:

Provided that the Commission may conduct an investigation notwithstanding that the

person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it."[52]

With regard to the second class of limitations upon the Commission's jurisdiction the Commission reported in its second Annual Report that in their form they presented one of "the impediments to the smooth running" of the Commission's work.[53] The Commission reported that instances had been experienced during the first one and a half years of the Commission's existence where complainants brought complaints which "quite clearly ... could competently and promptly be determined administratively."[54] Some complainants brought frivolous cases. As the Act stood, the Commission in these circumstances was powerless to decline such complaints or to discontinue inquiries in them if inquiries had already commenced when this was discovered. These experiences, among others, led to the Commission for Investigations (Amendment) Act No.27 of 1975. This Act, by its Section 4, repealed Section 9 and replaced it with the following Section 9:

"9 (1) No investigation under this Act shall be conducted concerning any allegation or grievance in respect whereof the complainant or the person aggrieved has, or has had at any material time, the right or opportunity of obtaining relief or seeking redress by means of—

(a) an application or representation to any executive authority; or

(b) an application, appeal, reference or review to or before a tribunal established by or under any law; or

(c) proceedings in a court of law:

Provided that the Commission may conduct an investigation where it is satisfied that in the particular circumstances of the case it would be unreasonable to expect the complainant or the person aggrieved to resort or to have resorted to any of the foregoing means without fear or undue hardship, expense or delay.

(2) The Commission may refuse to conduct an investigation where it is satisfied that -

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

(b) the investigation would be unnecessary,

improper or fruitless.

(3) The Commission shall, in any case in which it decides not to conduct an investigation, or not to proceed further with any investigation, inform the complainant in writing accordingly but shall not be bound to give any reasons therefor."

According to the statistics from the Commission's Annual Reports (quoted in the last Chapter), the Commission between September 1974 and December 1974 declined more than 50% of the cases it received on jurisdictional grounds and on limitations refered to above. During 1975 it declined more than 50% on the same grounds. During 1976 however, the number of complaints declined fell to just less than 50%. Since the pattern or level of acceptances and rejection of cases has been substantially consistent, we need state here only the statistics for one year, in considering the breakdown of such cases. We shall take the year 1976, after the important amendment to the law.

The breakdown of the cases rejected in 1976, and the sections of the Act under which they were rejected, is as follows:

Section:	3	7		8		9				
Sub-Section:		(1)	(2)	(4)	(3)	(1)			(2)	
Paragraph						(a)	(b)	(c)	(a)	(b)
Total	28	1	2	8	1	72	30	33	28	23
GRAND TOTAL:	226 Cases									

Source: Annual Report, 1976, PP.52-68. Compiled by Author

Some preliminary comments about the above table are necessary:

1. According to the Commission's Annual Report for 1976, the total number of cases declined for that year is 231. The total according to the author's compilation and arithmetic (from the report itself) is 226. The difference of 5 cases is to be attributed to errors in the Annual Report because the Report says two cases[55] were declined on the basis of section 4 of the Act. This section merely defines the composition of the Commission and the tenure of office and conditions of service of the members of the Commission. It can not, in the present submission, conceivably provide a basis for declining any complaint.

2. The provisions of section 3, section 7 and section 9 have been recounted elsewhere in this discussion. The provisions of section 8(3)(4) have not been so recounted.

Since they have been refered to in the above table, they need to be quoted here to assist in understanding the above table.

Section 8(3) of the Act reads:

"Every complaint or allegation shall be signed or thumbprinted by the person making it."

Section 8(4) reads:

"No complaint or allegation shall be received by the Commission unless it is made within a period of two years from the date on which the facts giving rise to any such complaint or allegation became known to the person making the complaint or allegation:

Provided that the Commission may in its absolute discretion receive complaints or allegations not made within the said period."

Having thus stated the limitations on the jurisdiction of the Commission and how these have actually determined the rate of complaints being declined, it is now possible effectively to advance

some comments upon these jurisdictional limitations. We might start with commenting upon the jurisdictional limitation effected by Article 117(5) of the Constitution which is in identical terms with section 7(2) of the Act.

