CHAPTER SIX

THE OMBUDSMAN AND PUBLIC SERVANTS:

Governments are run through the agency of Ministers and the public servants. The ministers change periodically but the public servants constitute the permanent feature of the Government. Ministers who are appointed for a term may have to step out before the completion of the term in case they happen to lose the confidence of the House or that of the President or the Governor, as the case may be. Public servants do not go with the ministers.

Modern social welfare state is an administrative state in which public servants have a vital role to play. The State is playing the role of an educator, manufacturer, distributor and performs multifarious social welfare jobs. It can successfully discharge this responsibility only with the help of a dedicated team of public servants. Public servants in the performance of their functions have to serve and not to act as bureaucratic bosses. The definition of democracy envisages this. An independent, impartial, honest and competent public service is the sine qua non of good government.

Public servants wield extensive powers as administrators. People come in contact with the administration through representations and applications

2. Constitution of India, Article 83(2) which stipulates the duration of the House of People.
3. Id., Article 75(3).
4. Id., Article 75(2).
5. Id., Article 164(1).
and personally also when due to increase in administrative controls, they have to visit various offices for the affairs of their daily life. The citizen-administrator relationship is that of doctor and patient. The administration has to cater for the well-being of citizens and the citizen have to co-operate with the administration by following its instructions. In this interaction, citizens often complain of simple clerical errors to oppression and injustice including failure to carry out legislative intent, unreasonable delay, administrative error, abuse of discretion, lack of courtesy, oversight, negligence, inadequate investigation, unfair policy, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficacy, abuse of authority, discrimination, carelessness and all other acts that are frequently inflicted upon the governed by those who govern. Protection of citizens against these abuses is necessary. In spite of the conventional means of controlling the administration, these abuses have continued almost unabated. Administration, like any other discipline, is a developing science and the need for the widest possible research and debate on making it more effective and purposive can hardly be overemphasized.

To deal with the malady of maladministration, one of the experiments that has been tried is that of Ombudsman. It will be useful to examine how far this institution has been successful in this respect in various systems, whether it is adaptable within the constitutional framework applicable to civil servants.

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In India and can also be used as an aid for the civil servants or not? This is relevant to this study since some doubts have been expressed regarding the compatibility of Lokpal inquiries and departmental inquiries envisaged in article 311(2) of the Indian Constitution.

6:1: OMBUDSMAN CONTROL ON PUBLIC SERVANTS

The Scandinavian Experience

The Swedish public administration is not subject to much of ministerial or parliamentary control. In fact, each official is only answerable to the law rather than to his higher officials. The most serious punishment of all, removal from office, is left to be determined by the courts of law. An official can be penalized for wrong doing only by a Judicial decree after a formal trial and not by techniques or instrumentality of personnel administration ordinarily utilized by sizeable organisations. In this context, the supervision which is exercised by the Ombudsmen over the public officials assumes importance.

Ordinary Courts of law in Sweden have the power to apply only the penal law to administrators. They cannot command an official to do an act nor restrain him from acting. They can only punish an administrator for having violated the law but have no role to play in securing sound administration or in forestalling bad administration. The penal offence for which the courts...

try the officials is 'breach of duty'. Breach of duty means the failure of the official to act in the manner required by a statute, a valid regulation or direction, or by 'the nature of his office' through negligence, imprudence or unskilfulness. The Court can punish the civil servant concerned for the said offence by way of fine, imprisonment, suspension or dismissal. In accordance with this provision of law, the Ombudsman can only prosecute an official whom he believes to be guilty of the crime of 'breach of duty'. Before launching a prosecution, the ombudsman is required by parliamentary instructions, to afford the supposed offender a chance to justify or excuse himself.

In actual practice, Ombudsmen in Sweden have not been frequently resorting to prosecution of various officials. Instead, they have developed the practice of giving reminders and admonitions to erring officials as is evident from the following statistical data:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of complaints</th>
<th>No. of prosecutions</th>
<th>Number of admonitions or other criticism</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973:</td>
<td>3662</td>
<td>9</td>
<td>551</td>
</tr>
<tr>
<td>1974:</td>
<td>3662</td>
<td>7</td>
<td>621</td>
</tr>
<tr>
<td>1975:</td>
<td>3602</td>
<td>3</td>
<td>639</td>
</tr>
<tr>
<td>Jan-June, 1976:</td>
<td>1309</td>
<td>2</td>
<td>337</td>
</tr>
<tr>
<td>July, 1976 to June, 1977:</td>
<td>2939</td>
<td>2</td>
<td>335</td>
</tr>
<tr>
<td>July, 1977 to June, 1977:</td>
<td>3408</td>
<td>3</td>
<td>485</td>
</tr>
</tbody>
</table>

13. Swedish Penal Code, Chap. 20, Sec.4.
It is clear from this table that prosecutions have been sparingly used. This is because ombudsmen have been of the view that punishment for a past mistake is a rather antiquated way of encouraging sound administration. Admonitions have been justified on the ground that they influence not only the official immediately involved but also others who may deal with similar matters in future. Admonitions carry reasons with them and that is why Prof. Walter Gellhorn has aptly observed:

"Behind the admonitory lecture lurks a thinly veiled threat to prosecute if the admonition be ignored."

The practice of administering admonitions has no support in the Constitution. It has been developed by the Ombudsman on his own initiative. It has been a subject of criticism. It is argued that when the ombudsman initiates prosecution, the final decision lies with the court but when he chooses to give his opinion otherwise, there is no chance for the court to review the decision.

Some officials have pointed out that the ombudsman prosecutions have been far from uniformly successful and suggest that his judgment may be equally fallible when he 'gives a reminder'. The officials have questioned whether an ombudsman should castigate an official whom he has found no cause to prosecute; they think that he

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15. This table includes even those cases which were initiated by ombudsmen themselves as well in each year. The table is based upon Ombudsmen's annual reports - English summaries given in Justitieombudsmans arbetsberattelse for the years 1974, 1975, 1975-76, 1976-77, 1977-78, 1978-79.
17. Ibid.
18. Ibid.
should keep condemnatory opinions to himself, except in so far as they may be formulated so generally as not to bring shame to a named individual.21 Nobody wants his name in the Ombudsman's annual report because it is a kind of 'who's who in reverse of public officials and civil servants'?2

On the other hand, this practice has been defended by ombudsmen. They say that the law requires them to prosecute only those who are grossly negligent, and dangerous official behaviour and not for every picaune fault they may detect. The courts, moreover, will convict only when an official's mistake has been so blatant as to warrant imposition of punishment. Hence prosecution is a waste of everybody's time when in their own estimation punishment would be inappropriate even though an impropriety has occurred. It is further emphasized that an official aggrieved by the Ombudsman's treatment is always at liberty to complain to Parliament and to seek redress there. Finally, anyone who is outraged by having been castigated has only to say so - in which case the Ombudsman will 'co-operate' by prosecuting instead of by simply criticizing.23 It cannot be denied that many official acts may be wrong without being criminal. The Ombudsman's effectiveness would be greatly diminished were he to remain silent about non-criminal wrongs. The solution lies in providing a legal base to the practice of the ombudsman of administering admonitions and to permit access to the courts in those instances when a conscientious official thinks that the ombudsman has erred.

21. Id. pp. 246-47.
The Ombudsman has made a positive contribution in this direction in Sweden. It provides a constant and healthy influence on the manner in which public servants should perform their duties. It has been able to introduce due process in the administration, particularly by stressing that in a democracy people ought to be given the reasons for any decision that goes against them and by recommending that all administrative agencies be compelled to state the reasons for every adverse decision they make. The functioning of the Swedish Ombudsman does not militate against the interests of public servants. By finding no fault in such a large number of cases, as shown in the table earlier, the actions of the public servants are upheld by the Ombudsman which by itself is a vindication of lawful administration. Sometimes, in his reports of inspection, the Ombudsman gives praise which helps in boosting the morale of public servants. His rulings help in future actions of the administration. His suggestions help in bringing organisational reforms. Though the ombudsman system is primarily designed to mete out blame rather than to give credit where credit is due, yet legitimate protection and occasional applause from the ombudsman to the public servants have proved useful by-products of the system.

The position in Finland is, to a large extent, similar to that in Sweden. In Finland, an official who commits errors through indifference, negligence, carelessness, ignorance or lack of skill is included within the meaning of ‘criminal’ and is punishable by a warning or fine. Article 92 of the constitution of

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25. Finland Penal Code, Chapter 40, Article 21.
Finland provides that no official may enforce provisions of decrees, orders, or regulations that conflict with an Act of Parliament or with the basic law. The provision places on every official the responsibility of checking the legality of rules given to him by the government in power. The sanction behind this responsibility has been provided in Article 93, according to which whoever suffers a violation of right or injury as a result of an illegal measure or negligence by an official has the right to demand that the official in question be punished and pay damages, or he can lay information against the official demanding his indictment in accordance with the formalities prescribed by law.

This contemplates some machinery to exercise supervision so that officials act in accordance with law. That machinery is the Ombudsman who acts as the overseer of all public officials. He can make a charge with respect to any official error that has occurred in the performance of official duties. The jurisdiction of the Ombudsman is not limited to cases in which it can be shown that a particular official or office made an error; he must also make sure that the laws are upheld generally in official acts. He is thus empowered to call attention to grievances or abuses that cannot be viewed strictly as the fault of a particular official. There is no requirement that the complainant must exhaust legal remedies before approaching the Ombudsman. After investigation, what course of action will be adopted by the Ombudsman will depend upon his findings but in so deciding, the ombudsman takes into account not only its formal implications but also its effect upon the official.

3. Id., p. 55-56.
in questions or upon the whole governmental apparatus. Like his Swedish counterpart, the Ombudsman has the power of prosecuting officials for committing errors. He may press the charge himself or leave it to some other person such as an official prosecutor. The activity of the "Inland Ombudsman in this area is presented by the following statistical data:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of complaints</th>
<th>No. of incrimination</th>
<th>No. of recommendations</th>
<th>No. of actions for various reasons</th>
<th>No. of investigations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td>1333</td>
<td>1394</td>
<td>5</td>
<td>x</td>
<td>76</td>
</tr>
<tr>
<td>1968</td>
<td>1524</td>
<td>1177</td>
<td>7</td>
<td>2</td>
<td>24</td>
</tr>
<tr>
<td>1969</td>
<td>1547</td>
<td>1110</td>
<td>7</td>
<td>4</td>
<td>30</td>
</tr>
<tr>
<td>1970</td>
<td>1437</td>
<td>1093</td>
<td>3</td>
<td>x</td>
<td>36</td>
</tr>
<tr>
<td>1971</td>
<td>1132</td>
<td>979</td>
<td>2</td>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td>1972</td>
<td>1428</td>
<td>971</td>
<td>4</td>
<td>3</td>
<td>23</td>
</tr>
<tr>
<td>1973</td>
<td>1452</td>
<td>1119</td>
<td>3</td>
<td>2</td>
<td>32</td>
</tr>
<tr>
<td>1974</td>
<td>1441</td>
<td>353</td>
<td>2</td>
<td>x</td>
<td>22</td>
</tr>
<tr>
<td>1975</td>
<td>1740</td>
<td>1074</td>
<td>8</td>
<td>2</td>
<td>29</td>
</tr>
<tr>
<td>1976</td>
<td>1305</td>
<td>1115</td>
<td>1</td>
<td>3</td>
<td>52</td>
</tr>
</tbody>
</table>

This table indicates that the number of prosecutions has been small. Besides prosecutions, other means have also been adopted. Ombudsmen make proposals for disciplinary measures, send reminders and sometimes take actions of a special type depending upon the circumstances of a case.

31. This table is based upon the information contained in Jona S. Hall, The Parliamentary Ombudsman in Finland: Position and Functions, Table 1 and III on pp.126 and 25(1975) and Report of the Parliamentary Ombudsman - IWF.
The Ombudsman has always taken pragmatic view while deciding the course of action, keeping in view the objectives of his office. Even the proposals for disciplinary measures against the officials have not been large. The Ombudsman can only recommend disciplinary actions to the superior official but cannot act as the prosecutor. Action on the recommendation is the duty of the administrative office.

