CHAPTER SEVEN

CHIEF MAN AND THE JUDICIARY

The Judiciary is a major institution of Government. It reviews the actions of the other two organs, the Parliament and the Executive. It is to act as democracy's hedge on majority rule and executive high-handedness. The system of Justice is a huge and complex machine. Its careful management is necessary because independence of Judiciary and faith in Judiciary are the cornerstones of any democracy. It is no doubt true that the Judges are the oracles of law and the embodiment of Justice but all the same they are human, they are a part of society and they have to discharge their functions or exercise their powers under various limitations, personal or otherwise. In any group of men, may it be of Judges, perfection cannot be taken for granted.

The record of the Judiciary in India as also elsewhere has been, by and large, free from blamish but it cannot be said to be faultless. One hears from time to time of 'Injudicial Justices; of 'Indiscipline of robes'; of 'Judging the Judges'; and of 'Judge, Judge thyself'. The question of evolving methods of disciplining Judges is both serious and sensitive. It has different aspects which warrant and examination.

1. Upendra Baxi, The Indian Supreme Court and Politics, 12(1930).
3. Id., 42.
6. Time, supra note 2, 42.
7. Kuldeep Nayar, 'Judge, Judge Thyself', Indian Express, (Bombay), 6(March 27, 1980).
DOES THE JUDICIARY NEED SUPERVISION?

The traditionalists would object to this question outright. Even Lord Denning belongs to this category.*

There are two main objections. Firstly, supervision will encroach upon the independence of the Judiciary. This is based upon what is called the 'pedestal' theory which means that Judges must be placed in a position where they are apart from all mankind and their behaviour is outside the range of scrutiny or criticism. Secondly, administration of Justice might suffer if Judges are subject to scrutiny since this would deter them from taking a 'strong, forthright and independent line in their decisions and judgments.'

It would be an exaggeration to say that all is fine with the Judiciary, whether it is English, American or Indian. Henry Cecil's Tipping the scales deals with corruption of different kinds indulged in by the Judges. Joseph Borkin's The Corrupt Judge contains a list of fifty-four Federal Judges into whose conduct an inquiry had been made. Bob Woodward's recent book, 'The Brethren' lifts the veil on the collegiate functioning of the U.S. Supreme Court and shows that the court often is neither judicious nor judicial. It accuses the Justices of stealing opinions from each other and then claiming them as their own. Time has recorded that Judges have been convicted of income tax evasion, perjury, bribery, conspiracy, mail fraud and backdating of documents. It has been...

* See, Henry Cecil, Tipping the scales, p.232.
* See, Paul MacDonald, 'Expediency in U.S. Supreme Court', The Tribune (Chandigarh), 4(Dec.13,1979).
* Supra note 2, p.47.
reported that in New York since 1975, ten Judges have been removed, sixty-five censured and four suspended, while seventy-three have resigned. Recently, a Judge was barred from Judging for a year.  

IIe Sandler has reported that there is an ample number of corrupt or incompetent Judges in each State of America. It has been testified in the American context that the problems caused by unfit federal Judges, whether from outright corruption, political favouritism or inability due to ill-health or senility, amount to a hidden national scandal. Justice S.M.N. Raina has observed that it has been extremely depressing and distressing to note the fall of the Judiciary in the estimation of the people. Late Mr. M.C. Getavald has given examples where a Chief Justice of India approached a Governor to ensure promotions of certain judicial officers or recommended appointment under pressure from high quarters.

This, in brief, shows that the Judiciary is not altogether free from questionable conduct and the trend is on the increase. In the light of this, one has to approach the question of supervision over the Judiciary. This gives rise to the basic issues: whether the independence of the Judiciary implies 'virtual irremovability' of Judges and that there should be 'no supervision' whatsoever over them. Should Judges be placed in a position wherein their behaviour be completely outside the range of scrutiny or criticism? It is submitted that independence of the

14. Ibid.
19. Id., p.343.
Judiciary does not necessarily mean that Judges should be free from responsibility or criticism. It is necessary that Justice must be allowed to suffer scrutiny. Confidence cannot be instilled by stifling criticism. Independence of Judiciary should not 'serve to hide abuse.' Absence of vigilance would amount to all the freedom to do what one likes to do. Exposure of corruption in the Judiciary will act as the eye-opener for others. If it is allowed to remain underground, it will sap the judiciary of its credibility. If judicial corruption is allowed to be a subject of rumour or gossip rather than a serious matter of scrutiny, debate and discussion, people will soon lose faith in the Judiciary.

As regards the other point that supervision will deter the Judges from taking a strong and independent line in their decisions, it is necessary to appreciate that supervision is not meant to be used as a tool to oversee the Judges. Moreover, supervision has to be carefully worked out in order to eliminate all kinds of possibilities of its misuse. The fact cannot be overlooked that faith in Judiciary has started faltering. It needs to be halted by adopting appropriate means for the same.

7:12: ___________________ THE JUDICIARY:

In most of the systems, the Judiciary supervises itself. The Judges are left to be regulated by the Judges.

21. Hain, supra note 17, p. 130.
themselves except that they are removable on a resolution of both the Houses of the legislature. It is only in Sweden and Finland that Ombudsman control has been provided over the Judiciary. In the U.S.A., the Procurator who is in the nature of Ombudsman performs this function. The Judiciary, in other countries where Ombudsman has been adopted has been kept out of its purview and no serious move has been made for its inclusion. An assessment of the impact of Ombudsman's Jurisdiction over Judiciary in Sweden and Finland, in the context of the apprehensions against such jurisdiction thus becomes necessary.

THE SWEDISH EXPERIENCE

Since the very inception, the Ombudsman in Sweden has been exercising supervision over the Judiciary. Members of the lowest court to the highest court are within his jurisdiction. Both, judgements as also the conduct of the Judges fall within his purview. A Judge is prosecuted by an Ombudsman in the court superior to the court to which he belongs. Supreme Court Judges and the members of the Supreme Court of Administration are prosecuted before the special court of impeachment. There is no instance of such prosecution but the Ombudsman has been criticised for


refraining from 'his duty' to prosecute supreme court Justices. Actions against the members of the court of appeal have been brought before the Supreme Court. The following record of the first one hundred and fifty years of the Ombudsman's functioning in Sweden is revealing:

<table>
<thead>
<tr>
<th>Period</th>
<th>Total Prosecutions</th>
<th>Prosecution of Judges</th>
<th>Prosecution of Officials of Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910-1910</td>
<td>1050</td>
<td>649</td>
<td>91</td>
</tr>
<tr>
<td>1911-1960</td>
<td>550</td>
<td>166</td>
<td>132</td>
</tr>
</tbody>
</table>

The statistics regarding prosecution of members of judiciary in the 19th century were so high that certain newspapers had a standing headline, 'Fined Judges.' A good number of prosecutions have been in regard to wrong interpretation of law. There have also been instances when Judges have been fined for behaving improperly towards parties and witnesses, for assisting a lawyer friend in drawing up a number of documents to be handed to the courts. This was done outside the scope of duties of the Judge. In a particular case, a Judge had improperly ordered one party to pay the other party's court costs and the party went to the Ombudsman. The Judge was allowed to pay the costs himself and was merely given a reminder. In another case,

30. Id., 122.
31. Id., 117.
32. Id., 113.
33. Id., 125.
34. Bexelius, supra note 20, p.30.
35. Ibid.
a Judge was prosecuted for insulting a counsel and was sentenced to two month's suspension. The Ombudsman has also taken up cases where there has been undue delay in handling of cases. The obvious question that arises is why the share of the Judiciary was so high in the ombudsmanic prosecutions? Out of a total of 1600 prosecutions in a span of one hundred and fifty years, 1031 were of Judges and Judicial officers alone as is evident from the table given earlier. It has been observed that there is no reason to believe that the Judges were more prone to fault and neglect than other officials. Alfred Sromelius has explained that the position can be attributed to two factors: the holders of the office were from the Judiciary and were therefore not very well acquainted with the practice of the civil service, whereas they had close familiarity with the functioning of Judiciary and secondly the civil service was small, particularly throughout the 19th century as a result of which there were not very many complaints against it. Whatever the factors may have been responsible for this trend, the Ombudsman's concentration on the Judiciary was a subject of criticism. Public and official reaction to such prosecutions eventually brought about a change in the policy of the Ombudsman. Where the wrong was due to careless and unintentional conduct, the custom arose to send an admonition or a suggestion for correction instead of commencing a prosecution. This is clear from the record shown in the table on the following page. The statistics show that the Ombudsman

37. Ibid.
38. Sromelius, supra note 29, p.126.
39. Ibid., p.117.
40. Ibid.
41. Ombudsman, supra note 23, p.102.
42. Ibid., p.100.
### Schedule of Cases Based Upon Complaints Received Against the Courts and Also Initiated by the Ombudsman