The Commission for Investigations, although adopted mainly because of the ineffectiveness of pre-existing remedial institutions like the courts of law and the administrative tribunals was not meant to be a "Court of Appeal" or a "super administrator" which would review court decisions or reverse decisions of administrative tribunals. That is to be seen as the justification for precluding the Commission from reviewing court and tribunal decisions. The limitation upon the Commission from investigating any matter relating to the exercise of the prerogative of mercy necessarily follows from the fact that the Commission has no power to investigate any allegation against the President. Under Article 60 of the Constitution the prerogative of mercy is a prerogative of the President. Consequently one might even venture to suggest that Article 117 (5) insofar as it precludes the Commission from

investigating the exercise of the prerogative of mercy, is superflous.

Even in the light of the above justification for Article 117(5) one cannot but ask if there is anything wrong in principle for the Commission to investigate a matter being part of a set of facts upon which there has been a judicial pronouncement or decision by an administrative tribunal. No serious objections, in strict principle, are apparent.

It is submitted therefore that the fact that a court is adjudicating over any set of facts or has actually pronounced upon any set of facts should not preclude the Commission from investigating allegations based upon those facts. Just as a civil case has been seen to lie in any set of facts upon which criminal proceedings have previously been based and concluded, equally the Commission may proceed to investigate upon any set of facts either contemporaneously with or subsequent to judicial proceedings.

Two further arguments may be advanced in support of the above submission. Firstly, when a

court adjudicates over any facts, it only adjudicates over those aspects of the facts that reveal or support a judiciable cause or matter. Indeed all the rules of procedure and evidence point to that conclusion. On the other hand when the Commission investigates any allegations based on the same facts, its concern is with those aspects of the facts which reveal maladministration or abuse of office. Secondly, courts as remedial institutions have been proved earlier on to have failed in many regards to provide remedies, whereas the flexibility of the Commission has been seen in a previous section of the present Chapter to render the Commission a more able remedial institution.

It is submitted therefore that Article 117 (5) of the Constitution should not be construed very strictly so that the Commission is forced to decline a complaint <u>just because</u> the facts upon which the complaint is based at one time constituted the basis for some judicial proceedings. However, this submission should itself not be extended to providing the Commission with a reason to review judicial pronouncements.

We may now turn to the jurisdictional limitation effected by section 9 of the Act.

The Commission in their 1975 Report made some valid observations on section 9 as it was prior to the amendment. These have been cited elsewhere. It is however necessary to make some more observations here. The Commission should not be seen as a "Court of Appeal" or "a super-administrator" to which appeals may be taken from judicial decisions of courts and administrative tribunals. The Commission should also not be seen as a rival of appellate executive bodies, tribunals and courts: The Commission was introduced to supplement the pre-existing channels for seeking redress in public law, not to replace them, hence section 9. In accordance with this, the Investigator-General once said: "We expect that people should, in the first instance, exhaust channels of complaint handling institutions open to them and only come to the Commission as a last resort."[56]

The Act has gone on to ensure that to all intent and purpose the remedy which the Commission may provide if it decides to take a case under the

proviso to section 9 is at least as effective as the one the complainant would have obtained in any other institution. Indeed the Commission can even give "judicial" remedies because under section 11 of the Act the Commission is empowered to make orders which hitherto only courts could make.

One other matter upon which a comment has to be made is that the Commission has, in declining cases on jurisdictional grounds played the very vital role of advising individuals on the channels through which they may appeal. It is no exaggeration to suggest that most persons who are affected by administrative determinations hold administrative authorities is such awe that they do not conceive of a situation where they can appeal to higher institutions. The Commission has come in to advise such people of the appeal channels. One might repeat the argument that ignorance of the law and legal procedures has played a major role in nullifying the role of appellate remedy-providing institutions in Zambia. Were it not so, the figures under "section 9" in the table above would have been much smaller. It is perhaps still too early to conclude that this additional role of the Commission has led to the reduction

of the number of cases being declined on the ground of failure by the complainants to exhaust other remedial institutions. As can be seen from the tables in the previous Chapter, such cases have declined from being more than 50% of the total number of cases declined in 1974 and 1975 to being less than 50% in 1976.