Reminders are issued where the official error is of minor nature, has caused no damage and there is reason to suppose that the official or office would mend its way in future without a charge being brought. In the relevant legal provisions, there is no authorization for such reminders. In Sweden, this practice of reminders was initially opposed on the ground that the Ombudsman can either bring a charge or leave the matter as it was. The Ombudsman justified its practice of reminders as falling within the orbit of his supervisory jurisdiction. At present, it is an established form of action by the Ombudsman and is, by far, the most significant. The statistical Table given above points out that reminders were issued in a large number of cases. A reminder is in the form of a critical observation and not in the form of a charge regarding the conduct of the official. A reminder is a flexible tool since the criticisms and viewpoints it contains can be tailored in accordance with the requirements of each case or situation.

33. Ibid., supra note 77, p.105.
34. Id., p.111.
35. Id., p.105-99.
36. Id., p.105.
These reminders have proved helpful in raising the performance level of official agencies, preventing illegal acts, securing the rights of citizens and increasing the general reliability of administration. An added advantage of the reminders is that they have helped in lessening the workload of the ombudsman and also of the courts for otherwise preferring a charge means more of work for both.\(^{37}\) The only negative aspect of reminders is that the official gets no chance to defend himself. Besides these measures, the ombudsman makes from time to time other proposals depending upon the situation, particularly in case of discretionary decisions. The ombudsman also recommends the enactment of laws or decrees. These proposals and recommendations have no binding effect, though through this process, he is able to point out the lacunas in law.\(^{33}\)

Civil servants in Finland have not made much use of the ombudsman to vindicate their personal cases such as in the case of dismissal or disciplinary action since these are combatable by special tribunals to which access is easy. However, the civil servants' organisations have reported to the ombudsman for purposes of collective bargaining with officials.\(^{39}\)

The experience of the ombudsman has shown that he takes action only in a few cases, for his investigations prove that in the majority of cases no action is called for. It has been testified by many administrators that the investigations of the ombudsman have substantial preventive effect.\(^{40}\) The main significance of the ombudsman lies in the fact that he is able to ensure that officials

\(^{37}\) ibid., p. 109-09.
\(^{33}\) ibid., p. 118.
\(^{39}\) Gellhorn, supra note 10, pp. 66-67.
\(^{40}\) ibid., p. 7%.
follow the law and fulfill their duties so that no one is denied the enjoyment of his legal rights. In the administration, the senior officials are happy with the existence of the Ombudsman for as they say, 'he takes a lot of cranks off our backs, because they write to him instead of continuing to badger us.' In sum, the mere existence of the Ombudsman has been regarded as a valuable shield against oppression - in much the same way as a nation's military force is usually thought to be a shield against aggression.

The Ombudsmanic remedy against the administration in Denmark was considered necessary because the existing two remedies were not sufficient and effective. Two reviews of the administrative actions were available, one before the superior administrative official and the other before the ordinary courts. The administrative review was in the nature of making the administration a Judge of its own cause, so it did not inspire much confidence. The Judicial review also had certain limitation for it was primarily limited to the questions of ultra vires. The courts were reluctant to interfere even in situations of 'inaction'. They were slow on appeals from administrative orders, and above all, the proceedings were costly. It was in this context that the Ombudsman was provided for as an appellate institution for citizens who come into conflict with the administrative agencies. He was meant to be 'the protector of the man in the street'.

42. Gellhorn, supra note 19, p.73.
43. id., p.97.
against injustices, against arbitrariness and against the abuse of power on the part of the executive.\textsuperscript{45}

There was initially opposition spearheaded by civil service groups and local governments. The opposition was understandable since the ombudsman's supervision was primarily directed towards civil servants.

The Act empowers the Danish Ombudsman to supervise persons within his jurisdiction in order to prevent faults of omission or commission in the course of their work.\textsuperscript{47} His duties are elaborated in his instructions, which direct him to see that no one in public service pursues unlawful aims, makes arbitrary or unjust decisions, or is guilty in any way of error or neglect.\textsuperscript{48} In short, the Ombudsman not only exercises legal supervision over the administration, but is also charged with preventing arbitrary and unreasonable dispositions.\textsuperscript{49} In pursuance of these duties, the ombudsman goes into the merits of a case only when he finds that the discretion has been exercised in a most unreasonable manner.\textsuperscript{50}

The Ombudsman has not been given any authority to annul or amend an administrative order but he has certain other powers.\textsuperscript{51} If after the investigation, 

\textsuperscript{46} Lda., 1125; Gallhorn, supra note 10, p.7.
\textsuperscript{47} Sec.5, The Ombudsman Act (Act No.203 of June 11,1934) as amended by Act No.399 of June 9, 1971.
\textsuperscript{48} Article 3 of Directives for the Parliamentary Commissioner for Civil and Military Administration (Ombudsman) originally adopted by the Folketing on March 22, 1956, replaced by Government Notice No.45 of Feb.9, 1962.
\textsuperscript{50} This was explained by Mr. Per Lorentzen, the Deputy Ombudsman of Denmark in a personal interview on 17th and 24th Oct., 1979 at the University College, London.
\textsuperscript{51} The Ombudsman Act, Sec.9; Directives for the Parliamentary Commissioner, Art.9.
the Ombudsman is of the opinion that any person within
his jurisdiction (not a minister) ought to be held
responsible for a criminal offence, he can direct the
prosecuting authority to institute a preliminary
investigation or to prosecute such a person before the
courts. This rule has been applied only once. 52 If he
considers that a civil servant is guilty of misconduct
which necessitates disciplinary proceedings, he may order
the administrative authority concerned to institute
disciplinary investigation. This rule also has been
sparingly used. 53 The most important aspect of
Ombudsmen's activity has been Ombudsman's of communication
of his views on the matter to the person against whom the
complaint comes. On the basis of this rule the Ombudsman
has stated his criticism and put forward recommendations
to the authorities concerned. His recommendations are
practically always acted upon. 54 This rule has proved
to be a potent, versatile, 55 flexible and efficient
instrument. This has enabled him to provide guidance
to the administration to initiate negotiations to get
erroneous decisions corrected and to achieve revision of
general procedure. 57 The Swedish and the Finnish Ombudsmen
had no such power and yet they developed a practice
whereby they could communicate their views on a particular
matter. The Danish Ombudsman does so on a statutory basis.
This has helped in introducing 'preventive therapy' in
the administration. Self-reforg has deep, penetrating
and usually lasting consequences. 59

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52. Based upon The Information Sheet, The Ombudsman, Denmark:
2 (June, 1977) supplied by Mr. Peer Lorenzen,
Deputy Ombudsman, Denmark.
53. Id., 3.
54. Id.;
55. Id.;
57. Federsen in Kowal, supra note 44, p.91.
58. Stephen Kurzitz, 'The Folketingets Ombudsmand', 12
Parliamentary Affairs, 199 at p.202(1959); See also
the same author, 'Scandinavian Ombudsman',
The Ombudsman has been making frequent use of his right of stating his views. From 1955 to 1971, 13,055 complaints were lodged with the Ombudsman. Of these, 13,142 were rejected for various reasons. Of the 4,913 cases investigated, in 393 cases the Ombudsman stated his views in the form of criticism and/or recommendation. The trend continued as is evident from the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total cases</th>
<th>Cases rejected</th>
<th>Cases investigated</th>
<th>Criticism or recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>1841</td>
<td>1048</td>
<td>646</td>
<td>140</td>
</tr>
<tr>
<td>1973</td>
<td>1529</td>
<td>858</td>
<td>626</td>
<td>198</td>
</tr>
<tr>
<td>1974</td>
<td>1753</td>
<td>964</td>
<td>726</td>
<td>196</td>
</tr>
<tr>
<td>1975</td>
<td>2009</td>
<td>1098</td>
<td>797</td>
<td>233</td>
</tr>
</tbody>
</table>

*(Total includes the cases received as also initiated by the Ombudsman).*

In 1977, 1937 cases were received out of which 1039 were rejected. Of the 779 cases investigated, in 214 cases the Ombudsman made his criticism or recommendation.

Civil servants who were apprehensive of the Ombudsman's supervision have themselves made a considerable use of the institution. They frequently refer complaints of ill-treatment by their superiors in matters of appointment, discipline, wages, pension etc., to the Ombudsman. It has

been observed that instead of fleeing from the Ombudsman, civil servants have fled to him. The functioning of the Ombudsman has scotched the fears of civil servants. It has proved to be a natural and beneficial unit of a democratic form of government. Mostly the complaints are addressed impersonally against administrative organs rather than against individuals. The Ombudsman has in many cases explicitly stated that while no basis has been found for criticizing the civil servant, yet the administrative practice should be revised for the future. The Ombudsman has normally avoided ascribing blame on an individual official. The President of the civil servant's organization has condemned the work of the Ombudsman. A Judge of the city court of Copenhagen has recorded that the Ombudsman has supplemented the control, without hampering the efficiency or independence, of the administration. It has been explained that the Ombudsman has not rendered judicial control superfluous; rather it has created opportunities for a more detailed control over executive authorities. The Ombudsman's reports get good publicity and are read by Supreme Court Judges, provincial Governors and Civil Servants. They have had a 'tonic effect' upon public administration. The Ombudsman has been able to diminish laziness in the administration, rationalize their work methods and liberate them from their bondage by introducing a fresh approach.

The Ombudsman in Norway was introduced not because of administrative abuses but only as a safeguard against

62. Gallhøm, supra note 10, 76.
64. Gallhøm, supra note 10, p.27.
65. Ibid.
66. Pedersen, in Rovat, supra note 44, p.94.
67. Gallhøm, supra note 10, p.35.
the possibility of excesses being committed. The Norwegian
civil servants were not opposed to it. They were quiescent
about it and in fact even lent some support. The reason for
it was that they were encouraged by their Danish counterparts
about the beneficial assistance of the Ombudsman.

The Ombudsman has been assigned the duty to
endeavour to ensure that public administration does not
commit any injustice against any citizen. The Ombudsman's
control is a post factum control; he does not take up any
matter for consideration so long as it is being handled
by the administration. The administrative right of
appeal must also be exercised before any complaint can
be lodged with the Ombudsman. The Ombudsman advises the
complainants on their rights of appeal to a higher
administrative authority. Discretionary decisions of
the administration have been a controversial area of the
Ombudsman's jurisdiction. The relevant section in the
Act says: 'If the Ombudsman comes to the conclusion
that a decision must be regarded as unlawful or clearly
unreasonable, he may state this.' The corresponding
regulation, however, says: 'If the Ombudsman comes to
the conclusion that a discretionary decision is clearly
unreasonable or is otherwise clearly in conflict with fair
administrative practice, he may state this.' The words,
'conflict with fair administrative practice' are not to
be found in the Act. These words expand the scope of the

68. Idas pp. 155-56.
69. Sec. 3, Act of June 22, 1962, concerning
The Storting's Ombudsman for the Administration.
70. Sverre Thune, 'The Norwegian Ombudsman for Civil and
Military Affairs', Reference Papers, Press Department,
Royal Ministry of Foreign Affairs, Oslo-Norway,
71. Sec. 10, supra note 69.
72. Sec. 9, Instructions of Nov., 1962, for the
Storting's Ombudsman for the Administration.
Ombudsman's competence over and above what the Act envisages.\(^7\) He will have the authority to express himself on the merits of discretionary decisions when they are 'clearly unreasonable' or contrary to 'fair administrative practice'.\(^7\)

The Ombudsman in Norway does not have much power to wield. Unlike the Ombudsman in other Scandinavian countries, he has no authority to direct that a civil servant be prosecuted or subjected to disciplinary proceedings. Under the Act he can only "express his opinion in matters which come within his province."\(^7\)

He can point out any errors or negligence on the part of an administrative organ or official. If the Ombudsman comes to the conclusion that a decision must be considered invalid, he can say so, and if he finds it reasonable to do so he can inform the administrative organ in question that compensation should be paid unless a new decision can remedy the situation. If the Ombudsman questions the validity of a decision he may, according to the circumstances, advise the complainant to take legal action.\(^7\)

The following statistical data presents the operation of the Ombudsman in this area:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of complaints received</th>
<th>No. of cases on Ombudsman's initiative</th>
<th>Justifiable complaints</th>
<th>Compensation paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>1504</td>
<td>28</td>
<td>1520</td>
<td>261</td>
</tr>
<tr>
<td>1976</td>
<td>1357</td>
<td>22</td>
<td>1408</td>
<td>271</td>
</tr>
<tr>
<td>1977</td>
<td>1601</td>
<td>35</td>
<td>1631</td>
<td>292</td>
</tr>
</tbody>
</table>

\(^7\) Jain, supra note 9, 53-59, Thune, supra note 70, p.6, Sec.10, supra note 69, Sec.9, supra note 72.
The table indicates that a sizeable number of complaints are found justifiable and in a small number of cases, even compensation is paid. Prof. Gellhorn has aptly observed that his is the power of reason alone, unaided by the power of compulsion or punishment and it has been acknowledged by him that the Ombudsman's capacity to counsel rather than command seems adequate for Norway's needs and consonant with its traditions. Public servants in Norway enjoy an extraordinarily good reputation. Crime under Norway's Penal Code does not include inattentive, negligent, ignorant or rude acts of public servants. In actual practice, however, public employees are not prosecuted for minor lapses. So the inability to initiate criminal proceedings is of no great consequence.