<table>
<thead>
<tr>
<th>Year</th>
<th>Total:</th>
<th>Dismissed without investigation:</th>
<th>No criticism after investigation:</th>
<th>Comments:</th>
<th>Prosecutions:</th>
<th>Proposals to Parliament/ Government:</th>
<th>Referred to other Agencies:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>262</td>
<td>102</td>
<td>119</td>
<td>40</td>
<td>x</td>
<td>1</td>
<td>x</td>
</tr>
<tr>
<td>1974</td>
<td>233</td>
<td>93</td>
<td>157</td>
<td>31</td>
<td>x</td>
<td>x</td>
<td>2</td>
</tr>
<tr>
<td>1975</td>
<td>316</td>
<td>93</td>
<td>130</td>
<td>46</td>
<td>x</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Jan-June 1976</td>
<td>230</td>
<td>46</td>
<td>34</td>
<td>93</td>
<td>x</td>
<td>1</td>
<td>x</td>
</tr>
<tr>
<td>July, 1976</td>
<td>219</td>
<td>77</td>
<td>122</td>
<td>29</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>June, 1977</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>July, 1977</td>
<td>252</td>
<td>75</td>
<td>156</td>
<td>20</td>
<td>x</td>
<td>x</td>
<td>1</td>
</tr>
<tr>
<td>June, 1978</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

43. This schedule is based upon the summaries in English of the reports of the Swedish Parliamentary Ombudsman contained in Justitieombudsmannens årsbok, Astabadets Tryck, Stockholm for the years 1974, 1975, 1975-76, 1976-77, 1977-78, 1978-79.
has been dealing with good number of complaints against the courts indicating thereby that people do have frequent grievances against the functioning of courts. It is also clear that most of the complaints were dismissed before investigation since they were found baseless or after investigation as they were found to be without any substance. In those cases, where the ombudsman found questionable conduct or act, he normally expressed himself through admonitions and rarely through prosecutions. From 1973 to 1979, there have been no prosecutions and the number of admonitions has been moderate. Criticism of judges is made with great caution and it is seldom directed against the actual decision in a case. It refers more to the way the case is dealt with.

It has been observed that the ombudsman's supervision from "arrest to judgment" (police is also within the jurisdiction of the ombudsman) has helped in protecting the rights and liberties of citizens and in providing a 'new look' to the Swedish Judiciary. This supervision at the higher levels of the judiciary has proved useful in clarifying and unifying the application of substantive and procedural rules. At the lower levels, inspections and investigations of the court-rooms and record books has operated as a strong preventive force. On the basis of experience, it has been reported that the Swedish Judges are not influenced in their decisions by the power of the ombudsman to survey the activities of the courts. It has been argued by a Swedish ombudsman that

45. ibid., supra note 23, pp.102-03.
46. ibid., 104.
Once it is accepted that a Judge should be punished by a higher court for an abuse of his powers, his independence cannot be harmed by the additional fact that the prosecution of the offence has been made on the initiative of the Ombudsman. It has been emphasised by him that the claim to an independent position does not necessarily mean that a Judge should be free from responsibility or criticism when acting against the law. In this way, Ombudsman's supervision has been justified both on principle as also, on the basis of long experience. Walter Cellhorn, after quoting the views of the Ombudsman as also of the Judges, has turned up the position that the Judges seem genuinely enthusiastic about the Ombudsman when they regard as an able Jurist and a good human being and are not against the present system of supervision.

In 1919, the parliamentary Ombudsman (Judicial delegate of parliament) in Finland was ordained to see that Judges uphold the laws and regulations and take measures, whenever a Judge had in the performance of his duties been guilty of deceiving practice, partiality or gross negligence, had infringed upon legal rights of a private person or had exceeded his authority. The Ombudsman was given the right similar to his counterpart in order to institute proceedings against Judges as also against the President or a member of the supreme court or the supreme administrative court for faults committed in office.

47. Demelius, supra note 64.
48. Walter Cellhorn, Ombudsman and others, supra note 67.
51. Id., Article 5.
The independence of Courts in Finland is ensured by the Constitution and effectuated by tradition. No Judge can be dismissed from office except by a decision of a higher court. The fact that the independence of the Judiciary is considered an essential part of the Constitutional structure of the State has not prevented the ombudsman from being granted the power to supervise the legality of the functions of the Judges and, if need be, to prosecute them for crimes or errors in office. The ombudsman is of course not entitled to change decisions of courts or otherwise to intervene in the lawful functioning of the Courts.

The Ombudsman has been in operation in Finland for the last sixty years now but has not so far instituted any prosecution against members of the Supreme Court or the Supreme Administrative Court. Even in the case of members of the Court of Appeal, there have been only four cases where charges of error in the performance of official duties were preferred. In all these cases, the error related to the calculation of the length of sentences. But over the years, there have been many charges against the Judges of the lower courts. These cases have usually been concerned with minor technical errors or dealt with the procedure of the presiding Justices.

52. Constitution Act of Finland, promulgated in Helsinki (Helsingfors) July 17, 1919, Chapter V, Articles 53-60.
54. Id., 3-9.
55. Id., 17.
57. Ibid. See also Reports of Finland Ombudsman for the years: 1934, pp. 35-37; 1936, pp. 32-33; 1943, pp. 14-15; and 1949, pp. 35. These Reports have been referred in Mikael Hiden, ibid.
of the lower courts.\textsuperscript{59} It seems that the Ombudsmen have been concerned with the work which normally is performed by the appellate courts in other systems with the difference that technical errors are rectified by way of bringing charges against the Judges, which to an outsider appears not very congenial to the concept of independence of the Judiciary. In some cases, however, the conduct of Judges has been in question like when a Judge was prosecuted and dismissed because he had exacted improper fees for judicial proceedings and another Judge lost his job when insobriety affected his courtroom demeanour.\textsuperscript{59}

Unlike in Sweden, there have been sharp reactions to the process of prosecution of Judges: 'nobody could pay back to me the shame of being prosecuted', 'our trouble is that everybody is supervising us' and 'if prosecution were reserved for big things, it would be a real whip instead of a darned irritation'.\textsuperscript{60} Prof. Cellhorn feels that prosecution is a harsh means of supervising the work of Judges.\textsuperscript{61} On the other hand, Mikael Uiden does not agree with this. He argues that the proceedings against Judges always leave the final word to a court, so they do not conflict with the principle of independence of the Judiciary.\textsuperscript{62} Those who have been trained in the background of 'independence of judiciary' as the foundation of rule of law will find it difficult to accept the view that as the final word rests with the courts, prosecution of Judges is of no adverse consequence.\textsuperscript{59}

\textsuperscript{59} Ibid.
\textsuperscript{59} Cellhorn, supra note 41, 60.
\textsuperscript{60} ibid, p.61.
\textsuperscript{61} ibid, p.62.
\textsuperscript{62} Uiden, supra note 56, p.104.
prosecution results ultimately in acquittal, it does leave a mark on the fair name of the Judge and the Judiciary. Prosecution is a serious matter which should be resorted to only in exceptional situations.

There is another useful aspect of the Ombudsman in Finland. He may propose the annulment of a duly-arrived-at decision and the re-opening of a case on the ground that the decision is materially incorrect or based upon false testimony or that materially new evidence has come to light. The Ombudsman may propose that a party whose procedural time-limit has already run out without a fault of his own be granted an extension of time to proceed in the matter. A criminal may have been sentenced as a habitual criminal to a heavy sentence, although he had not suffered earlier sentences which would define him as a habitual criminal. Proposals of this kind are submitted either to the Supreme Court or Supreme Administrative Court. In a majority of cases the Ombudsman's proposals for reopening the case have resulted in de novo consideration of the case by the Court. In a few rare cases the Ombudsman has suggested that the President of the Republic may grant pardon. He has also proposed the payment of damages to a person who has suffered from an official error. This is a useful dimension of the role of the Ombudsman. If these proposals are made with care and caution and not as a regular feature, it will prove to be a good outlet for genuinely hard-hit cases. The Ombudsman in Finland is not only a prosecutor. He is also

an instrument to 'prevent injustice' so that no one is denied the enjoyment of his legal rights.66

All Courts, beginning from the people's court and ending with the Supreme Court of the USSR, are formed on the basis of election.67 The Soviet law does not provide for the appointment of Judges or their replacement in any way save by election.68 Under the Constitution, the Supreme Court of the USSR is elected by the Supreme Soviet of the USSR for a term of five years.69 The Supreme Courts of the Union Republics are elected by the Supreme Soviets of the Union Republics and the Supreme Courts of the Autonomous Republics are elected by the Supreme Soviets of the Autonomous Republics — all for a term of five years.70

As for the Supreme Courts of the Regions and National Areas, they are elected by the Soviets of the respective administrative divisions and also for a term of five years. People's Judges of district (city) people's courts are elected by the citizens of the district (city) for a term of five years on the basis of universal, equal and direct suffrage by secret ballot.71 In conformity with the Fundamentals of the judicial system of the USSR, judges regularly report to their electors on their work and activity.