THE COMMISION AND THE COURTS.

Section 10 of the Commission for Investigations Act enacts as follows:

> "Subject to the provisions of this Act, the jurisdiction and powers conferred on the Commission may be exercised notwithstanding any provision in any 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."

Under Section 11 the Commission is conferred with powers to issue writs and orders only courts could otherwise issue. The Commission has powers

under various other provisions to compel the attendance of witnesses at its inquiries, to administer oaths, to compel the production of documents notwithstanding any claims to the doctrine of privilege in any one of its multifarious facets, to enter premises and to commit any person being a witness before it or otherwise who incurs the Commission's displeasure to the High Court. These are very wide powers indeed. In one sense these powers make the Commission a very powerful institution - so powerful that one is left wondering: Is the Commission justiciable?

The answer is provided partly by Section 22 of the Act. It enacts:

> "No inquiry proceeding, process or report of the Commission shall be held bad for any error or irregularity of form or be challenged, reviewed, quashed or called in question in any court save on the ground of lack of jurisdiction."

Stated simply, there is only one ground upon which a person who is aggrieved by the Commission can challenge the Commission in the courts: by alleging that the Commission had no jurisdiction to

inquire into a matter the inquiry into which gave rise to the grievance.

A pertinent issue here however is whether an aggrieved person may challenge the decision of the Commission that it has no jurisdiction to inquire into his allegation. Could the courts interfere by issuing the order of mandamus to the Commission? The British Parliamentary Commissioner has been the subject of litigation on this particular point. The case of Re Fletcher's Application[57] decided that no order of mandamus could be issued to the Commissioner because Section 5 of the Parliamentary Commissioner Act 1967, by enacting that the "Commissioner may investigate . . ."[58] conferred a discretion upon the Commissioner.

The Commission for Investigations Act is replete with discretion-conferring provisions. On the authority cited here no court can compel the Commission to inquire into any matter. This can obviously occassion some misgivings especially if on its own accord (i.e. without being directed by the President) the Commission declines to investigate an allegation because it considers it to be outside its jurisdiction, and the view taken by the

Commission is manifestly wrong. This is one aspect where the Constitution and the Parent Act may require amending.

The relationship between the Commission and the Courts may also be discussed on another premise which, prima facie, does not seem to reveal any relationship between the two institutions, that is, the effect of a recommendation of the Commission and its implementation where this offends some other provisions of the Constitution.

This situation may best be illustrated by referring to a rather serious case reported in the Annual Reports. This is Case No.88/75.

In this case the complainant, an education officer, was on the 14th September 1974 assaulted, arrested and detained by an assistant superintendent of police. His wife was also arrested and detained on 15th September 1974. This aggrieved him and he lodged the complaint. The Commission found the following facts: The complainant on the material day during the late evening (between 21.00 hrs. and 22.00 hrs.) was returning home from visiting friends. On approaching his house, he saw

a car parked outside. He stopped and came out of his car. As he was approaching the other car the police superintendent came out of it and angrily asked the complainant why he had flashed the lights on him. On being told by the complainant that he wanted to see who was on his premises, the superintendent said he was "the officer-in-charge." A quarrel ensued during which the superintendent slapped the complainant. The complainant was retaliating when he was stopped by a lady who had been sitting in the superintendent's car. The superintendent went off with the car and the lady. He left his car at the police station and with a police land-rover and two policemen - a constable and an officer, returned to the complainant's house. He directed the two policemen to arrest the complainant. However the complainant and his wife of their own accord drove to the police station. There the complainant was charged with drunkenness and disorderly behaviour. He stayed in the cell for about three and a half hours. The next morning he was treated for bruises at a hospital. This same next day the wife also was arrested and charged with disorderly behaviour. They were

both issued with police bonds pending criminal proceedings. They never heard from the police again.

The Commission found that the arrest was unjustified and that the superintendent had misused his position. It recommended that the superintendent ought to be disciplined by being demoted to a rank one step below the one he was holding. The President accepted the recommendation and directed accordingly. The Inspector-General implemented the directive of the President.