The Ombudsman has been frequently made use of by civil servants themselves to get resolved their grievances about appointments, promotions, salary employment, determination of pension rights and other conditions. Top ranking functionary of a civil servants organisation has expressed approval of the Ombudsman by pointing out that the ministries have started taking more care in personnel matters than they did before the Ombudsman was around to ask them questions. This is a clear evidence of the two-fold utility of the institution of Ombudsman. It is not used only against civil servants, they also use him to get their grievances reviewed.

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77. The source of the table is, Bernard Frank, Ombudsman and other complaint handling systems survey, Nos. V-XXII, covering period from July 1, 1975 to June 30, 1978.
78. Gellhorn, supra note 10, p. 176.
79. Sections 324-25 of the Norwegian Penal Code.
80. Gellhorn, supra note 10, p. 177.
81. Id., p. 174.
The Scandinavian Ombudsman has thus proved to be a potent instrument to deal with maladministration. It has also been able to ensure better security to public servants which is necessary for a sound administrative set-up. The institution is not a substitute for the existing remedies. It is an additional control so that a constant vigilance is exercised on those who wield power.

And above all, it has been able to evolve new processes which have contributed for better administrative jurisprudence. Its effectiveness has been felt in other systems as well.

THE USE OF MEDIATOR:

The introduction of the Ombudsman in the form of the Mediator in a well developed system of administrative courts as that in France, was a surprise to many foreign admirers of droit administratif. The introduction was in response to the need for improved machinery for protection against administrative abuse. The Mediator is authorised to investigate a complaint that a public authority has not acted in accordance with its mission of public service. This is a wide frame which has been interpreted to mean that he can consider not only whether a public authority has acted in a systematically obstructive or hasty manner but also whether it has acted without due equity or humanity. The tasks of the Mediator include, inter-alia, to humanize relations between the public and an administration which has become more and more opaque and complicated; to secure respect for the rule, when decisions

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93. Stacey, supra note 60, p.93.
95. Stacey, supra note 60, p.96.
have tended to stray away from it, or simply to soften the effects of a regulation in the name of equity; to uncover and eliminate cases of "maladministration" which are as damaging to the public image of the administration as they are frustrating for the victims of "maladministration," It has been explained that the role of the Mediateur will not come in conflict with those of the conseil d'État and the tribunal administratif which are concerned with the legality of action taken by public authorities. The Mediateur is to complement their role by saying that although a public authority has not acted illegally, it has not acted fairly or with proper humanity.

The law authorises that when the Mediateur finds that a complaint is justified, he can not only recommend redress for the individual but also suggest ways in which the administration can be improved. He can also propose changes in legislation where he finds that the law is working inequitably. If having made his recommendations after an investigation, the Mediateur does not receive a satisfactory reply from the public authority concerned, he can publicise his recommendations in a special report which he sends to the President of the Republic and to Parliament. If the authority concerned is not willing to act on his recommendations, he can invoke disciplinary procedure against the official concerned or take judicial action against him. Therefore, the Mediateur has powers comparable with those of the Swedish and Danish ombudsmen.
The following statistical data furnishes an idea about its operation in France:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of complaints</th>
<th>Justified</th>
<th>Partially justified</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>1773</td>
<td>70</td>
<td>112</td>
</tr>
<tr>
<td>1974</td>
<td>1659</td>
<td>162</td>
<td>170</td>
</tr>
<tr>
<td>1975</td>
<td>3150</td>
<td>245</td>
<td>165</td>
</tr>
<tr>
<td>1976</td>
<td>3197</td>
<td>243</td>
<td>111</td>
</tr>
<tr>
<td>1977</td>
<td>3599</td>
<td>312</td>
<td>x</td>
</tr>
</tbody>
</table>

An analysis of this table makes it clear that the number of complaints received is large and has been progressively increasing over the years. In 1973, the number of complaints received was over 4000 and of the investigated complaints, 39 per cent were found to be justified. The institution which is only some years old has justified its creation. Substantial number of complaints have been found to be justified. The mediator has not so far issued a special report nor has it invoked disciplinary procedure or taken judicial action against any official.

Unlike in Scandinavian countries, the mediator cannot consider complaints from serving civil servants against public authorities in their role as employers. Under the French System, civil servants have two avenues of complaint in personnel matters. First, the case can be taken to the Conseil d' Etat or a tribunal administratif. Second, civil servants make considerable use of their trade unions to take up a case with the Ministry. But since 1976,
retired civil servants have been permitted to complain in civil service personnel matters.

In the early stages of the office, the relations between the Mediateur and senior civil servants, including members of the Conseil d'État, were 'cool'. The Civil servants were fearful of what the Mediateur might do. The members of the Conseil d'État considered him as a rival. But soon their doubts proved wrong and their relations improved. Writing in 1979, Prof. J.M. Garner has recorded that the institution has now firmly established itself; it seems to be better understood by the general public and it is gradually improving administrative standards.

Theygovernment policy

The administration in New Zealand had not suffered any critical town affair. Still Prof. Peter Campbell has said that the New Zealand tradition is that the civil service should be widely regarded with fear, contempt and dislike as a host of unproductive, socialistic, power-hungry bureaucrats. This assessment has been viewed by Prof. Larry J. Hill as 'somewhat overdrawn'. In any case, to keep the administration under control, administrative, parliamentary and judicial controls have been provided. Insipe of the availability of these controls, the institution of ombudsman was considered necessary and it appeared to be congruent with and complimentary to the

100. The details are given in Chapter Two: 'The Institution of Ombudsman' of this work. See id., p. 94.
103. See, id., pp. 53-65; Callinom, supra note 90, pp. 94-101; J.P. Horsey, 'New Zealand's Parliamentary Commission' in Court, supra note 44, pp. 127-131.
In the words of Sir Guy Fowles, the institution was adopted because without adequate and effective controls, 'the citizen would have no defence against administrative despotism. But civil servants were not prepared to welcome the Ombudsman for they viewed him as an intruder who would monitor their every action. They feared that if at all the ombudsman worked, it would cause confusion and disgruntlement ... It is the public servant, and only he, who is to be harassed and hounded as part of the policy of halting the welfare state in its tracks. It was against this opposition that the ombudsman was introduced in New Zealand.

The principal function of the ombudsman in New Zealand is to investigate any decision or recommendation relating to a matter of administration and affecting any person or body of persons in his or its personal capacity. This means that his jurisdiction extends to a 'matter of administration' as distinct from a 'matter of policy,' though 'policy' has not been expressly excluded. No statutory guideline has been provided to decide whether the act in question constitutes a matter of policy or is an action of administration. These are inextricably mixed up areas and it is not easy to demarcate them. The ombudsman describes this as a "notoriously difficult..."

104. Hill, supra note 102, p. 64.
105. Sir Guy Fowles.
106. Hill, supra note 102, p. 64.
distinction and acknowledges that he has not been able to 'construct any guiding principles.' The Ombudsman has taken the position that so long as the complaint refers to a matter of administration, it falls within his jurisdiction even though it may also relate to a matter of policy. Many decisions of the Ombudsman to exercise jurisdiction in particular situations have been doubted by some of the critics. The 1962 legislation, as also the 1975 one, provide that if any question arises whether the Ombudsman has jurisdiction to investigate any case or class of cases, he may, if he thinks fit, apply to the Supreme Court for a declaratory order. In spite of the fact that disputable situations have arisen, yet matters have not been taken to the Supreme Court. The Ombudsman has also not so far applied to the Supreme Court for a declaratory order. Even the recent Act of 1975 has not attempted to statutorily lay down the demarcation between matters of policy and matters of administration. Probably, it was thought that it would create more riddles than solve, so once again it has been left to the pragmatic sense of the Ombudsman himself.

There are wide grounds enabling the Ombudsman to review the administrative actions extensively. He can examine the act to see whether it was unreasonable, unjust,

111. Gray has been quoted in Jobson(ed.), New Zealand: The Development of its Laws and Constitution, 148(1967).
113. The Parliamentary Commissioner (Ombudsman) Act, 1962, Sec.11(7); The Ombudsman Act, 1975, Sec.13(9).
115. The Parliamentary Commission (Ombudsman) Act, 1962, Sec. 19(1) and (2); The Ombudsman Act, 1975, Sec.22(1) and (2).
oppressive, improperly discriminatory or was in accordance with law or practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory. He can also examine the reasonableness of exercise of discretionary powers. He has the onerous duty to ensure 'due process' in the administration and the applicability of principles of natural Justice. In order to carry out its duties, the Ombudsman has been given the power of recommendation whereby he can report to the Department for further consideration of the matter or ask for alteration, variation, rectification or cancellation of the matter. He can also ask for the reconsideration of any law or practice on which the decision was based or may require that reasons should have been given for the decision or that any other steps should be taken. If no appropriate action is taken within a reasonable time, the Ombudsman may send a copy of the report and his recommendation to the Prime Minister and thereafter may make such report to the Parliament as he thinks fit. Civil Servants have been provided a safeguard as the ombudsman cannot make an adverse comment unless that person has been given an opportunity to be heard.\textsuperscript{116}

From its inception up to 31 March, 1975, the Ombudsman received 10,776 complaints.\textsuperscript{117} Over these twelve years, 1,036 cases, about one-tenth of the total complaints processed have been found justified.\textsuperscript{118} 79 percent of these cases have been labelled as 'rectified' which signifies that the department has agreed to comply with the Ombudsman's interpretation. In small number of cases only, the Ombudsman had to use pressure or any element of coercion to get the agency to agree to comply.