70. Art.152.

71. Ibid.
of the Court. If a Judge does not justify the elector’s trust he may be recalled by them. Art. 155 of the Soviet Constitution provides that Judges are independent and are subject to the law alone. It has been observed that the accountability of Judges to the electors has not interfered with their Judicial independence. In order to prevent the right of electors to recall Judges from becoming an instrument of pressure on them, procedure is regulated by law which is intended to preclude the possibility of recalling a Judge when his activity and judgments fully meet the requirements of the law. A Judge can be recalled by the electors after a collective and all-round discussion of the matter. It has been argued by Mr. Vladimir Terebilov that the principle of Judges being permanently appointed contributes the qualities of superiority, self-confidence, conceit and infallibility which are generally responsible for judicial errors and even arbitrary actions. It is on this ground that the recalling of Judges is justified. But on the other hand in order to ensure that the Judges function free from any pressures, it is provided that they are not liable to criminal proceedings and cannot be dismissed or arrested without the sanction of the Presidium of the Supreme Soviet of a Republic; while Judges of the Supreme Court of the USSR cannot be removed from office or arrested without the sanction of the Presidium of the Supreme Soviet of the USSR. The law also provides for special disciplinary measures applicable to Judges guilty of misdeeds in their work or misdemeanours in their behaviour. Judges have disciplinary responsibility to special disciplinary collegiums made up of Judges only.

72. Terebilov, supra note 69, p. 40.
73. Id., p. 41.
74. Id.
75. Id., p. 43.
76. Id., pp. 41-42.
77. Id., p. 43.
71. Id.
It is important to examine the role played by the Soviet procuration which is the Soviet 'Ombudsmanship'

in its co-relation with the judiciary. It exercises supervision from the time of arrest up to conviction and even thereafter. By law no person can be arrested except by the order of the court or with the sanction of a procurator. Before giving the sanction, the procurator examines all the material and may even personally interrogate the person concerned. He also exercises supervision over those who conduct investigations and thereby ensures that no citizen is subjected to unlawful and ungrounded criminal prosecution. The procurator presents his opinions concerning legal issues while the case is in progress. The procurator appears before the courts as a party, representing the interests of the State and in that capacity enjoys the right of making an appeal to a higher court like any other party to the proceeding. The powers of the procurator go further than that. He conducts 'post-audit' of the Judges' work.

After the court judgment, the procurator-general and his deputies can lodge 'protests' against the decision and demand that the proceedings be re-opened for re-consideration. Pending action on the protest, they can suspend execution of the judicial order whose reconsideration has been asked for. These protests and appeals are not frequently resorted to.

79. Leon Botin, "Ombudsmanship in the Soviet Union," 22 Tul. L. Rev. 509-540 (1974); Walter Celhorn has observed: 'General supervision' of the 'procuration' in the Soviet Union somewhat resembles that of Parliamentary Commissioners (or ombudsman) in Scandinavian countries, supra note 41, p. 367.

80. Terobilov, supra note 61, p. 75.

81. Ibid.
to, they affect fewer than five per cent of the court decisions. But to exercise this supervision, they can demand and obtain the records of any civil or criminal case from the judicial organs for verification. The procurator-General also has the right to bring before the plenary session of the supreme court representations on the issue of instructions to judicial organs on matters of judicial practice. Where the procurator-General finds that a decision of the plenary session of the supreme court does not confirm to the law, it is his duty to make representation on the matter to the presidium of the supreme soviet of the union.

Private individuals can petition to the procuracy to exercise its powers to cause re-opening of judgments that are no longer appealable. In this respect, ref. Cellhorn says that the procuracy became the protagonist of an individual who has been the victim of mistake or has been wronged by defective procedures. The system of procuracy fulfills the function of an appeal by a party to a case with a basic difference that in the appeal process, after the final judgment, nothing can be done whereas in case of procuracy, reconsideration of the judgment can still be asked. And once the whole process has been followed, the procuracy supervises the observance of legality in keeping convicted persons in places of confinement.

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12. This is an estimate recorded by Cellhorn, supra note 43, p.345, l.n. 23.
It is clear from the above discussion that in the Soviet system, procuracy is not associated with disciplinary collegiums for purposes of disciplining the Judges. But it exercises supervision over the courts in order to ensure that sentences, judgments, rulings and decisions of Judicial bodies are legal and well-founded and that sentences are carried out, by filing appropriate protests with the higher courts. This in short means that the decisions of the courts are subjected to the scrutiny of the procuracy. This role of the procuracy cannot be said to interfere with the independence of judiciary for independence does not mean that wrong decisions should not be brought to the notice of the higher courts. Since Judges are accountable to their electors and subject to disciplinary collegiums comprising of Judges, it will be useful to give it a serious consideration that the role of the procuracy should be extended to bring to the notice of collegiums acts of misdemeanours on the part of Judges. This will otherwise also be in conformity with the general functioning of the procuracy.

POSITION IN DENMARK:

In Denmark, complaints about the behaviour of Judges can be lodged either with the Presidents of several courts or with a Special Court of Complaints, founded in 1939. In view of this, it was proposed in the original Bill in 1953 that the jurisdiction of the Ombudsman should include only the administrative functions of the Judges whereas judicial conduct of their office should be outside his jurisdiction. During the debate on the Bill in the Parliament,

objections were raised against this provision, with the result even the administrative activities of the Judges were set outside his jurisdiction. There was no fundamental objection against the inclusion of Judges but since they were already within the jurisdiction of the Court of Complaints, it was thought appropriate not to put the Judges under the supervision of Ombudsman.

The Courts of Complaints has three members: a Supreme Court Judge, an Appeal and District Court Judge and a County Court Judge. To begin with, the activities of deputy Judges were within the control of the Ombudsman but this resulted in some practical difficulties, so in order to introduce uniformity in Judges and deputy Judges, the Act was amended in 1959 and the deputy Judges were also put under the control of Court of Complaints. On the other hand, members of the administrative tribunals continue to be within the Ombudsman's competence and they are not subject to the jurisdiction of the Court of Complaints. Inspite of the fact that Judges had been excluded from the jurisdiction of the Ombudsman, still complaints were received in the first year of the operation of the Act. Considerable dissatisfaction with the Judiciary in Denmark continues since as late as 1975, the Ombudsman had to decline 74 complaints as without jurisdiction against the Judges. Judges have thus been kept away from the supervision of the Ombudsman in Denmark.

90. I. E. Pedersen, 'Denmark's Ombudsman' in Rowat supra note 44, p.79.
91. ibid.
On the basis of Denmark position, it was not only Norway that did not include judges within the jurisdiction of Ombudsman,\(^\text{94}\) infact no other system has extended Ombudsman's supervision over the Judges. The issue was specifically considered in New Zealand by the Royal Commission on the Courts.\(^\text{95}\) The main concern of the Commission was to evolve such a procedure to deal with complaints of judicial misbehaviour which should enhance judicial independence and ensure an effective mechanism for screening unjustified complaints.\(^\text{96}\) In its report of 1976, it rejected any notion of an Ombudsman as the person to consider matters relating to Judicial conduct in view of New Zealand's history and constitutional development.\(^\text{97}\) On the other hand, it recommended a Judicial Commission to deal with complaints against the Judges.\(^\text{98}\) The Commission was to comprise of both Judicial and non-Judicial members.