This was undoubtedly a serious abuse of powers —— some punishment had to be meted out. No quarrel is being advanced with the nature of the punishment. The issue presently is, however, that does the President have any powers to order the disciplining of a public officer in this manner?

The status of Government employees with regard to dismissals and other disciplinary actions is determined by the Constitution. Article 132 of the Constitution, insofar as it is relevant to enable us to answer the question above in the light of the case cited above, enacts as follows:

"132 (1) Subject to the provisions of this Article, power to appoint persons to hold or to act in any office in—

(a)....

(b)....

(c) the Zambia Police Force; and

(d) ....

(including power to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove any such person from office shall vest in the President.

(2).....

(3).....the powers of the President to make appointments to any office in a service mentioned in clause (1)...and to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall be exercised -

(a)...

(b) in relation to any office is the Zambia Police Force . . . . by the Police and Prison Service Commission;

(c)....

acting in the name and on behalf of the President.

From these provisions it is apparent that all forms of disciplinary action against a public servant like a police superintendent are to be effected by the Service Commission. The President does have the power in exceptional circumstances to demand that a matter which is under consideration by the Service Commission be refered to him. This power is conferred upon him by Article 131 (10) which enacts:

> "The President may require a Commission ..... to refer any matter relating to the functions of that Commission under Article 132 which is under consideration by the Commission ... to the President and the President may himself in such a case exercise any of the powers conferred by clause (1) of that Article."

However this Article was construed strictly in the case of Kangombe v. the Attorney-General[59] to the effect that the case must be strictly under consideration by the Commission for the President's

intervention to be justified. In that case the President was instigated by the Secretary to the Cabinet to demand that the file of one teacher be referred to him even though the Commission had already decided upon it. The Court held that the procedural error deprived the President of any jurisdiction.

In these circumstances it is difficult to justify as constitutional the directive in the case (from the Commission for Investigations Annual Report, 1975) quoted above from the President to the effect that the police superintendent must be demoted. The directive cannot even be justified under Article 131 (9) which empowers the President to give "general directions with respect to the exercise of the functions of the (service) Commission," because a directive to demote an individual cannot in all reasonableness be termed as a "general" direction. In any case in the instant case the Presidential directive was to the Investigator-General (the Chief of Police) and not to the Police and Prison Service Commission.

We have arrived at two statements of law. The first one is that the police superintendent in

the case cited here ought to have been disciplined in accordance with the procedure stated here by the Police and Prison Service Commission. The second one is that the police superintendent may have been disciplined, as he in fact was, by the President as a result of an inquiry by the Commission for Investigations. The second statement of law contradicts the first one. And yet they both enjoy constitutional status. How is this issue to be resolved? How would a court resolve it? Some suggestions may be made here.

Firstly, the issue may be sought to be resolved by relying upon one latin maxim which says generalia non specialibus derogant- general provisions do not derogate from specific ones.[60] The more specific provisions with regard to disciplining government employees are the provisions relating to the Service Commissions. Therefore, on this argument, a government employee may only be disciplined by a Service Commission, any other procedure would be unconstitutional.

Secondly, it may be suggested that the procedure of disciplining government employees after

an inquiry by the Commission for Investigations is necessarily an amendment to the status generally of government employees. So that on this argument a government employee may be disciplined either by a Service Commission or by the President after investigations by the Commission for Investigations.

Whichever proposal is adopted, the present argument reveals one point, that there is need for an amendment to the Constitution. It is suggested that Article 132 (1) of the Constitution should be amended by the addition of a proviso to the effect that it shall be constitutional for a government employee to be disciplined as a result of investigations by the Commission for Investigations. Such an amendment will, besides making the law more certain, reduce the possibilities of the powers of the Commission for Investigations being the subject of litigation in court, which eventuality will not do much good to the status and authority of that important institution.

CHAPTER SIX

CONCLUSIONS

ON THE PLACE OF THE COMMISSION IN THE ADMINISTRATIVE PROCESS.