\textsuperscript{116} Sec. 19(3) to (6) of 1962 Act and Sec. 22(3) to (7) of 1975 Act.  
\textsuperscript{117} Hill, supra note 107, p.136.  
\textsuperscript{118} Id., p.192.
again, only in small number of cases, the Ombudsman made 'recommendations'. These were situations in which the agency refused to comply with his wishes. But ultimately, the Ministers have generally complied with the recommendations of the Ombudsman. It has been recorded that only in two cases, the recommendation has not been implemented.\(^\text{119}\)

The following statistical data presents the operation of the Ombudsman of New Zealand in recent years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints Received</th>
<th>Complaints Investigated</th>
<th>Complaints Sustained</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>31-3-76</td>
<td>1315</td>
<td>408</td>
<td>134</td>
<td>33</td>
</tr>
<tr>
<td>31-3-77</td>
<td>2093</td>
<td>962</td>
<td>349</td>
<td>40</td>
</tr>
<tr>
<td>31-3-73</td>
<td>1905</td>
<td>1031</td>
<td>391</td>
<td>36</td>
</tr>
<tr>
<td>31-3-79</td>
<td>1635</td>
<td>667</td>
<td>129</td>
<td>19</td>
</tr>
</tbody>
</table>

The table\(^\text{120}\) is indicative of the trend that the inflow of complaints continues to be substantial though in fluctuating degree. The same is true in case of the percentage of the complaints sustained, though it fell down by almost fifty percent for the year 1979. It is difficult to draw out any set pattern except that it is clear that there is a continuous need for Ombudsman investigations.

Prof. Larry S. Mills' evaluation is that the Ombudsman in New Zealand has been a success on the basis of his achievements in two crucial areas i.e., relationship with citizens and with the administrative system. The office has become identified as a national symbol to whom

\(^\text{119}\) Id., pp. 192-93.

\(^\text{120}\) The table is based upon Reports of New Zealand Ombudsman for the years ending 31st March, 1975 to 1979.
The Ombudsman has reported that the 'outstanding feature' has been the cooperation of the departments which has helped the Ombudsman's office to operate with comparatively small staff and yet deal with a comparatively large caseload and has served to 'build a firm structure of confidence between the office and the departments which has undoubtedly been in the national interest.' The office has made no adverse impact upon the civil servants. There is no evidence indicating that the Ombudsman has disrupted the administrative process. The regret of some that the Ombudsman will be an 'expensive bureaucracy' and 'not very effective democratic luxury' has been proved wrong by the functioning of the Ombudsman. The benefits that have accrued to New Zealand from having an Ombudsman appear to have greatly outweighed the social and financial costs. As an impartial viewer, the Ombudsman has been able to assist the administration by bringing to its notice what is needed to reform a particular situation or a process. The Ombudsman has proved to be a good channel for receiving complaints from civil servants with regard to their working conditions, salary, job, conduct etc. The Ombudsman acts not only as an invigilator over the civil servants but also a shielder of their interests. Sixteen percent of the clients of the Ombudsman have been civil servants and thirteen percent of them have...

121. Hill, supra note 102, pp. 319-20.
123. Hill, supra note 102, p. 320.
124. Id., p. 321.
125. Id., p. 321.
126. Id., p. 321.
127. Id., p. 124-25.
been helped by the Ombudsman. It would not be wrong to say that the Ombudsman had been co-opted by the civil servants. This is evident from the recent adoption of the collegiate system of Ombudsmen in New Zealand.

The Parliamentary Commissioner for Administration in England was also established to ensure cleaner and better administration. The British Civil Service, in its present form, is a product of the last over one hundred and twenty-five years, it has its own traditions which have been developed during this period. The administration is kept under control through the process of courts which is both formal and expensive. Many a time grievances arise from actions which are legal or are not clearly illegal but are unreasonable and unfair. Cases of misleading, bad treatment and of excessive delay are not unheard of. Prof. H. A. J. Wade has pleaded that a humane system of government must provide some way of assuaging these grievances, both for the sake of Justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country. To meet this requirement, the Hyett Report made a recommendation in 1961 to constitute a permanent office of the Parliamentary Commissioner. It was hoped that the office would help in enhancing the prestige of the civil service.


Commons was supported on different grounds, inter alia, that it would help in vindicating the Civil Service against whom many unjust accusations are levelled, would reinforce confidence of the people in the integrity and fairness of the administration and would contribute to the correction of certain administrative regulations by drawing the attention of the Parliament.

The Parliamentary Commissioner Act, 1967 authorises the Commissioner to investigate those complaints which are recommended by a member of the House of Commons where the complainant claims to have sustained injustice in consequence of maladministration in connection with the action so taken, by or on behalf of a government department or other authority to which the Act applies. The experience of some of the aggrieved persons is that Members of Parliament act as the 'statutory pillar boxes' between the complainants and the Parliamentary Commissioner. On the other hand, this 'filter' has not been able to check those complaints which the Commissioner finds outside his jurisdiction. The Commissioner has been finding more than sixty percent complaints filed with him to be outside his jurisdiction.

Doubts have been expressed about the

134. Id., col.105.
135. Id., col.107.
137. Id., sec.5(1)(b), emphasis added.
138. Id., sec.4, schedule 2 of the Act read with sec.5(3) and schedule 3 of the Act.
140. During the period from 1967 to 1979, the Parliamentary Commissioner received 10,652 complaints from out of which he found 6,467 complaints outside his jurisdiction. This information is based upon his annual reports.
reasonableness of the continuation of this filter. The commissioner in his investigations is required to find out whether any 'maladministration' has taken place or not. Maladministration is a recent term in law though not in the language itself. The act does not define it. Richard Crossman told the House of Commons that maladministration would cover "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on and that it would be a long and interesting list." The Crossman catalogue of maladministrative actions, gives ample room to the Commissioner to exercise his jurisdiction. The act lays down a restriction on the Commissioner by


142. Wade, supra note 139, 5-39.

143. 734 R.C., Deb., Col.51 (Oct. 13, 1966).
declaring that he is not authorised to question the 'merits of a decision' taken without maladministration in exercise of the discretion vested in the concerned authority. This initially prevented the Commissioner from questioning the exercise of discretionary power in taking decisions even where there were elements of bias or perversity. This happened due to the self-imposed restraint of the Commissioner. This was criticised by the Select Committee which made the Commissioner change his interpretation and start criticising discretionary decisions which were bad on merits. Prof. Wade has justified this shift by pointing out that bad decisions are bad administration and bad administration is maladministration. Not satisfied with this, Justice in its 1977 Report recommended that the Commissioner should be empowered to investigate any "unreasonable, unjust or oppressive action," instead of 'maladministration.' This did not meet the approval of the Select Committee. The Commissioner also believes that these areas fall within his scope and he can investigate them. He makes it clear that he would not substitute his judgement, if he sees no evidence of 'maladministration' either in the way the decision was taken or in the nature of the decision itself. Similarly, the Commissioner

144. Parliamentary Commissioner et al. 1967, p.12(3).
149. Wade, supra note 145, para 23.
was at first unwilling to criticise departmental rules and regulations, here again, the select committee had to induce him to interpret 'maladministration' more broadly.

The Commissioner makes reports on his investigations both to the Member of Parliament through whom the complaint came and to the head of the government department and any of his officials who were complained against. The Commissioner submits annual reports to the Parliament as also special reports from time to time in such cases where there has been failure to remedy injustice caused by maladministration. He has made a number of special reports on important cases. Normally, his reports are as detailed and elaborate as judgments of courts of law. Since 1972, the Commissioner was following the practice of laying before Parliament each quarter the full text of the reports of all his investigations. It has now been decided to present to Parliament with effect from 1979, a text of only selected cases in order to cut down the cost of publishing reports. The statistics in the table given on the following page indicate that in the initial years, the inflow of complaints gradually decreased, then it showed some rise and again some fall. The investigation of cases indicates that maladministration has been consistently found in increasing number of cases. In the last three years, maladministration has been detected.

152. supra note 145, para 36.
156. See Select Cases, 1929-30, vol. 1, 3 (Jan. 16, 1930).
157. The table is based upon the statistics given in the Annual Reports of the C.
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<thead>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Received from MPs:</td>
<td>1069</td>
<td>1120</td>
<td>761</td>
<td>645</td>
<td>543</td>
<td>573</td>
<td>571</td>
<td>704</td>
<td>923</td>
<td>915</td>
<td>901</td>
<td>1259</td>
</tr>
<tr>
<td>Outside jurisdiction:</td>
<td>561</td>
<td>727</td>
<td>445</td>
<td>362</td>
<td>295</td>
<td>313</td>
<td>295</td>
<td>374</td>
<td>576</td>
<td>505</td>
<td>504</td>
<td>927</td>
</tr>
<tr>
<td>Partially investigated &amp; discontinued:</td>
<td>100</td>
<td>30</td>
<td>43</td>
<td>30</td>
<td>39</td>
<td>17</td>
<td>12</td>
<td>27</td>
<td>19</td>
<td>29</td>
<td>24</td>
<td>35</td>
</tr>
<tr>
<td>Investigations completed:</td>
<td>133</td>
<td>374</td>
<td>302</td>
<td>259</td>
<td>192</td>
<td>261</td>
<td>239</td>
<td>252</td>
<td>244</td>
<td>320</td>
<td>312</td>
<td>341</td>
</tr>
<tr>
<td>Maladministration found:</td>
<td>19</td>
<td>33</td>
<td>43</td>
<td>59</td>
<td>67</td>
<td>79</td>
<td>83</td>
<td>94</td>
<td>90</td>
<td>139</td>
<td>177</td>
<td>139</td>
</tr>
<tr>
<td>Percentage of maladministration cases:</td>
<td>10</td>
<td>10</td>
<td>16</td>
<td>23</td>
<td>37</td>
<td>30</td>
<td>37</td>
<td>37</td>
<td>43</td>
<td>57</td>
<td>55</td>
<td>55</td>
</tr>
</tbody>
</table>
in more than fifty per cent of the investigated cases. This rise has been attributed by Prof. Wade to the Commissioner's growing power of penetration.159

A perusal of the reports of the Commissioner will show that he has been able to remedy injustice in a good many cases, particularly where no other remedy would have been effective. His experience has been that the government departments are generally willing to rectify the wrong by paying compensation or otherwise by making reasonable amends as are deemed necessary in a given situation. The Select Committee itself has been instrumental in getting the recommendations of the Commissioner implemented at the departmental level. The Select Committee has recorded that "Government departments are very ready to accept the views of the Commissioner and to afford remedy for injustice."159 The departments also remain under pressure because if the maladministration is not remedied, the case is reported to a Member of Parliament who will bring it before the House. This, however, does not mean that the Commissioner has never got a 'no'. Refusal cases mostly pertain to the Inland Revenue and the Customs and Excise department. In the sphere of taxation, the administrative mind is said to be stubborn.161 Besides obtaining a redress for maladministration in individual cases, the Commissioner has also been able to introduce a number of general reforms in the administration by making an exposure of bad practices.162 The Commissioner

159. Wade, supra note 130, p.30.
told a news conference in Birmingham recently that he is not ineffective, that in fact he possesses 'a pretty hefty bite' and wherever injustice has emerged, a remedy has been recommended which rarely has been ignored.\textsuperscript{163}

One specific area which is outside the bounds of the Parliamentary Commissioner relates to actions taken in respect of appointments or removals, pay-discipline, superannuation or other personnel matters of Crown servants.\textsuperscript{164} The Select Committee has repeatedly recommended to the government that the Commissioner's jurisdiction should be extended to cover personnel matters involving Crown Servants.\textsuperscript{165} The Committee has argued that Members of Parliament already have wide rights to raise personnel matters relating to Crown with Ministers, that the Parliamentary Commissioner will provide the means to enable them to discharge their functions more effectively and there is no good reason why his services should be denied in this particular area. The Government, on the other hand, has been rejecting the demand on the ground that the Commissioner was not established to deal with the relations of the State as employer with its employees. It has also been emphasised that there is no evidence to the effect that the grievance machinery available to civil servants (in the form of Civil Service Commissioners and Whitley Councils) is inferior to that available to workers generally and that

\begin{itemize}
\item \textsuperscript{163} 4 Commonwealth Law Bulletin, 407-03(1973).
\item \textsuperscript{164} 1976-77, para 3 (July 20, 1977).
\end{itemize}
the present arrangements do not involve any unfairness to civil servants as compared to other workers. Except in U.K. and France, the personnel matters are within the investigative powers of the Ombudsman. The plea that the Commissioner was not established to deal with disputes between employer and employees suffers from the infirmity that if a public man has a grievance against the administration he can approach the Commissioner, but if a 'public servant' has a grievance against the treatment meted out to him by his employer, he cannot do so. This 'one-way traffic' rule has an element of 'grouch' for if complaints can be entertained against civil servants, why should they be deprived from bringing their complaints to the Commissioner? The opposition of the Government is not understandable for another reason. It has been acknowledged by different writers that the civil service in England is legally the most precarious of all employments but in reality the most secure. It has been observed that there is virtually no litigation over dismissals because dismissals hardly ever occur. In spite of these claims of 'security' and 'no dismissals', certain anomalies continue to exist. Prof. Wade explains that a civil servant may claim statutory compensation for unfair dismissal but he still appears to have no right to damage for breach of contract at common law if he is dismissed in breach of the terms of his engagement. His basic legal rights to enforce


other terms of his employment, such as his right to his pay, likewise remain in doubt. His terms of service are a strange amalgam of certainties and uncertainties. In this fluid position, the exclusion of civil servants from the commissioner's jurisdiction is not desirable. The inclusion of personnel matters will instil in the civil servants a better sense of security, which in general will help to better administration. The Commissioner himself has expressed his doubts on the exclusion of personnel matters. In the light of the above assessment it appears distinctly advisable that such matters be included within the jurisdiction of the Commissioner.