The creation of commissions to discipline Judges has been the major reform in the administration of Justice in the United States of America. Since 1960, 43 States and the District of Columbia and Puerto Rico, have created these commissions.\(^\text{100}\) The procedures in this regard are different in details from one state to another. 34 States have established a single Judicial Discipline Commission, which consists of lawyers, Judges and non-lawyers. The

\(^{94}\) M. J. St. J. 'The Ombudsman for Civil Affairs' in Staat's, supra note 44, p.\(^\text{99}\).
\(^{95}\) A Royal commission under the chairmanship of the Hon'ble Mr. Justice Beattie was established in 1976 to inquire into the structure and operation of the Judicial System of New Zealand.
\(^{96}\) Time, supra note 2, p.\(^\text{47}\).
\(^{97}\) Id., pp.217-18.
\(^{98}\) Id., p. 146.
\(^{99}\) The composition of the Commission being: the chief Justice, a Judge of the High Court or Court of Appeal, the Chief District Court Judge, the Solicitor-General, the Secretary for Justice and two members nominated by the Law Society and appointed by the Governor-General.
\(^{100}\) Time, supra note 2, p.\(^\text{47}\).
Commission received the complaints and investigates them. It imposes discipline in minor cases and in more serious cases formal hearings are conducted and recommends action, subject to Supreme Court review. In some other States a two-tier system is worked and this separates investigatory functions from adjudicatory functions. An enquiry commission investigates complaints and presents charges to a Courts Commission composed of Judges. This Commission decides whether to reprimand or remove the Judge. Some of these commissions have been constituted through constitutional amendment, some others by statute and still others by Supreme Court rule. These commissions mainly focus upon three aspects of Judicial behaviour: poor performance on the bench, conduct prejudicial to the administration of justice and the physical and mental competence of Judges.101

The issue was considered at length by a sub-committee of Justice in the U.K.102 It did not approve of the Lord Chancellor's supervision, has enough to do with his present day-to-day tasks and moreover he is a political figure, consequently less impartial and possessed of less freedom of action than a wholly independent tribunal.103 It also did not like the idea of a complaints tribunal composed solely of Judges which could be open to the objection that esprit de corps among the Judges might render it ineffective.104 In its view, the ideal solution was a system so designed as would retain the merits and share none of the defects of the Swedish Ombudsman but it ultimately recommended a representative tribunals (including non-lawyers) presided

101. These details have been taken from Siby Mathew, 'Judiciary in America' in K.L.T., 2(Jan.3,1979).
102. Webster, supra note 9.
103. Id., p.54.
104. Id., p.55.
over by a Judge or a Judicial Commission. The Committee did not consider it necessary to make a detailed proposal in this regard but the following fundamentals were thought to be desirable:

"(T)here should be a formal procedure for bringing complaints before a specific tribunal, that the tribunal should be independent both of the legislature and of the executive, that its proceedings should be in camera, that its decisions should not normally be published and that safeguards should be provided if possible to protect Judges from paranoid and frivolous complaints. Rules might provide that (save in very serious cases) a Judge would only be answerable to the tribunal after a number of complaints had been received and been deemed, prima facie, to be well founded."106

The Committee justified itself by observing:

"The main advantage of providing such a procedure is that it would afford a regular channel of complaint to an impartial tribunal; this would inspire confidence and act as a deterrent to misbehaviour which might otherwise persist and remain unpunished."107

It is evident from all this that the Committee had no fundamental objection against the Ombudsman being given the supervisory power but it could not prove itself sufficiently bold to make this suggestion and consequently expressed its preference for a tribunal.

The position in France is that the Conseil Supérieur de la Magistrature acts as a disciplinary committee with

105. Ibid.
106. Ibid.
107. Ibid.
jurisdiction over all Judges. It is presided over, when sitting as a disciplinary committee, by the First President of the Cour de Cassation (the highest court), although under the Constitution the President of the Assembly and the Minister of Justice are its normal President and Vice-President respectively.

So neither the legislature nor the executive can participate in the disciplinary control of the Judges. Judges can be disciplined for professional misconduct, which is defined by Art. 43 of the Ordinance 53-1270 of Dec. 22, 1951, as:

"Any breach by a Judge of the duties of his profession to behave with honour, with delicacy and with dignity constitutes a disciplinary misconduct."

In order to enforce this the sanctions range from reprimand to removal from office with no right to appeal.

As regards the International Court of Justice, confidence has been reposed in Judges themselves with no other agency to discipline them. The Statute provides that, "no member of the Court can be dismissed unless in the unanimous opinion of the other members, he has ceased to fulfil the required conditions."

Whatever be the mode of supervision, what needs to be protected is the independence of Judiciary. This task cannot be performed by the legislature for it is dominated by the executive. It has been well observed that the main purpose of the Parliamentary procedure was not to provide a method of removing Judges but rather to safeguard them against removal. Obviously, supervision

103. Id., pp. 53-54.
109. Id., p. 54.
110. Statute of the International Court of Justice, Art. 18(1). Reference to 'required conditions' has been nowhere elaborated.
111. Webster, supra note 9, p. 75.
over the Judges cannot be entrusted to the executive. If the Judges are allowed to judge their brethren on the bench, it has the snag of making them the Judge of their own cause. In this background, the trend that is now emerging as seen above is that supervision be exercised by commissions comprising Judicial and non-Judicial members.

Charles T. Burbridge has argued that the Ombudsman should be kept away from the Judiciary. He has explained that the Judiciary is an independent body which tends to police its own members and if any assault is made on its independence, it is likely to cause opposition to the Ombudsman plan by the Judiciary which can be an extremely powerful source. That is intended to be conveyed as that if once there is opposition from the members of the Judiciary, it will be difficult to adopt it even in other spheres. He has recommended that for a successful transplanting of an Ombudsman, it would be useful if it is not allowed to enter the realm of the Judiciary. While considering the concept of Ombudsman, a Canadian Committee has reported that in view of the tradition of independence surrounding the Judiciary, it would not be appropriate for the ombudsman to be concerned with the courts. Even this fear has also been expressed in another report that the existence of an ombudsman might impair the independence of Judges, who might be influenced by his opinions.

It is not understandable as to how an Ombudsman could endanger the independence of Judiciary by calling attention of Judges to their misbehaviour or to arbitrary conduct in the court-room. He is only to inform and to point out as to who is doing what? Thereafter, if a judicial body is required to look into the matter, there could be no threat to the independence of Judiciary. The possibility of a motivated or a deliberate reference from the Ombudsman to a Judicial body cannot be completely ruled out but in that case the Judicial body itself can prove to be a good filter by not taking any action on it as in its considered opinion, it would not be desirable. The basic structure of the institution of Ombudsman is that it functions independently of the executive and of the legislature. As long as it is an independent body and does not function under the influence of any organ of the Government, including the Judiciary, it would be safe to assign the onerous task of supervising the Judiciary to the Ombudsman. Even in Sweden and Finland, the Ombudsman bring a charge against the Judge before the next higher court in the Judicial hierarchy. The Swedish experience points out that initially the Ombudsman was used more for controlling and supervising the Judiciary than the administration and the need for such supervision continues. Speaking of his co-relation with the Judiciary, Ombudsman Alfred Bexelius says:

I myself came from the ranks of Judges, and can assure that I have never heard a Swedish Judge complain that his independent and unattached position is endangered by the fact that the JO may examine his activity in office.115

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Prof. Walter Gellhorn interviewed in 1964 many Swedish Judges of all ranks and of different degrees of experience, they all confirmed that Judiciary does not feel imperiled with Ombudsman's supervision and none of them suggested that this system of supervision should be abandoned.116 Since the very idea of any interference with the courts is anathema, the remarks of Javo Kastari, former Finnish Ombudsman are pertinent:

"Neither in Sweden nor in Finland have such superintendence detracted from the independence of the Courts, which consideration seems in Denmark and Norway as well as in the Anglo-Saxon countries to be regarded as a hindrance to extending the competence of the Ombudsman to the courts." 117

Claude Armand Heppard wants that the Ombudsman should be permitted to entertain complaints about the maladministration of the courts, the negligence of court officials, unnecessary delays, the personal conduct of court officers, prosecutors and even Judges. He points out that this would in no way interfere with the dignity or intellectual independence of the Judiciary but might go a long way in curbing arbitrariness and exposing judicial abuse.113 The Judiciary in the last quarter of the twentieth century cannot be left without some supervision. It may sound unpalatable but there is no gainsaying the fact that there is a need for watch-dogging the judiciary which was not so much earlier. This role can be usefully performed through the institution of Ombudsman.

118. Heppard, supra note 23.
The Santhanam Committee in 1964 reported that corruption exists in the lower ranks of the Judiciary all over India and in some places it has spread to the higher ranks also and recommended that the Chief Justice of India in consultation with the Chief Justices of the High Courts should arrange for a thorough inquiry into the incidence of corruption in the Judiciary and evolve, in consultation with the Central and State Governments, proper measures to prevent and eliminate it and suggested the setting up of Vigilance Organisation under the direct control of the Chief Justice of every High Court co-ordinated by a Central Vigilance Officer under the Chief Justice of India. This matter did not receive sufficient consideration of the Central Government. On the other hand, the Rajasthan Administrative Reforms Committee in 1963 examined the issue of Ombudsman and took the view that his jurisdiction should not be extended to officers acting in Judicial capacity. The same view was taken by the study team of the Administrative Reforms Commission of India. The Interim Report of the Administrative Reforms Commission also did not contemplate Lokpalic control over the Judges. To eliminate any possibility of doubt, the Bill of 1961 specifically

provided that the Lokpal or the Lokayukta will have no authority to investigate any action which is taken by or with the approval of:

(a) the Chief Justice or a Judge or an officer or servant of the Supreme Court of India,
(b) the Chief Justice or a Judge of the Delhi High Court or a Judicial Commissioner, additional Judicial Commissioner or an Assistant Judicial Commissioner in any Union territory or any District Judge in a union territory.