It is obviously impossible to peruse all the Annual Reports of the Complaints and comment on each of the cases reported therein. However, the Annual Reports, in their totality, teach a lot with regard to the place of the Commission in the administrative process. On the one hand, the Annual Reports, as well as the present study, have revealed that the Commission for Investigations on its establishment undertook to publicize itself so that as many people as possible who are affected by government administration may present to it any grievances that they may have in the process. On the other hand, it is ironical that virtually all the complaints so far handled by the Commission have been submitted to it by individuals who allege

that administrative officers have offended them in their professional capacities. In other words the Commission for Investigations has ultimately acquired the role of protector of individuals' professional and therefore economic interests. This may be explained in one or both of the following ways: Either that despite all its efforts the Commission has not achieved the objective of persuading the illiterate, unemployed, timid, rural dweller to "come out" with any grievances he may have against those who wield power, or that, with all the bold undertakings by the State to achieve meaningful social and economic development, the situation to those who participate only minimally in the money economy during the seventy years of colonialism remains little changed. Consequently, the rural Gambian, and he is a member of the vast majority of the population, still has little contact with the State, therefore he has no occassion to complain to the Commission.

In the present submission, the explanation for the fact that the big majority of the Commission's

clients are those Zambians who are involved in the money economy is to be found in the synthesis of the two possibilities advanced above. Thus however much as one can argue that meaningful social and economic development has not as yet affected every Zambian to the extent of both him coming into contact with government administration very frequently and deliberately seeking to have redressed any grievances he may have in the process, it is nonetheless difficult to deny that government administration has increased - the administrative process has increased. One would therefore expect to see in the Annual Reports complaints from those in outlying areas.

In blunt terms the conclusion drawn from the Annual Reports considered is that the Commission for Investigations is more relevant to the employed Zambian, the urban Zambian, the Zambian participating in the money economy, than to the rural Zambian.

One of the most frequently asserted objections to the idea of having an Ombudsman in the United Kingdom was that an institution which works well for Sweden with her small population could not necessarily be expected to work as well for the

United Kingdom with her 50 million people.[1] Zambia has a population of 5 million people. It has just been submitted that out of these 5 million people, only the small proportion who take part in the economic activities in the country seem to be utilising the institution of Commission for Investigations. Whilst it can not be said that it is good to have an institution which, although intended to serve the entire population of the country in practice only serves a small proportion, it must however be conceded that on this "population" argument, the prospects of the Commission for the future are very bright indeed.

ON THE ROLE OF THE COMMISSION IN REDRESSING GRIEVANCES.

In the limited scope of the Commissions operation, discussed above, the Commission has nevertheless justified its existence. It has revealed that in Zambia's rapid move forward towards social and economic ideals "individual rights and the fine points of fair legal procedure are .... disregarded in the interests of speed...."[2]

and in the personal interests of selfish bureaucrats. To quote Rowat, "The bureaucrats.... have inherited from their colonial masters an attitude of superiority rather than service, an 'insolence of office' which often leads to arbitrariness."[3]

Partly by design and partly as a necessary consequence of the operations of the Commission the Commission has played many roles in the process of redressing grievances and in the whole administration generally. The Commission has served;

1. as a deterrent against abuse of authority;
2. as an institution for redressing individual grievances;
3. as a critic of rules, regulations and some policies and practices of administrative authorities;
4. as a defender of bureaucrats against unfair criticisms;
5. as an agent of the bureaucracy in explaining the working of the government process and thereby maintaining an atmosphere of confidence between the government and the governed; and
6. as an institution to enlighten the members of the public on their rights.

ON THE FUTURE OF THE COMMISSION.

The future of the Commission in the Zambian State stracture is very much dependent upon three factors: a strong Executive and one which is willing to maintain the Commission; the confidence which the Commission cultivates and maintains in the eyes of the members of the public and the Executive; and related to the last stated factor, the integrity and personalities of the members of the Commission. The first factor is assumed. On the second factor we may add that so far there have never been any serious challenges from any circles to the power and authority of the institution. On the third factor, we may note that the choice of the first Investigator-General was a contributory factor to the establishment of the status which the Commission enjoys today. The second Investigator-General seems, even at this early stage, to be enhancing the status of the Commission——although one would wish that continuity be maintained at least in the office of Investigator-General.

On those considerations, the Commission for Investigations shall continue to be a strong pillar of government administration in Zambia.

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