The Commissioner in England has now continued for more than a decade. One view is that this has been a 'relatively unimportant' development for the civil service and the other is that it has achieved 'notable improvement' in administrative justice. It will be useful to examine the credit and the debit side of the Commissioner in reviewing its impact upon the civil service.

The functioning of the Commissioner has created additional work for the administration which has been acknowledged even by the Commissioner himself. It is difficult to give an estimate of additional work. According to the Head of the Civil Service, it takes something like 1% to 1% man-days per case. The inquiries

169. Wade, supra note 130, p.70.
172. Note, supra note 131, p.90.
174. See, Report from the Select Committee, 1963-69, Minutes of Evidence, 8, 76 (Jan., 1963) and 9, 397 (March 26, 1969); Second Report from the Select Committee, 1967-68, Minutes of Evidence, 8, 197 (Feb., 1963) and 8, 634 (May 29, 1963).
of Prof. Roy Gregory and Peter Hutchesson have revealed that no department has increased its establishment solely in order to deal with the Commissioner's work. The increase in work-load is only nominal. It can legitimately be said that this is the price worth paying to raise the standard of public administration and to remedy individual injustices. It is said that the presence of the Commissioner makes the civil servants less forthcoming and helpful in the work they do for the public, that they try to pass the 'buck', and do not allow the public to take a decision. Probably, civil servants did initially show some nervousness but with the passage of time it has passed off. This has not been a serious problem; in fact any such institution of safeguards is bound to have this side-effect. Another problem is that of 'delay' which is caused because of the Parliamentary Commissioner. In cases where the aggrieved persons complain about a departmental decision to the Commissioner, the department proceeds to implement it. If it does, and later on, the Commissioner finds maladministration, its reversal may not be possible and the department may not be in a position to provide a remedy. The effect of filing a complaint is that of an 'extra-statutory injunction', meaning thereby: 'at all costs to stop things from happening'. In practice, the Commissioner has sometimes accommodated the department by giving them some

References:

176. E. de Smith, Constitutional and Administrative Law, 611 (1971).
178. Ibid.
179. Gregory and Hutton, supra note 175, p.372.
180. Id., p.369-375.
182. Gregory and Hutton, supra note 175, p.371.
idea of how long his inquiry is likely to take and by giving priority to those cases where the department is anxious to implement the order urgently.\(^{133}\) This is something which probably cannot be fully resolved.

The record of the Parliamentary Commissioner for more than a decade has established that the Commissioner has been clearing departmental action in large majority of cases. In order to be fair, the Commissioner has made it a policy of drawing attention not only to their shortcomings but to their sound practices and 'good deeds' as well.\(^{134}\) Vindication and commendation by the Commissioner has certainly encouraged the departments and the civil servants concerned.\(^{135}\) Indeed, the trouble is that the news media is not interested in those thousands of cases where things have gone off smoothly. Prof. Frank Stacey has rightly commented that the Commissioner's achievements have gone largely unnoticed because he works behind the scenes, out of the glare of publicity.\(^{136}\) The very presence of the Commissioner has helped in improving the quality of administration.\(^{137}\) It has 'tuned up' the departments and helped in 'keeping them on their toes'.\(^{138}\) The officials do now take additional care to avoid acting in a way which is likely to meet with the Commissioner's disapproval, should it come to his notice.\(^{139}\) The Commissioner has been instrumental in introducing changes in the administrative systems and procedures. Changes and improvements have been introduced in the form of

\(^{133}\) supra note 141, p.106.

\(^{134}\) supra note 131, p.236-37.

\(^{135}\) supra note 118, p.236-37.

\(^{136}\) supra note 131, p.106.

\(^{137}\) supra note 131, p.106.

\(^{138}\) supra note 131, p.236-37.

\(^{139}\) supra note 131, p.390.
revised, fresh or fuller instructions for the officials of the concerned departments.

The parliamentary commissioner as a 'remedial' machinery has been able to establish itself. It has taken pressure off the courts by dealing with cases which otherwise would have been tried in courts. The Commissioner has proved that justice is not exclusively a matter for what Dicey called 'the ordinary courts'. The institution of parliamentary commissioner, which is young in terms of English constitutional history, has fulfilled useful functions by exposing maladministration wherever it existed and shielding the civil servants whenever it did not. Government departments have been willing to accept the view of the parliamentary commissioner and to afford a remedy for injustice. The record of the parliamentary commissioner is impressive.

The federal ombudsman in Australia is authorised to investigate those actions which relate to a 'matter of administration' and find out whether it was unreasonable, unjust, oppressive or improperly discriminatory as in New Zealand. The requirement of natural justice has also been stipulated. In case, the ombudsman after the investigation proposes to make a report that expressly or impliedly criticises a department, prescribed authority

190. Schwartz and Wade, supra note 167, p.66.
191. Smith, supra note 176, p.611.
192. Thomas, supra note 141, p.137.
193. Id., p.133.
194. Wade, supra note 130, p.99.
196. Id., rec.134 (a).
or person, he is required to give the principal officer of the department or the person principally concerned an opportunity of making submissions orally or in writing. The Ombudsman has power to investigate complaints of unreasonable delay in administration and for the purpose of an appeal to the Administrative Appeals Tribunal, he may certify that there has been such delay. The effect of such a certificate is to 'deem' the decision to have been made, thus creating an immediate right of appeal.

The Ombudsman in Australian States are also required to investigate complaints relating to a 'matter of administration'. In three occasions, this concept has been examined by the Supreme Court in Victoria. In the first two cases, 199 Zum J., did not consider it appropriate to formulate a definition of a 'matter of administration', whereas in the third case, 200 Hillard and Enright JJs explained that it referred to any act or omission in the executive or administrative arm of the government as distinct from the legislative and judicial arms. It was further explained that it covered not only any action which would fall strictly into the area of the performance of executive or administrative function but also any other action which might be regarded as reasonably incidental to the performance of such function. 201 This has the effect of widening the area of the Ombudsman's operation.

On an average twenty percent of complaints are found to be justified 202 which is about the same as in

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197. ibid., scc.3(5).
199. ibid., scc.11.
201. ibid., p.551.
New Zealand. It is discouraging to learn from the federal Ombudsman that several Government Departments are using all the methods of the bureaucracy and red tape available to prevent him from taking effective action. It is perhaps too early to assess the full impact of the Ombudsman on the Australian administration.

Ombudsmen in Canadian provinces are empowered to receive complaints against the bureaucracy directly from the public, civil servants and politicians, and can review them on similar grounds as in New Zealand and Australia. It was thought that these wide grounds on which the Ombudsmen could take action may hamstring the government, but in practice this has not been the case. It has been said that to limit these grounds would only serve to limit the improvements the Ombudsmen would encourage. If no action is forthcoming on the reports, the Ombudsmen may use their powers of persuasion and publicity to spur the department into action. None of the provincial Ombudsmen have the power to amend or reverse a decision. The responsibility for seeing that corrective action is taken rests with the Government. The Ombudsmen have been receiving substantial number of complaints and experience has shown that without an Ombudsman, the gap between the

203. 5 (Commonw. Law Bulletin, 216(1979)).
204. 4Hilmore and Townsend, supra note 202.
205. Hale v. Innes, 'The Provincial Ombudsmen: Supervisors of Bureaucracy', 6(1973). This essay was made available to me by the staff of Canada House Library, London.
206. The Manitoba Ombudsman Act, sec. 7; New Brunswick, sec. 1; Alberta, sec. 36; Manitoba, sec. 36; Nova Scotia, sec. 20; Newfoundland, sec. 23.
207. supra, supra note 205, p.7.
208. Idem.
209. Idem.
public and the administration would have widened.\textsuperscript{211} It has proved that it does not supplant the existing controls, it only supplements them.\textsuperscript{212}

The Fijian Ombudsman has also been playing a useful role. Under the constitution, the Ombudsman can investigate a complaint alleging that a person or body of persons has suffered injustice in consequence of an action taken by an officer or authority in the exercise of its administrative functions.\textsuperscript{213} After the investigation, the Ombudsman is to report his opinion and his reasons therefor and may make such recommendations as he thinks fit. If within a reasonable time after the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman after considering the comments (if any) made by or on behalf of the department may make such further report on the matter as he thinks fit to the House of Representatives and the Senate.\textsuperscript{214} The introduction of the Ombudsman was hailed as a step in the direction of social justice in so far as administrative law was concerned. It was explained that although the Ombudsman’s door is open for the poor and the rich alike, the institution was essentially a charter for the little man.\textsuperscript{215} Over the years, the Ombudsman has proved that he is a lightning-conductor for bonafide grievances\textsuperscript{216} and acts as a protector of public officials who are

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\textsuperscript{211} Andreas, supra note 205, p.13.
\textsuperscript{212} Id., 19.
\textsuperscript{213} Constitution of Fiji, Chapter IX-The Ombudsman, sec.13(1)(a)
\textsuperscript{214} Id., sec.11B.
\textsuperscript{216} Justice Koti Ram, ‘Ombudsman’s role in increasing efficiency and promoting better understanding’ in Third Annual Report of the Ombudsman of Fiji, 23 at p.29 (March, 1974-Feb., 1975).
\end{flushleft}
subjected to unjustified criticism, born of either ignorance or prejudice. We has been able to improve upon the standards of administrative conduct in the application of the principles of natural justice.

In an imperfect world one should not think of perfect institutions, but this does not mean that some institutions are not preferable to others. The experience of the Ombudsmen in different parts of the world has shown that there is strong support for it among the citizens and civil servants. All available evidence indicates that the Ombudsman abroad has been contributing a great deal in its endeavour to provide better 'administration' and 'better administrative justice' so that sound administrative jurisprudence could ultimately be developed. Had it been otherwise, the institution would not have travelled from one system to another and made a place for itself. In the background of this rich experience, it is proposed to examine how such an institution in India is likely to operate under the Indian Constitutional set-up.

612: THE POSITION UNDER THE INDIAN CONSTITUTION:

India is no exception to the problems linked with any modern administrative set-up. In different countries where the institution of Ombudsman has been adopted, it was found that the court-mechanism by itself was not sufficient, to safeguard the individual against the administration. Prof. D. P. Jain has observed that the courts' review does not penetrate sufficiently deeply into the administrative action, that it is mostly


218. Ibid.
superficial and formal and that many cases of individual grievances cannot be redressed by courts.\footnote{Jain, \textit{supra} note 9, pp. 25-26.} The Constitution of India makes adequate provisions through articles 32, 226, 136 and 227 for exercise of judicial review over the actions of administration. Despite these provisions, the courts cannot review administrative actions in all aspects. Writ Justice is mostly technical as well as costly Justice. \footnote{Crossman catalogue, \textit{supra} note 9, p. 26.} The Writ Jurisdiction of courts has no doubt helped to keep the administration within the bounds of rule of law, but it has its own limitations and cannot possibly check maladministration. The 'crossman catalogue',\footnote{Crossman catalogue includes maladministration in the form of bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness.} mostly remains outside the precincts of the courts. The problem becomes still worse because of the failure of the legislature to lay down articulately the norms and guidelines for exercising vast administrative powers which are conferred at present on the administration, more or less as a routine matter.\footnote{Jain, \textit{supra} note 9, pp. 25-26.} In this context, the ombudsman has a definite role to play in the Indian administrative set-up.