During the evidence stage before the Joint Committee, views on both sides were expressed. Messers F.R. Diwan and Mohan Kumaramangalam advocated that the conduct of judicial officers should be brought within the scope of Lokpal and Lokayukta.124 Whereas Messers F.R. Kumru and A.N. Guilla pleaded otherwise that it will ruin the country.125 In fact, the above mentioned provision had not even been properly drafted. In case of the Supreme Court, officers and servants had been excluded whereas in case of the High Court, they had not been. Similarly, District Judges had been excluded but not the sub-Judges. This kind of inclusion of some and exclusion of others was not based upon any sound principle. It was because of this that the Joint Committee recommended the exclusion of the entire Judiciary and its establishment.126 Thereafter, when the Bill came up before the Lok Sabha, Messers Manab and

122. The Lokpal and Lokayuktas Bill, 1961, cl.20.
125. Id., pp.91, 215.
127. WRT Lok., cl.256(14.3.1969).
S.S. Kothari argued in futility for bringing the Judiciary within the Lokpal's investigatory scope. Once again, the Bill of 1971 kept the Judges and the establishment outside the purview of the Lokpal. The Bill of 1977 was even otherwise confined to deal with corruption in political circles only. In case of the State legislations also, the Judiciary has been kept out of the purview of the Lokayuktas. So far there has been no legislative move in India to extend Lokpalic supervision over the Judiciary. To specific reasons have been assigned wherever the proposal has been considered for the exclusion of Judiciary.

In a federal set-up regulated by a written constitution, the need for an independent Judiciary cannot be over-emphasised. That was said by Sir Winston Churchill in the House of Commons over twenty-five years ago is equally applicable to India: 'The principle of the complete independence of the Judiciary from the executive is the foundation of many things in our island life and the independence of the Judiciary is a part of our message to the ever-growing world which is rising so swiftly around us'. One of the Directive Principles in the Constitution of India enjoins the State to take steps to separate the Judiciary from the executive. Not being satisfied with this, Prof. K.T. Shah in the Constituent Assembly moved an amendment to the effect:

122. The Lokpal and Lokayuktas Bill, 1971, cl.21.
125. The Uttar Pradesh Lokayukta and D-Loakyuktas Act 1975, sec.22
Subject to this constitution the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature.\footnote{135}

The amendment was supported by Messrs. C. J. Ten,\footnote{136} V. R. Ramath,\footnote{137} and Naziruddin Ahmed\footnote{138} on the ground that separation of powers is the foundation stone of democratic government. It was opposed by K. N. Ranji,\footnote{139} R. K. Shriya,\footnote{140} Alladi Krishnaswami Ayyar,\footnote{141} and V. V. Reddy\footnote{142} for they viewed that the doctrine of absolute separation of powers is not maintainable in a modern state. So much so the amendment because of its impracticability was described as 'unfortunate' by Dr. B. R. Ambedkar\footnote{143} and it was negatived by the House.\footnote{144} Two things are clear from this. One that the framers did not contemplate a complete separation of powers and the other, that separation of powers was not completely by-passed. There was unanimity so far as the fundamental issue was concerned that the Indian Judiciary should be as independent as its counterpart in any other country of the world.\footnote{145}

In the present day set up, it is not very desirable to leave each organ to regulate its own affairs. In a parliamentary system, the executive is answerable to the legislature and its actions are reviewable by the

\footnotesize{\begin{itemize}
\item \footnote{135}{\textit{ibid.} p. 219 (23.5.1949).}
\item \footnote{136}{\textit{ibid.} p. 221.}
\item \footnote{137}{\textit{ibid.} p. 221-23.}
\item \footnote{138}{\textit{ibid.} pp. 225-27.}
\item \footnote{139}{\textit{ibid.} pp. 217-20.}
\item \footnote{140}{\textit{ibid.} pp. 220-21.}
\item \footnote{141}{\textit{ibid.} pp. 223-24.}
\item \footnote{142}{\textit{ibid.} pp. 224-25.}
\item \footnote{143}{\textit{ibid.} p. 227.}
\item \footnote{144}{\textit{ibid.} p. 220.}
\item \footnote{145}{\textit{ibid.} p. 220.}
\end{itemize}}
Judiciary. The legislature is answerable to the people periodically and its enactments are subject to the scrutiny of the Courts. Normally, controls on judiciary by the executive and the legislature are not considered healthy for they adversely affect the independence of Judiciary. If the Judiciary were to be under the scrutiny of the other two or either of the two, it would not be able to discharge its functions "without fear or favour, affection or ill-will." But to leave the judiciary without any supervision or scrutiny may also be not a safe proposition for the Romans long back had asked: *quis custodiet ipsos custodes* - who is there to watch the watchmen themselves? It has been stressed that Judges ought not to be placed in a position basically opposed to recognised principles of Justice.

In the Indian Constitutional set-up, the subordinate Judiciary functions under the control and supervision of the High Court. The High Court exercises disciplinary powers over the district and subordinate Judges. It exercises control over the conduct and discipline of the Judges. It accordingly holds inquiries and imposes punishments on judicial officers. But the power of dismissal or removal is, however, vested in the Governor who can take such an action only on the recommendation of the High Court. The High Court also exercises the power of superintendence over the subordinate courts. In case of the higher judiciary, there is no

supervision provided of the Supreme Court over the High Courts. This supervision apart, the High Court judges are appointed after consultation with the Chief Justice of India,\textsuperscript{152} and they can be transferred from one High Court to another, again in consultation of the Chief Justice of India.\textsuperscript{153} A Supreme Court and a High Court judge can be removed by an order of the President passed after an address by each House of the Parliament with special majority on the ground of proved misbehaviour or incapacity.\textsuperscript{154} Misbehaviour or incapacity have not been defined in the Constitution or in the Judges (Inquiry) Act, 1969. So it has been left to be determined in a given situation whether the conduct of the judge amounts to misbehaviour or not or whether the judge is capable of performing his duties or not. The Judges (Inquiry) Act lays down the detailed procedure. It provides that the notice of a motion for presenting an address to the President praying for the removal of a judge should be signed by at least 100 members of the House of People or 50 members of the Council of States. The speaker or the chairman may then consult such persons as he thinks fit and consider such material as may be available to him and then either admit the motion or refuse to do so. If he refuses to admit the motion, that is the end of the matter. If the motion is admitted, the speaker or the chairman shall keep the motion pending and constitute a committee for the purpose of making an investigation into the grounds on which the removal of a judge is prayed for, consisting of three members, Chief Justice or a judge of the Supreme Court, a Chief Justice of a High Court and a

\textsuperscript{152} id., Art.217.
\textsuperscript{153} id., Art.222.
\textsuperscript{154} id., Arts.124(4) and Art.217(1)(b).
The committee then has to frame the charges and these together with a statement of grounds on which each such charge is based shall be communicated to the Judge. He will thereafter be given a reasonable opportunity of defending himself. The committee will submit the report to the Speaker or the Chairman as the case may be. If the report does not contain any adverse finding, the matter will come to an end and the motion pending in the House shall not be proceeded with. If the report is otherwise, it will be taken up for consideration by each House and if the motion is adopted with special majority, then the misbehaviour or incapacity of the Judge shall be deemed to have been proved and address shall be presented to the President for the order of the removal of the Judge. The law does not provide for a situation where the committee is not unanimous. This apart, it is a well guarded process. In the whole removal exercise, the executive and the Parliament play a minimal role. The major role is assigned to the Committee. There is even a constitutional ban on any discussion in the Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge.