In order to ensure that the functioning of an ombudsman does not come in conflict with the constitutional position of the civil servants, it is important to examine the provisions of the Constitution. Under the Constitution, subject to some limitations, all posts civil or military, permanent or temporary, are held during the pleasure of the President or the Governor as the case may be.\footnote{Constitution of India, \textit{article} 313(1).} This principle is derived from the English Constitutional law.

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\item \footnote{Jain, \textit{supra} note 9, p. 25-26.}
\item \footnote{Crossman catalogue includes maladministration in the form of bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness.}
\item \footnote{Jain, \textit{supra} note 9, p. 26.}
\item \footnote{Constitution of India, \textit{article} 313(1).}
\end{itemize}
where all posts are held at the pleasure of the Crown. The limitations on the 'pleasure-right' have been imposed by the Constitution itself. The two limitations are: that no person who is a member of a civil service or holds a civil post under the Union or a State Government can be removed or dismissed by an authority subordinate to the one who appointed him. The action of removal or dismissal can be taken by an authority of the same rank or an authority higher in rank to him but not by an authority who is subordinate to the appointing authority. Such an authority need not necessarily be the same appointing authority. The other limitation is that no person holding a civil post in the Union or a State Government can be removed or dismissed or reduced in rank except after an inquiry in which he had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Dr. B.R. Ambedkar explained in the Constituent Assembly that this is the best provision that we have for the safety and security of the Civil Service, because it contains a fundamental limitation upon the authority to dismiss. This protection is available only in case of three specific punishments, reduction in rank, removal and dismissal, and not in case of other 'punishments'. Those civil servants who are compulsorily retired cannot claim the benefit of these limitations because the retirement is not by way of

223. Id., Article 311(1).
226. Constitution of India, Article 311(2).
227. 9 C.L.R., 1113 (30th Sept., 1949).
228. According to the Central Civil Services (Classification, Central and Appeal) Rules, 1957, the other punishments are: Censure, withholding of increments or promotion, recovery of any of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders, Compulsory retirement.
Punishment. On the other hand, temporary servants are entitled to the same protection as permanent government servants where dismissal, removal or reduction in rank is sought to be inflicted upon them by way of 'punishment' and not otherwise. Similarly, if a probationer is discharged by way of punishment by casting aspersions on his conduct, he is entitled to guarantee of reasonable opportunity.

The 'reasonable opportunity' contemplated under clause 2 of article 311 is not a mere formality. It has to be in accordance with the principles of natural justice. The authority must frame specific charges in respect of the allegations on which they are based, intimate those charges to the civil servant concerned, give him any opportunity to answer those charges and to defend himself against those charges by cross-examining witnesses produced against him by examining himself or any other witness in support of his defence. After considering the whole evidence on record, findings are to be recorded and the report is to be sent to the competent authority. Prior to the Forty-second Amendment, the requirement was that the Government was to consider the report of the inquiry officer and if it was of the view that one of the above-mentioned punishments to be imposed, then, the civil servant


concerned was to be given an opportunity to represent against the punishment proposed to be imposed. The representation could be made only on the basis of the evidence adduced during the inquiry stage. This opportunity has been taken away by the forty-second amendment which has provided: '.... it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.' The effect of it is that the Government can straightaway proceed to impose the punishment without any opportunity to comment upon the report of the inquiry officer. This deprives the civil servant concerned the opportunity of pointing out the lacunas in the report and consequently the wrong imposition of a punishment. There is as yet no move to restore the position as it existed prior to the forty-second amendment. The advantage of providing an opportunity at the second stage is that lacunas in the report can be pointed out. Even otherwise also, natural justice demands that the report should be made available to the party before taking final action on it.

The safeguard of reasonable opportunity is not available to the civil servant where the punishment is imposed on the ground of conduct which has led to his conviction on a criminal charge or where the authority is satisfied that for some reason, to be recorded in writing, it is not reasonably practicable to hold such inquiry or where the President or the Governor as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such

233. Constitution of India, Article 311(2).
239. Id., proviso to Article 311(2), sec. 44 of the Constitution (Forty-Second Amendment) Act, 1976.
The decision of the competent authority regarding the impracticability of holding the inquiry shall be final. This enables the Government to bypass the fundamental safeguard provided in Article 311(2). This provision was vehemently opposed in the Constituent Assembly when Mr. H.V. Kamath warned:

"If we adopt this article as it is, I warn the House that these services will have no heart in their work; they will get demoralised and they will not be efficient."

Dr. B.R. Ambedkar did not agree with this view and explained that this provision has been bodily taken from Section 240 of the Government of India Act, 1935. Even the Britishers, who were very keen on giving protection to the civil services, thought it necessary to introduce a proviso like this. "Relax that we have, therefore, not introduced a new thing which had not existed before."

It cannot be denied that the provision can be misused particularly in situations like the internal emergency proclamation under Article 352 when the system of administration can be subverted with impunity. The argument given by Dr. Ambedkar was not based on logic. It was at best an argument of fear or an argument which virtually appeared to carry forward the colonial legacy.

This, in brief, is the constitutional position of civil servants in India. With the coming of the institution of Judicial, one of the main issues would be that if the reports serious maladministration or any other....

240. Constitution of India, Proviso to Article 311(2).
241. Id., Article 311(2).
243. Id., 1113.
act on the part of the Civil Servants, would the government be able to take an action against the civil servant on the report of the Lokpal or would it be necessary to independently carry out the requirement of 'reasonable opportunity'? In view of the express constitutional provisions, the experience of other Ombudsman systems cannot be of much relevant in this regard.

613: THE LOKPAL AND PUBLIC SERVANT:

The Bills of 1963-245 and 1971-246 had included the civil servants within the investigatory jurisdiction of the Lokpal whereas the Bill of 1977-247 excluded them. Civil Servants have been included in the state legislations-248. Some difficulties in the states have already been experienced and voiced in connection with the investigations which are made by the State Lokayuktas and the actions that can be taken against civil servants in view of the constitutional protections they enjoy.249 One cannot rule out the possibility of having a Central Lokpal in the near future covering civil servants as well. It is necessary in this background to review the whole position as to what impact the Lokpal would have over civil servants.

At the very advent of the Lokpal movement in India, Chief Justice Mr. C. Rajendra Prasad while delivering convocation

246. The Lokpal and Lokayuktas Bill, 1971, cl.7.
247. The Lokpal Bill, 1977, cl.10 read with cl.2(e) and 3.
248. The Maharashtra Lokayukta and Upper Lokayukta Act, 1971; cl.7; The Bihar Lokayukta and Upper Lokayukta Act, 1973; cl.7; The Uttar Pradesh Lokayukta and Upper Lokayukta Act, 1975; cl.7; The Kerala, Tamil Nadu and Goa Lokayuktas Act, 1973, sec.7.
address said ... that once the Ombudsman begins to function, his existence will turn out to be more a source of strength to the public servants than a source of weakness. This he explained by pointing out that if complaints were received from the citizens against public servants and they were examined and found to be without any basis, that would inevitably create a feeling of confidence in the public mind and the fear, that the authority of the public servants would be shaken if an Ombudsman is appointed, would turn out to be not well-founded.250 He did not examine the issue from the point of the constitutional scheme. The administrative reforms commission has stated that the inquiry made by the Ombudsman would not answer the requirements of article 311 and the government would have to hold a separate inquiry to deal with the delinquent official. The commission added that this would not only lead to long-drawn investigations and inquiries, but it might in the final result involve a conflict of findings between that of the Ombudsman and the departmental inquiry.251 The same view had also been expressed by the study team of the Administrative Reforms Commission. In order to resolve those constitutional difficulties, the commission went on record to say that they can be overcome by constitutional amendments,253 which according to J.B. Tripathi should not be resorted to because constitutional amendments are suitable instruments for bringing out comparatively 'small changes' and not changes.

252. Report of the Study Team, supra note 9, para 30, p.15.
253. Interim Report, supra note 10, para 12, p.15.
of 'fundamental nature.' It is certain that the introduction of Lokpal will not contemplate fundamental changes in the constitution. Secondly, no doubt as the position stands today, the constitution cannot be so amended as to alter or destroy its basic structure but it would not be correct to say that 'small changes' alone can be introduced by an amendment of the constitution. Even the limitation of 'basic structure' was not there when Prof. Tripathi had expressed this view. It cannot be denied that if the introduction of Lokpal would contemplate some changes or changes in the constitution, they can be so provided by an amendment of the constitution.

The Bill of 1961 was considered by the Joint Committee of the Parliament. Most of the witnesses who appeared before the committee were of the view that after the Lokpal investigation and report, either the requirement of article 311(2) will have to be gone through or an amendment in the Constitution will be necessary. The reason assigned for this was that the nature of inquiries contemplated under article 311(2) of the Constitution and those of the Lokpal will be fundamentally different from each other. The constitutional inquiry is of detailed kind whereas Lokpal inquiry is designed to be merely of summary form.

256. The committee comprised of 30 members from the Lok Sabha and 15 from Rajya Sabha with C.B. Rana as the Chairman.
257. Sh. C. athambha, Sh. S. Tripathi, Sh. M. Anandra, Sh. N. Bhatary, the then Attorney-General of India, Shri V. P. Vaidya, the then Attorney-General of India, Shri V. P. Vaidya, ex-Judge, Shri H. Shivakumar, Director General, Vigilance, Railway Board.
259. Id., p.69-70.
260. Id., p.96.
S.V. Shiveshwar Kar, C.K. Daphtary and M.C. Setalvad were unanimous that the Lokpal inquiry will not be in consonance with article 311(2). The Bill which was under consideration of the Joint Committee had provided that if the Lokpal decided to conduct an investigation, he will forward a copy of the complaint to the public servant concerned, afford him an opportunity to offer his comments on such complaint and will conduct the investigation in private. The rest of the details in the circumstances of the case were left to be worked out by the Lokpal himself. The Committee in its report did not suggest any change in the proposed legislation to bring the investigations of the Lokpal in conformity with the provisions of article 311(2). It also did not recommend any amendment in the Constitution in this regard.

The other connected issue which was considered by the Committee was that after the Lokpal investigation and before the competent authority takes any action against the public servant, would it be necessary to consult the Public Service Commission or not? K. Santhanam and S.V. Shiveshwar Kar expressed the view that the Lokpal will report a prima facie case. Thereafter, the departmental inquiry as contemplated in article 311(2) will follow and then the matter will be referred to the

261. Id., p.135.
262. Id., pp.149-50.
263. Id., p.164.
264. The Lokpal and Lokayuktas Bill, 1969, clause 10(1) and (2).
265. Id., cl.10(3).
268. Supra note 259, pp.69-70.
269. Id., p.135.
Public Service Commission before proceeding to take any action. It was emphasised that the constitutional provision regarding the Public Service Commission should be retained. On the other hand, Mr. S. Dutt suggested that allegations of corruption and dishonesty against public servants which come within the jurisdiction of the Lokpal should not be referred to the Public Service Commission again for opinion.

The Committee recommended that Government may make suitable regulations to exclude from the purview of the Union Public Service Commission matters considered by the Lokpal or the Lokayukta. The Constitution does authorise the President and the Governor to make regulations for providing exceptions. The Committee also recommended the deletion of the proviso to sub-clause 5 of clause 12 of the Bill which provided that no special report will be made by the Lokpal in respect of any action taken in consultation with the Union Public Service Commission. This was obvious, in view of the other recommendation of the Committee. A dissent was recorded by Mr. A.B. Vani. He was of the view that the Lokpal or Lokayukta would take the place of the Union Public Service Commission and this development should be avoided. He stressed that the Union Public Service Commission is a creature of the constitution and nothing should be done to weaken its position as the guardian of the conditions of service of Government Servants in order to strengthen the new offices of the Lokpal or Lokayukta.

The constitutional position is that the

269. Id., p.174.
270. Supra note 266, p.9.
271. Constitution of India, Proviso to Clause 3 of Art.320.
272. Supra note 266, p.9.
273. Id., pp.XXIV-XXVII.
provisions of article 320(3)(e) are not mandatory and non-compliance with those provisions does not afford a cause of action to a civil servant. They are not in the nature of a rider or proviso to article 311. It does not confer any right on a public servant. The absence of consultation or any other irregularity will not entitle him to relief under article 226 or 32 of the Constitution. Even otherwise, when a matter has been independently examined by the Lokpal, there is no justification for duplicating the process by referring it to the Public Service Commission for advisory purposes. This does not weaken the position of the Public Service Commission, nor does it imply any modification of the provisions relating to the Public Service Commissions. In fact, the Constitution itself authorises the Government to specify such matters where consultation is not necessary. So the Government can provide in the regulation that in those cases in which the Lokpal has investigated, the Public Service Commission need not be consulted. The advantage of this will be that, besides there being no duplication, the Lokpal will prove to be a help by sharing the burden with the Public Service Commission. Mr. H.N. Sreerai has been forthright in pointing out that these Service Commissions have not fulfilled the hopes set upon them because 'Governments have not hesitated to send secret circulars and Ministers have not considered it improper to privately influence their decisions.' He adds that when an independent Chairman, of a Public Service Commission asserted the Commission's right to be consulted, he found that an order was issued under the proviso to article 320(3) withdrawing

In view of this past experience of public service commissions, it is hoped that with the coming in of the Lokpal, he will provide the necessary service and the Government will not hesitate to make the required regulations.

When the Bill came before the Lok Sabha after the Joint Committee stage, the issue of civil servants was not given serious consideration. For most of the time, the debate centered around the issue of the inclusion and exclusion of the Prime Minister within the jurisdiction of the Lokpal. The Bill of 1971 was not even taken up for consideration and that of 1977 otherwise excluded the civil servants. The Joint Committee considering the Bill of 1977 felt that since it is restricted to "public men", to suggest an amendment for the inclusion of "public servants" would be going beyond the scope of the Bill. But it did observe that, in the light of the experience gained, the government might examine if it was necessary in the interests of the main object of the Bill to bring forward an amending Bill at a later stage to cover the public servants.

Messrs Bhupesh Gupta, B. S. Korble and Narendra J. Rathwani in their notes of dissent pleaded for the inclusion of civil servants on the ground that Ministers and civil servants are inseparable. In the Lok Sabha, Messrs M. N. Govindan Nair, Yashwant Borole, and C. V. Pragesan argued that the Minister is enabled to commit an act of corruption only with the aid of the

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279. Id., xv.
280. Id., XXXIV.
281. Id., XXXVIII-XXIX.
283. Id., 320-27.
284. Id., 323.
bureaucracy, consequently the inclusion of one and the exclusion of the other is not a workable scheme. But in the whole discussion, the plea was only for the inclusion of the civil servants without touching upon the constitutional consequences of such inclusion. It cannot, however, be considered to be a closed matter since any future legislative proposal can include the civil servants. Infact, it will be an important step forward to include them.

This matter has not received adequate attention of academicians. Prof. H. P. Jain did take up this issue by posing the question: will it be possible to treat the inquiry by the Lokpal into the charges against civil servants as an inquiry under article 311(2), or will an inquiry have to be started de-novo after the Lokpal has reported a prima facie case against the civil servants? He did not, however, consider it expedient to examine it in detail. It would be relevant in this connection to consider the position of certain other investigating agencies.

One such agency is the Vigilance Commission. The position of the Vigilance Commission is that when a complaint is made to any particular authority that an official has acted improperly, the complaint is sent to the Commission along with the preliminary informal report. The Commission thereafter advises whether further action is to be by way of disciplinary enquiry or by way of prosecution. If there is a prima facie case for prosecution, it is referred to the Central Bureau of Investigation and the Special Police Establishment. If it results in prosecution in a court of law, that is the end of the matter. If it is a case for disciplinary enquiry, it is referred to the department.

for a departmental enquiry. The report of the departmental enquiry comes back to the Commission and the Commission after examining it advises the authority concerned whether the findings are to be accepted or not, or accepted with modification. So in case of the Vigilance Commission departmental enquiries are conducted, consequently no problem arises so far as article 311 is concerned. In the context of the Lokpal, it has been argued that if the enquiry officer is not to send his report to the Lokpal, the disciplinary authority would be in a position to show favour to a government servant by formally complying with the Lokpal's recommendation by initiating proceedings and ultimately letting him off without any penalty or with a nominal penalty. If the report of the enquiry officer is to be sent back to the Lokpal, besides leading to a long drawn-out process, it will also cause a further complication. In case the report of the enquiry officer is different from the initial findings of the Lokpal, the Lokpal will find it difficult to recommend an action which may run counter to his own findings. This needs to be avoided by not sending the report of the enquiry officer to the Lokpal.

Another point worth consideration is whether the Government can take action against a civil servant on the recommendations of the Comptroller and Auditor-General and the Public Accounts Committee or a separate inquiry will have to be conducted. Prof. K. Tripathi holds the view that without making a formal inquiry, the action will be challengeable as violative of article 311. This is the correct view. The Comptroller and Auditor-General

238. Supra note 237, p.106.
conducts an independent audit of all government transactions and makes his report to the Parliament through the President. The report is considered by the Public Accounts Committee. The Committee calls attention to flaws in the administration, leaving the department to remedy them. The Committee is concerned with any lacunae in the system or processes of control which have occasioned loss to the exchequer, rather than with the individuals involved. Individuals are left to be dealt with at the departmental level. The Committee has to be assured by the head of the department that he has inquired into the cause of the mistake and that he has taken such steps, including disciplinary action, as he deemed necessary in the matter. The Committee, however, is entitled to be informed of the action taken and may express an opinion as to its adequacy. It is evident from this that the process followed is far from the requirement of article 311(2). The Civil Servant is not provided any opportunity either by the Controller and Auditor-General or by the Committee, so the Government can take action only after affording a reasonable opportunity under article 311(2), otherwise as pointed out by Prof. Tripathi, the action will be questionable before a court of law.

The issue of public servants has also come up before the State Lokayuktas. The Bihar Lokayukta has put forward two alternatives to handle the practical problem. The Lokayukta can inform the competent authority...

how the assailed conduct could be investigated on the
correct lines and assess the subsequent investigation
from time to time. There should also be a provision in
the legislation for empowering the Lokayukta to follow
up the cases till the final disposal by the appointing
authority. The alternative was to simplify the procedure
governing the disciplinary proceedings against Government
servants, so that the investigation under the Act does not
add one more stage to an already lengthy and time-consuming
procedure. The Maharashtra Lokayukta viewed the issue
differently. He explained that at present, even after
a full investigation by the Lokayukta or the Upa-Lokayukta
is made and he gives his findings, Government orders a
fresh departmental inquiry. This may be necessary under
the law, but there is no doubt that it results in quite
unnecessary and avoidable duplication of work and waste
of time and energy of the Lokayukta or the Upa-Lokayukta
and of the witnesses and public servants involved. He
further pointed out that it is likely that sometimes
absurd results may also follow. In a certain case the
enquiry officer in the departmental inquiry may come to
the conclusion that the public servant concerned is not
guilty and deserves to be exonerated and this will put
the Government in a difficult position. Speaking about
the procedure that he follows in his investigations, the
Lokayukta of Maharashtra pointed out that inquiries and
investigations are held after following all the provisions
of the Act and also all the fundamental principles of
natural justice. The public servant is given an opportunity
to cross-examine the complainant and his witnesses. He is
also examined and is given an opportunity to lead his
defence. Arguments are heard and then the Lokayukta or
the Upa-Lokayukta comes to a conclusion and makes his report
and forwards his recommendations. In this background, the Lokayukta has suggested that the Government may carefully consider the matter and evolve a legally suitable solution to avoid duplication.

"Two points are very clear. The protections which have been provided in the Constitution to the civil servants must not under any circumstances be diluted or minimised. Already the second stage of reasonable opportunity under article 311(2) has been eliminated, there would be no justification to put further cuts on it to simplify the procedure as suggested by the Bihar Lokayukta. The constitutional guarantees to the civil servants have proved useful against arbitrary actions of the Government and have been able to instil a sense of security in them. Secondly, the introduction of the Lokpal or the Lokayukta should not cause any further complication. If the Lokpal is to hold investigations in accordance with principles of natural justice and thereafter the Government is to re-initiate the process by ordering fresh departmental inquiry, it will result in unnecessary and avoidable duplication of inquiries and consequential effects as explained by the Maharastra Lokayukta. One view can be that the Government, in this kind of a situation, will have the benefit of both the inquiry reports and as both are of recommendatory nature, it will be free to take any action as it deems necessary under the circumstances of the case. This course can be more useful where the Lokpal does not hold an investigation of the kind envisaged in article 311(2). He takes his summary investigation, and...

292. Id., p.6.
293. Supra note 290, p.79.
294. Supra note 291, p.5.
If he finds substance in the complaint, he recommends that the wrong be remedied and a further probe should be made into the conduct of the civil servant before imposing any punishment. In this way, the Lokpal will be merely informing the competent authority of a *prima facie* case, so that an inquiry may be ordered on the basis of which an action may be taken which would be in conformity with constitutional requirements. This will also avoid the unhappy prospect of two mutually contradictory reports. The report of the Lokpal will only draw the attention of the Government to a *prima facie* case. There will be no need to refer the report of the departmental inquiry to the Lokpal before taking any action for the reason that the institution of Lokpal is not basically a *punitive* institution. It is a *remedial* institution, basically meant to provide an outlet to the grievances of the public. The Lokpal will bring it to the notice of the authority concerned as to what is happening in his department, leaving it to him to handle it in accordance with law. This service of 'bringing to notice' the wrongs taking place can prove very useful in ultimately reforming the functioning of the Government. That presently is that even many of the serious misdeeds remain unexposed. The Lokpal will help in lifting the veil over them. In those cases where the Government does not contemplate reduction in rank, removal or dismissal, it can even proceed without holding a separate inquiry since the constitution provides for it only in the case of those three serious punishments.

In the alternative, if the Lokpal inquiries are conducted in accordance with the principles of natural justice as is done by the {kshayukta} of {shabhastra}, meeting the requirements of article 311(2), there will be no need for holding a *de novo* departmental inquiry and it would not be violative of the constitution. Article 311(2) requires 'an inquiry in which he has been informed of the charges
against him and given a reasonable opportunity of being heard in respect of those charges.' The Constitution does not specify as to who is to be the Inquiry Officer and who is to appoint them. The Lokpal inquiry will be on a better footing. In case of the departmental inquiry, normally a senior person from the department is appointed the inquiry officer. He may have his own personal biases. The Lokpal, on the other hand, is an outsider who is not subject to the control of the Government. He will be able to provide a more independent, impartial and objective base for the inquiry than a departmental inquiry officer.