The Constitution and the Judges (Inquiry) Act, 1969 deal only with the removal process of Judges of the Supreme Court and of the High Courts. Short of removal, the law does not provide for any kind of a situation. A suggestion was made for the formation of a Committee to consider

155. (The) Judges (Inquiry) Act, 1969, Sec.3.
156. Id., Sec.4.
157. Id., Sec.6.
158. Constitution of India, Arts.121 and 211.
allegations against any individual Judge by Chief Justice K. H. Beg in one of his recent judgements relating to a contempt matter.\textsuperscript{159} His lordship was of the view that the Committee should constitute of Chief Justices or Judges and if the Committee finds the allegations baseless or malicious, it would protect such Judge who was made the victim of such onslaughts. On the other hand, if there was substance, the Committee itself will forward its findings for appropriate action under Article 124 of the Constitution, to the Central Government which could then set up a Committee of Inquiry. He justified that in this way, in serious cases, the Judge concerned would get a consideration from his peers as well as by the Committee provided by the Judges' Inquiries Act, 1963.\textsuperscript{160} The Hon'ble Chief Justice emphasised that:

"Neither our constitution nor our law, could conceivably be infringed if Judges were to meet to devise means to prevent situations arising in which an accusing finger could be raised against the conduct of a Judge, whether inside or outside the Court, let alone involving Constitutional provisions of Art.124 for his removal after an inquiry by a body constituted under the Judges Inquiry Act, 1963. A code of this kind, if scrupulously observed by all the Judges, could only enhance their independence and prestige and not injure these in any way whatsoever."\textsuperscript{161}

There is denying the fact that the subject of 'Justice to Judges' is still virgin\textsuperscript{162} and needs careful consideration. There are numerous instances when Judges find themselves

\textsuperscript{159} In re. Bulcader, AIR 1973 SC 727 at p.732.
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid.
in hopeless and helpless situations. It was alleged by some lawyers of a district bar in a letter to the Chief Justice that Justice D.J. Tevati of the Haryana High Court had indulged in political talk and had openly attacked the State Government in its political and administrative decisions during his inspection visit to the district courts while talking to the members of the Bar Association. A contempt notice was issued in pursuance of this letter by the High Court to the lawyers. The lawyers affirmed on affidavit that there was no intention whatsoever on their part to scandalise the Hon'ble Judge or the Hon'ble Court or to weaken in any way the confidence of the people in the administration of Justice. It was added that in any case, if in the view of the Court, action in question constitutes contempt of court, an apology is tendered for the same and pray for its acceptance. Understandably, the full bench of the High Court did not ask the concerned Judge to testify on affidavit or otherwise, accepted the apology of the lawyers and discharged the rule against them. Against this decision of the High Court, the alleged contemnor went in appeal to the Supreme Court. It is reliably learnt that in the meantime, the matter was discussed with the then Chief Justice of India, A.H. Hey during his visit to Chandigarh. The three Judges bench of the Supreme Court presided over by A.H. Hey, C.J., set aside the order of the High Court and the contempt proceedings were dropped. The Supreme Court speaking through A.H. Hey, C.J., pointed out that the allegations in the letter were not disputed and challenged and that we

164. Id., p. 112.
165. Id., p. 113.
166. Id., p. 112.
wish to make it clear that if on facts it appears that the Judge did say things or matters about politics such utterances or views or observations will be the personal opinions expressed by the Judge, and, therefore, the protective umbrella of the Court cannot be used by way of bringing the critics on the charge of contempt of court. The Supreme Court observed that the High Court had fallen into the error of accepting the apology without the finding that the appellants had committed any contempt. If a speech or an utterance of a Judge becomes a disputed question of fact, it is necessary for the court to ascertain whether the Judge did speak what is attributed to him and on that basis proceed to decide the matter. The predicament of the High Court was quite understandable as regards the ascertaining of the facts alleged in the letter from the concerned Judge and in that background it adopted the cut-short method of accepting the apology without any finding on facts. In this process, the Judge was not asked or given any opportunity to explain his position. It was difficult for the Judge to step in suo motu. It is submitted that the Supreme Court should have appreciated the whole situation in the right perspective. Once it had found that the High Court had proceeded without having given any chance to the Judge to explain, it was not at all reasonable for the Supreme Court to proceed on the assumption that the allegations in the letter were not disputed and challenged. If the Supreme Court itself was not inclined to ascertain the facts, it was not obligatory on it to remand the case to the High Court for a finding on facts. The Supreme Court seems to have been fully

168. Id., p.113.
convinced (though the basis is not very clear from the judgement) that what had been alleged in the letter had actually been said by the Judge for otherwise it would not have concluded the judgement with the statement that the Advocate-General of Haryana quite fairly stated that the letter did not constitute any contempt. If the contents of the letter were not true, it could not then be said that it did not constitute any contempt. It does not sound reasonable that a High Court Judge who because of the position that he occupies will normally indulge in public in political talk and criticism of the Government, whereas on the other hand, the possibility of a group of lawyers with a particular political party affiliation may come forward with such a derogatory letter in order to overawe the Judge cannot be completely ruled out. The crux of the situation is that the Judge was condemned unheard and he had no occasion or forum to explain his position. The judgment of the Supreme Court left him with no remedy. The only hope that on his retirement, he will feel free to express himself. Such an opportunity was availed on retirement by Dr. T. T. Mehta, the Chief Justice of Himachal Pradesh. In an interview to the Indian Express, he told that in late 1975 a mysterious paper was distributed to all Judges (generally believed to have been distributed by the Law Ministry as a prelude to amending the Constitution) to set up a superior Council of Judiciary to act as the final interpreter of the Constitution and to supervise the performance of Judges. The Council was to comprise 15 members of which 10 were to be non-judicial. Most of the Judges of the Gujarat High Court felt that it would undermine the integrity and independence of the Judiciary. Justices T. T. Mehta and V. V. Dave decided to write a confidential letter to all the Judges calling for a convention of the Judges to assess the opinion of the members of
Indian Judiciary towards the proposed amendment. The confidential letter came into the hands of the then Union Minister of State for Home, Mr. Om Mehta, who told some Gujarat lawyers that the two Judges who wrote the letter should be impeached for breach of inner discipline. Sometime later, the then Chief Justice of India, N. Ray, wrote to the Chief Justice of the Gujarat High Court, B.J. Divan, saying that the two Judges had no right to express any opinion and cautioned that unless there was "inner discipline and restraint," difficult situation would be "created in this manner." Against this, a protest letter was written to the Chief Justice of India by eleven Judges of the Gujarat High Court and Justice Mehta wrote a separate letter that in a democratic country it was "very normal" for a Judge to write a confidential letter to his colleagues touching service conditions and other matters relating to the profession. Very shortly after this, Justice Mehta and Sheth and Chief Justice Divan along with certain other Judges were transferred. It was apparently because of their opposition to the circulated letter. Justice Sheth challenged the order of transfer in the High Court. He succeeded, on the ground that there was no effective consultation with the Chief Justice of India.

The Union of India came in appeal to the Supreme Court. The Supreme Court has acknowledged that a Judge can ill-afford the time and expense, hardship, embarrassment or inconvenience resulting to him by reason of his being compelled to become a litigant in his own court.

169. These details were given by Justice T.J. Mehta after his retirement in an interview to the Indian Express, Chandigarh, published under the caption "Ex-Judge tells a sordid tale", 7(Jan.3, 1930).
time the matter had come before the Supreme Court, there was a change of Government. The new Government transferred back Justice Sheth to Gujarat High Court and consequently leave was granted to withdraw the petition. This was one situation where Judges were in distress. Bhagwati, J. has pointed out that consultation with the Chief Justice of India before a Judge of a High Court is transferred does not afford 'sufficient protection to the High Court Judge against unjustified transfer by the executive.'172 He added:

It is obvious, and recent history has proved it beyond doubt, that it is dangerous to lodge unfeathered power in the executive to inflict injury on a High Court Judge and the check of consultation with one single individual, however highly he may be placed in the Judicial hierarchy, is illusory and unreal.173

It was rightly noted by *Untwalia*, J. that the order of transfer of so many (sixteen in number) Judges at one and the same time created a sense of fear and panic in the minds of the Judges which shook the very foundation and the structure of the independence of the Judiciary throughout the country.174 Justice *Fargan* had worked as a Judge of the Delhi High Court for four years. Nothing adverse had come to the notice of anybody during all this time. Infact, the report of the Chief Justice was that Justice Aggarwal was an asset to the Delhi High Court. The Minister of Law and Justice had agreed with the recommendation of the Chief Justice of the High Court and

173. *id.*, at p.244.
the Chief Justice of India that Justice Aggarwal should be appointed to the office of a permanent Judge of the High Court. And yet he was not appointed as a permanent Judge and had to revert as a Session Judge. The Shah Commission concluded that the order of reversion was in the nature of punishment. The Judge was remedyless. Virtually, the same was the situation with Justice J.P. Lai of the Bombay High Court. He was recommended for extension of the tenure by all concerned including the Chief Justice of India and the Minister for Law, Justice and Company Affairs of the Government of India. There were no adverse reports. Still, the then Prime Minister rejected the recommendation. The Chief Justice of the Gujarat High Court, B.J. Dhum had to resort to a 'threat to quit' in order to prevent the appointment of those persons whom he had not recommended as Judges in his High Court. It was alleged by the Karnataka Law and Social Welfare Minister in the State Assembly that the Chief Justice of the State High Court had stalled a Bill passed by the State legislature and that he was suggesting to the House to initiate contempt proceedings against the Chief Justice. The Chief Justice had no opportunity to reply to the accusation. Both the professional and academic lawyers did not express any concern.