One possible difficulty that has been pointed out by Mr. G.K. Pachauri is that if the Lokpal were to hold full-fledged inquiries, he will never be able to get through with his work. It is submitted that it is not likely to be much of a problem. The Lokpal need not go in for full inquiry in every case. If on his investigation he finds that the complainant has suffered injustice but there is no fault of the civil servant concerned, he only need recommend that the wrong be rectified so that injustice done to the complainant is undone. He will need to go in for a full investigation only in those cases where he feels that the wrong calls for an action against the civil servant and in such cases before recommending to the competent authority, he would afford a full opportunity to the concerned civil servant and thereafter, if he is convinced, he may make the recommendation. Secondly, the experience of the State Lokayuktas has shown that majority of the complaints stand siphoned out on grounds such like - "out of jurisdiction, vague, unjustified, anonymous, default of

the complainant and complaints withdrawn. In the U.K., it has been suggested that the Parliamentary Commissioner should adopt simpler methods for dealing with many complaints alongside his very thorough, 'Rolls-Royce', method of investigation, which would still have its place for the more difficult cases. The number of complaints requiring 'Rolls-Royce' investigation in India may not be very large. This will not be something peculiar to India. This has been the experience of the Scandinavian and Commonwealth countries having the institution of Ombudsman. Ultimately, the number of those cases where full inquiries will be required will not be something beyond the reach of the Lokpal. If need be, in the later stages, even a collegiate system of Lokpal can be introduced.

In order to carry out this scheme, it would be necessary to stipulate in the legislation itself that in those cases where the Lokpal proposes to recommend any one of three punishments provided in clause 2 of article 311, he will afford an opportunity to the concerned civil servant of the nature contemplated in the Constitution. And by way of abundant caution, the Constitution should be amended to add another ground to the proviso to clause 2 of article 311 whereby it is made clear that clause 2 will not be applicable 'where the action has been taken on the recommendation of the Lokpal who had provided a reasonable opportunity.' This will prove helpful to the Government.

296. See Maharashtra Lokayukta Reports for the period 25.10.72 to 24.10.73, pp. 4; 25.10.73 to 24.10.74; pp. 2-3; 25.10.74 to 24.10.75; p. 3; Bihar Lokayukta Annual Report, 1973, pp 6-7; Bihar Lokayukta Annual Report, 1974-75, pp 64-65; Rajasthan Lokayukta and UP-Lokayukta Report, 1973-74, pp 41, 49; Rajasthan Lokayukta Report for the period April 1, 1974 to March 31, 1975, pp 7-8; Rajasthan Lokayukta Third Annual Report for the period April 1, 1975 to 31st March, 1976, pp. 13-14.

for it would save it from the botheration of holding inquiries de novo and, at the same time, the interests of civil servants will be safeguarded. It will also save the governmental officials from the embarrassment caused by holding inquiries against their own colleagues.

The Administrative Reforms Commission had recommended that actions taken in respect of appointments, removals, pay, discipline, superannuation or other personnel matters shall be excluded from the purview of the Lokpal. On the basis of this recommendation, the Bill of 1969 bifurcated the personnel matters into two parts: matters during the course of employment and matters on ceasing to be in employment. Matters falling in the first category were excluded from the purview of the Lokpal but matters in the second category which included pension, gratuity, provident fund or any claims which may arise on retirement, removal or termination of service were kept within his jurisdiction. This meant that during the time the civil servant is in service, he is barred from seeking relief through the Lokpal and after he ceases to be in service, he could take his complaint to the Lokpal in regard to certain specific matters. This division was repeated in the Bill of 1971. Civil servants as such were kept out of the reach of the Lokpal under the Bill of 1977. State legislations have been enacted on the basis of the Bill of 1969. As mentioned earlier,
personnel matters have been excluded under the English and the French systems of ombudsman whereas in Scandinavia and in other Commonwealth countries they have been included.

The exclusion of personnel matters from the jurisdiction of the Lokpal or the Lokayukta needs reconsideration. Public servants form an important part of Society. Citizens have complaints against them. They also have complaints against the Government. If machinery is to be provided only one way, it would not amount to giving equal treatment to both. Moreover, complaints of the public servants cannot be ignored. In the present Indian context, the public servants are demoralised by the increasing politicisation of civil service appointments and by the trend towards dividing the civil servants into dependable sheep and unreliable goats. This trend got aggravated alarmingly during the emergency and in the period thereafter. Verbal orders are given to hand over the charge or to proceed on leave at once. According to a recent estimate, there are 70 to 90 officers belonging to the All-India Services in Delhi alone who have nothing to do. They are either on forced leave or are compulsorily waiting for postings. Having got tired of waiting for a fresh assignment, Mr. B.K. Such resigned from the I.A.S. His resignation was not accepted.

Mr. B.K. Nehru, a distinguished former civil servant and a veteran diplomat, has listed three powers which the Ministers use against civil servants freely and arbitrarily. If an officer is not willing to fall in line with the Minister, he is transferred and replaced by someone more pliable.

302. Inder Palhotra, "Ministers vs. Civil Servants", Times of India, N. Delhi (June 1, 1980).
302a. Ibid.
302b. Ibid.
Independent officers are harassed by continuous transfers. The second misused power is that of suspension. The Supreme Court has held that suspension is not punishment. There are well known cases where officers of the highest rank have been suspended for years without any charge ever being brought against them. When it is felt that the officer has been harassed and damaged enough, he is quietly reinstated. The third one is to deny promotion or to grant accelerated promotion. This prevailing situation should be a cause of anxiety. There are virtually no remedies by which such misuse of power could be checked and controlled. Mr. B.K. Nehru is fully justified in recommending that suspension should be included in the category of punishments which can be imposed only by following 'due process of law'.

During the emergency, 25962 public servants had been compulsorily retired. On a review of their cases after the emergency, 14117 public servants were reinstated. This means that in most, if not in all such cases, the guidelines laid down for compulsory retirement had not been followed. In this whole background it is necessary to devise adequate and appropriate safeguards. If personnel matters are brought within the jurisdiction of the Lokpal, it can prove to be an effective control on the arbitrary exercise of powers. Public servants will have an independent body for review of actions taken against them. Mr. B.K. Subba had argued before the Joint Committee that there is more hanky-panky in matters of seniority, appointments, promotions etc. than in other matters, that we are constantly faced with writs regarding these matters and in quite a number of

306. Nehru, supra note 304.
307. Ibid.
308. Thak Commission Report, supra note 244, p.231.
cases the courts have upheld the challenge on the ground that the impugned decision was either not strictly legal or that it was not honest. He stressed that this was one area which requires constant supervision by an agency like the Lokpal. The committee did not accept this plea of Mr. Sachdeva, ref. K. K. Agarwal, commenting on this has said that exclusion does not seem to be sufficiently justified. He feels that the high morale of the service can only be built up when not only are they exonerated of baseless accusations, but also when their own grievances regarding conditions of service, etc., are properly redressed.

There is no doubt that matters pertaining to pension, gratuity, provident fund etc., are important to any civil servant, particularly when he may have no means open to him to earn a living. Any delay in these retirement benefits can cause immense hardship. In this area, useful service is being rendered by the State Lokayuktas. But the fact cannot, however, be overlooked that personnel matters during the course of service are no less important. A large number of civil servants in the states as also at the centre have been moving the courts for relief. Besides having entered into long-drawn-out legal battles, often cases have been dismissed on technical grounds. Moreover, the dockets of the courts are overflowing with cases and they need a helping hand to share the burden. The experience of the State Lokayuktas has been that they have been

309. supra note 250, p.152.
310. ——, paras, The proposed Indian Commission, 29(1971).
receiving a sizeable number of complaints from civil servants but they have not been able to deal with them because of the cut-off clause.\textsuperscript{312} It will be wrong to presume that the Lokpal is meant to provide a remedy only against a public servant and not to a public servant. In the V.C., a wrong view has been taken that the Parliamentary Commissioner is not supposed to settle complaints between the employer and the employee. No such limitation exists in other Ombudsman Jurisdictions.

Even otherwise, it cannot be said that the Ombudsman as a concept is meant only to deal with complaints against the administration and not that of the administration itself. The process in the administration can be introduced only by reforming both, the treatment given by the administration to the public man and to its own personnel. Indeed, these are inter-dependent and difficult to separate. There may be things which may meet the requirements of law and yet there may be something deeper which could only be brought to surface through the services of an agency like the Lokpal. There is a strong case for the inclusion of personnel matters within the jurisdiction of the Lokpal and the State Lokayuktas.

The institution is still new to India. It has been in operation in a few States for sometime. If it could be a success in other systems and is playing the role of an administrative physician, there is no reason that it will not come to play the same role in India. The Lokayukta of

\textsuperscript{312} Rajasthan Lokayukta Annual Report for the period, April 1, 1974 to March 31, 1975, p. 16-17; Rajasthan Lokayukta Third Annual Report for the period April 1, 1975 to March 31, 1976, p. 26-27; Maharashtra Lokayukta and Uda Lokayukta Report for the period from 25.10.73 to 24.10.74, p. 3; 25.10.73 to 24.10.74, p. 3; 25.10.74 to 24.10.75, p. 3; Bihar Lokayukta Annual Report, 1973, p. 7; Bihar Lokayukta Annual Report, 1975-76, p. 65.
Kalmrastra, after being in office for one year, had reported a tremendous upsurge of interest in his functions. After the second year, he recorded that the office had proved to be a very beneficent jurisdiction and will continue to grow in value and effect as time passes. The Rajasthan Lokayukta has given a detailed appraisal of the institution. He tells us that the institution of Lokayukta is not meant to be looked upon with suspicion or disfavor by public servants. Such an outlook may defeat, and it would certainly obstruct, the basic purpose for which the institution has been set up. The Lokayukta is an impartial independent officer, who merely inquires, with an objective and detailed judicial approach, into the complaints by aggrieved citizens with respect to allegations of corruption etc., against public servants, in other words, as broadly understood - with respect to maladministration. He pointed out that the Lokayukta, is not only a friend, helper and rescuer of the aggrieved citizen but he is also a friend, well-wisher and helper of honest and well-meaning public servants. The institution, in the ultimate analysis, truly serves to function as a 'safety valve' to preclude violent eruption of frustration, or persisting feelings of dissatisfaction with what may sometimes appear to be a blatant and continued maladministration. Speaking of the experience outside India, the Lokayukta said that the public servant is, in fact, generally believed, in all countries where similar institutions have been established.

313. Maharashtra Lokayukta and Hari-Lokayukta Annual report for the period 25.10.72 to 24.10.73, p.14.
institutions are in vogue, to exercise his power more justly, more promptly and with the fairest methods, when there is an authority like the Lokayukta (Ombudsman) watching him. Commenting upon its usefulness, he observed that when the Lokayukta files a complaint considering it as devoid of merit, he suggests that the public servant concerned has not defaulted and has discharged his functions rightly and properly. This is considered as a vindication of the public servant concerned. The concept of integrity amongst public servants is thus strengthened by this institution through the rule of law as enacted in the act.

The institutions of Lokpal and the Lokayuktas will be highly useful for the people as also for public servants. Besides this, it will contribute towards the development of sound administrative jurisprudence. It will help in enforcing the rule of 'fairness' and the principles of 'natural justice' in the area of administration. It will help in regulating 'Discretionary Justice.' It will do justice where courts have failed, as in Kasturi Lal's case, where the state could not be held liable for the wrong done during the course of sovereign functions, by pointing out that it does not reflect well of the state to run away from its liability taking shelter under technicality of law when facts of the situation strongly demand otherwise. Its recommendations regarding the changes in the administrative process will go a long way in evolving newer and better methods of running the administration. Its contribution in developing Indian administrative law will be tremendous.

India is passing through a stage when it immediately needs the services of a Lokpal at the centre and of Lokayuktas in the States. Unlike the other appellate bodies, they will not substitute their own judgments for the impugned decision nor will they quash the decision. The weapons of the Lokpal will be publicity and persuasion rather than cumbersome controls. It will provide a fence along the administrative road, not a gate across it.\(^{317}\)

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\(^{317}\) Donald G. Kowal, 'The Parliamentary (Studler): Should the Scandinavian Model Be Transplanted?' \(\text{WWW Int. Rev. d. c.} 399, p.405(1962).\)