176. Id., 23, 51-52.
178. Times of India, New Delhi, May 24, 1979; statesman, New Delhi, May 24, 1979.
said that the Chief Justice was a "dishonest" man and that he was playing into the hands of the Janata Government. These remarks were made when there was no specific motion before the House for the removal of the Chief Justice and the Chief Justice had no forum to reply. A High Court Judge on inspection tour was forcibly evicted from a traveller's bungalow to accommodate a state cabinet minister. The Government did not agree to the proposal of the Chief Justice to treat the Judges at par with ministers of the cabinet rank at the Centre and in the States. Judges had to give an undertaking that they would not drink so long as they were on the bench. A High Court Judge had to resign because of the harassment caused to him. Surprisingly, in a span of a month or so, two recommendations came from the State, one that he should be given extension and the other that he should not be. The fact that after the first recommendation, President's rule had been imposed in the State cannot be ignored. Only some of the instances have been referred to where the Judges and the Chief Justices have found themselves in embarrassing situations. Institutionally, the Judiciary in India has been described as the 'third world' in the third world. The Judges are as much a part of society as others and they cannot be denied justice. In fact, the denial of justice to Judges would mean the end of Justice itself. It cannot be denied that the judiciary itself needs to be safeguarded. The Judiciary should not be compelled to fight for itself. The Judges function under certain

182. The Hindustan Times, N. Delhi, 7 (July 26, 1980).
183. The Times of India, N. Delhi, 7 (July 29, 1980).
limitations. We have inherited the British tradition in which the Judges as 'widows' are condemned to remain in isolation and do not reply in public. The one or two examples of mini-Marshalls from the Indian Supreme Court do not change the position of Judges. In any set up, disputes do arise amongst the members of the same organ or between it and the other organs. The Judiciary cannot be an exception to it. Under these circumstances, the idea of utilising the services of an Ombudsman deserves serious consideration. Often problems arise because of the communication gap. The Ombudsman can be useful in lessening this gap by hearing both the viewpoints in camera and thereafter taking up the matter with the concerned authority as to how it should be dealt with. This institutional innovation will have the desired affect of preventing and resolving embarrassing situations.

Another aspect of the problem is that the image of the judiciary is no more the same what it used to be. Not long ago, Judges inspired confidence. There was never any question of doubting them much less their judgements. But now the esteem in which they were held has been eroded considerably. Somehow, the impression has gained ground that many among them look beyond the confines of law courts. A former Chief Justice of India, while on the bench, felt so "distressed" that he wrote to the Chief Justices of High Courts about having heard of:

"instances of weakening in the Judicial fibre at times and undignified actions of some Judges arising from a desire to gain popularity with the

Kuldip Nayar, the journalist recently observed that there is an impression that some of the Judges adjust their antenna to know what would suit the Government in power.197 Dr. Rajdev Dhavan has said that in many ways the Supreme Court of India is a dying institution. He points out that it is subdued by internal dissensions, its public credibility is tainted by responsible and irresponsible discussion and that the Court has drifted from one crisis to another.198 Justice V.R. Krishna Iyer has warned against the growing indiscipline of the "robes" from the humblest to the highest courts and said that this "tragic trend" would ultimately prove disastrous to the institution of the Judiciary.199 This indiscipline is evident from the testimony of Bar resolutions and delegations demanding transfer of Judges191 and Chief Justices.192 The Judgement in the oath case in which Justice T.P.C. Chawla quashed proceedings against Mrs. Indira Gandhi was available to the press but was not made available to the Government for purposes of filing an appeal.193 One Judge of the summit court greets the Prime Minister on her election victory194 and the other publicly reminds him that if Judges start sending bouquets and congratulatory letters to a political leader

137. Ibid.
138. Ibid.
139. Rajdev Dhavan, 'Justice on Trial: The Supreme Court Today', The Illustrated Weekly of India, Bombay, 24 (May 4, 1930).
140. The Tribune, Chandigarh, 13 (April 6, 1930).
141. Indian Express, Chandigarh (March 29, 1930).
142. Times of India, N. Delhi (May 3, 1930 and May 12, 1930).
144. Indian Express, Chandigarh (March 23, 1930).
on his political victory, eulogising him on assumption of a high office, the people’s confidence in the Judiciary will be shaken. The entire controversy of Justice D.A. Desai’s appointment to the Supreme Court is a sad story which allegedly reveals that a few days before his appointment, he had stayed at Prime Minister Morarji Desai’s Delhi residence and had consultations with Justice Bhagwati. Sometimes even the Judges of the Supreme Court do not conduct themselves in the manner normally expected of them which evokes reaction from the members of the bar. Judges give the wrong age at the time of their appointment. In one such case, a Chief Justice of a High Court was permitted to resign. These instances are merely illustrative of the indiscipline of the Judiciary. Justice V.R. Krishna Iyer has pithily put it:

The brotherhood of the Bench, like the collective responsibility of the Cabinet, was a myth melting away in the heat and light of personal and other conflicts. Factions were not rare, nor secret and indiscipline of the judiciary went unpunished.

The damage to the Judiciary from this kind of development can be incalculable and unspeakable. Justice Krishna Iyer has pointed out that the new menace of indiscipline is institutional and the Bench and the Bar in their particular obsessions and fixations are oblivious of how far they are obliging the anti-judiciary forces by this suicidal game. The dilemmas of Justice, Justices and Justicing need a serious surgery.

197. Hindustan Times, N. Delhi, 7(April 3,1990);
198. Retrieved, supra note 13, p.204-05, 517.
200. Ibid.
The Government of Goa has recently decided to establish a special Vigilance Cell to handle complaints against Senior Judges. A Senior Judge would be appointed to head the Vigilance Cell in consultation with the judiciary. The cell will keep an eye on Judicial officers. This has been decided at the instance of the Central Government. The need for it was felt because certain complaints were received against Justice Tito Thottat who heads the Judicial Commissioner's Court in the union-territory. The Government was faced with the difficulty as to how these complaints could be dealt with. The complaints were processed by the Law Department of the Government which in turn referred them to the police. The police in turn referred back the complaints to the Chief Secretary who ordered that the same may be filed fearing adverse reaction from the Judiciary. The matter was later referred to the Centre for necessary advice in response to which it advised to establish a Vigilance Cell.

Such piece-meal solutions will not be the answer. There is a need for a regular body. The need has been voiced even by the Judiciary itself through Justice V.R. Krishna Iyer. He in an article, 'The Administration of (In)justice' says:

"A Judicial Ombudsman is needed to call attention and seek correction when the Judicial personnel or process fails structurally or functionally in integrity, expedition, efficiency, empathy or fairness. Public criticism, now benumbed by the law of contempt, must speak up to ensure that Judges do not become an imperium in imperio. Democracy does not stand aside for Judiciary"

but grants responsive and responsible autonomy, authority and finality so vital for justicing. The Court must communicate; Justice must be sociable." 202

Our superior Judiciary is bogged with so many problems. The Judicial Ombudsman will be able to play a multifarious role in-aid of judiciary and in overseeing its operation. It will call attention of the competent body which may comprise the Chief Justice of India and two other senior most Judges of the Supreme Court in regard to the instances of indiscipline in the superior Judiciary. In case it so happens that the conduct of one of the members of the body itself is in question, he can be dropped and the next senior Judge taken up on the body. Justice Iyer is of the view that this body should refer the report to the Parliament for necessary action. He does not wish that this judicial body itself should take action because it will be reluctant to take action against its own peers. 203 Moreover, under the Constitution it is the Parliament which is competent to pass a resolution for the removal of the Judge after following the procedure laid down under the Judges (Inquiry) Act, 1963. But the fact remains that this body of Judges will refer only those cases to the Parliament where it deems necessary that an action is called forth. In such cases, where the body feels that the matter is not serious enough to be referred to the Parliament, it would of its own take up the matter with the Judge concerned and remind him of the onerous office that he occupies and the duty that he owes. The ombudsman

being one not belonging to the Judiciary and yet occupying an independent position, free from any governmental control like the Judge will prove to be a suitable machinery to look into the complaints of judicial indiscipline. It is not to suggest that the judiciary itself cannot be trusted in this regard and that the Ombudsman will be free from all kinds of influences. But in this manner, without making the judges to be the Judge of their own cause, we would be providing a safe machinery which would cause no threat to independence of Judiciary. The judicial body assisted by the Ombudsman will in fact provide the necessary protection which is needed to keep the Judges out of public controversies. In more number of cases, the cause of the Judge will be vindicated. The exposure of indiscipline in small number of cases will not lower the prestige of the judiciary. Infact, if judicial indiscipline is allowed to be a matter of private talk, it causes much more harm.

The conduct of the Judge is one vital component of the Judicial process. Equally important are the pronouncements of the Judge. If a wrong decision has been given because of improper conduct, or extraneous considerations, it does not help the party even if some action is taken against the Judge but the decision is allowed to hold good. In such situations, a provision should be made for the re-opening of the case through Cassation proceedings in the next higher court even if it is barred by limitation. In case of the Supreme Court, the matter can be opened before a larger bench.  

204. It means 'making null and void any unjust or illegal act or decision.' See, Earl Jowitt, The Dictionary of English law, 319(1959).
205. Supra note 203.
If it is a full court decision, there is a remote possibility that the Ombudsman will be required to make such a recommendation but in case the Ombudsman has strong reasons, he may ask the Supreme Court to review its decision. Under Article 137, the Supreme Court has the power to review any judgement or order made by it and this power is regulated by any law made by Parliament or any rules made by the Supreme Court under Article 145. No constitutional change will be required to review its decisions by the Supreme Court on the recommendation of the Ombudsman. It would be appropriate to make a provision under the rules of the Supreme Court in this regard. In this way, the Ombudsman will be able to highlight those decisions which need reconsideration. If a wrong decision is allowed to become final, it will be failure of justice. Besides this, there are sometimes unusual delays in the pronouncement of judgements which may even spill over a year. In Minerva case, the Supreme Court made an order for which reasons were to be recorded later, after over six months of the hearing of the case on the vital issue of the basic structure of the Constitution relating to fundamental rights and directive principles. One of the judges did not rightly participate in this five judge order since he did not like to pass a final order without a reasoned judgement. The Ombudsman can in such situations politely remind the Judges of the need and the urgency of pronouncing the judgement at an early date. The Ombudsman should be able to bring to the notice of the High Court if some Supreme Court ruling has been over-looked or otherwise decided contrary to it. This will help in avoiding such situations as it arose recently when the Supreme Court had to severely reprimand the High

Court that no disciplined Judge could reduce to a husk a decision of this Court. The Ombudsman could also be a help to a citizen like the one who wanted permission of the Department of Justice to prosecute the former Chief Justice of India, A.N. Ray and a former Judge of the Supreme Court, K.K. Mathew for wrongfully, illegally, unconstitutionally, maliciously and contumaciously dismissing his special leave petition in a civil matter which he was never granted. Not that no other mechanism can be evolved for all this but this kind of a role of the Ombudsman will not be something unusual. It will be very much germane to the institution. The Swedish and the Finnish Ombudsmen have been playing this role. It would be wrong to say that Ombudsman will be a ready-made cure for every ailment of the Judiciary but it can prove to be a good first-aid-box for the ailments of the Judiciary.

An Ombudsman appointed to assist the Judicial body will not cause concern to independence of Judiciary. On the other hand, leaving the Judges entirely to their own peers may not be a very sound proposition. When the issue of removal of Judges had come before the Constituent Assembly, an amendment had been moved by Mr. Tejasmul Hussain to the effect:

"... Judge of the Supreme Court shall not be removed from his office except by an order of the President passed, after a committee consisting of all the Judges of the Supreme Court had investigated the charge and reported on it to the President and etc." 209

207. Times of India, New Delhi (May 9, 1990).
209. VITHALRAO, 9, 243(24.5.1949).
In support of this amendment, the mover argued that to remove a Judge on the recommendation of the Parliament would be wrong in principle. He added that if the majority party in the Parliament is not in favour of a particular Judge, then removal would become very easy and the Judge should always be above party politics. The amendment was not supported by other members, so much so that even Dr. B.R. Ambedkar did not consider it necessary to reply to it in his final conclusions and thereby it was negatived by the House. It is clear from this that the framers of the Constitution were not in favour of vesting this power with the Judges themselves. The Ombudsman who will operate in camera and will report to the Judicial body will not come in clash with the 'kind of separation of powers' that we have carved out under the Constitution. As for the possible opposition from the Judiciary is concerned, it is like any minister saying: do not have an ombudsman so far as we are concerned. This is reflective of ordinary human nature. As long as there is no compromise with the basics of the Constitution and there is need for an ombudsman in aid of judiciary, we have to shed our conservatism towards the Judiciary and give it a fair trial. If the judicial integrity becomes a casualty, the independence of the judiciary will not be able to save the judiciary. It is necessary in a democratic set-up that the Court system and the Judges be not above criticism. There has been no way out for the Judge to establish his clean and innocent conduct as and

210. Ibid.
211. Ibid., pp. 245-257.
212. Ibid., pp. 257-260.
213. Ibid., p. 262.
when a situation arisen. There has also been no way out to show to the public what the Judge has been doing. The services rendered by the Ombudsman will enhance the prestige and the independence of Judiciary rather than injuring them in any manner.

As regards the Subordinate Judiciary, the position is still worse. Numerous complaints are received from the members of the bar, the litigants and the public. The High Courts have no regular machinery to whom the complaints could be referred for investigation. It has been acknowledged by the Supreme Court that it is awkward and ineffectual for a superior Judge, trained in formal procedures and weighing and not collecting evidence, to undertake the sub rosa, informal, extensive and technical job of investigation which demands a different kind of expertise.

The Supreme Court has appreciated the difficulty that if police is permitted to check upon complaints, the successful invasion of Judicial independence is inevitable and no magistrate will be able to function fearlessly if the prosecuting department may also investigate against him. These observations have been made in Chamsher Singh's case where the Punjab and Haryana High Court had requested the Government to depute the Director of Vigilance to hold an inquiry into the conduct of two members of the Subordinate Judiciary. The Supreme Court held that the request by the High Court to have the inquiry through the Director of Vigilance was an act of 'self abnegation'. The High Court should have conducted the inquiry preferably through a District Judge. The members of the Subordinate Judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total

disregard of Article 235 by asking the Government to inquire through the Director of Vigilance. It is a well known fact that our Judiciary, both subordinate and superior, is under the heavy burden of arrears of cases. If the High Courts were to refer all complaints to the District Judges, it would mean extra work for them. After Charan Singh's case, the Punjab and Haryana High Court has set up a separate Vigilance cell under the control of a District Judge to deal with complaints coming from the lower judiciary. Such cells have also been set up in some other States. Even at the level of the Subordinate Judiciary, the Ombudsman can prove a good aid in more than one way. Such an Ombudsman would be from outside the arena of the Subordinate Judiciary and not one belonging to their cadre who would independently investigate the complaints and report to the High Court. The members of the Subordinate Judiciary will not be subject to the scrutiny of some member of their own set-up. This is important because many a time personal likes and dislikes play a vital role. This needs to be avoided. Like this, the Ombudsman will be able to bring it to the notice of the High Court as to what is happening in the subordinate judiciary. In this way, High Courts will be able to exercise their control more effectively over the subordinate judiciary.

The Lokayukta of Bihar is not even in favour of bringing the non-judicial personnel in Judicial establishments within the jurisdiction of the Lokayukta. According to him, it would disturb the basic principle of democracy, viz., independence of Judiciary, since such personnel in the State are under the administrative control of the High Court.

It is not understandable how the Lokayukta would affect the independence of the Judiciary. The Lokayukta is not a Government agency. It does not function under the control of the Government. It has to investigate and report back to the High Court. Complaints about the non-judicial staff are also well known. They need no elaboration here. The High Court's control, in fact, will be strengthened if both the Judicial and the non-Judicial staff is brought within the ambit of the Lokayukta.

There are some other problems relating to subordinate Judiciary which need projection and solution. The subordinate Judges resign because unprincipled promotions are made. The Courts are held in bath-rooms and toilets in some States. Petitioners are asked to bring their own stationery. All kinds of pressures are put on them. The Lokayukta through his frequent visits to the Courts would be able to know their problems at first hand and suggest appropriate measures to remedy them.

In short, in order to provide an agency to oversee the functioning of the Judiciary, there is need for a central Judicial Ombudsman (as is known in Sweden and as Justice Krishna Iyer would like to name him) who would look after the Supreme Court and the High Courts by reporting to a Judicial body comprising of Judges. There is also need for an Ombudsman in each state who would probe the complaints against the subordinate judiciary and report to the High Court. This will not amount to abdication of its functions on the part of the High Court. In fact, it will facilitate the control which the High Courts are required to exercise on

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217. Times of India, May 9, 1990.
219. Ibid.
the Subordinate Judiciary under Article 235 of the Constitution. It will be reasonable to leave the Ombudsman to work out the procedure that he would like to adopt while dealing with different matters pertaining to the Judiciary. Judging the Judges and trying the courts are constructive and introspective exercises meant to make justice real and reach the people where justice is not only done but also seen to have been done. The Ombudsman, it is hoped will help us in reaching our goal.

714: JUDICIAL REVIEW OF OMBUDSMAN ACTIVITIES:

Scandinavian and Commonwealth Experience -

Normally, the courts exercise judicial review over the actions of various bodies and agencies to keep them within the bounds of law. The Ombudsman being one such body, its activities are subject to the scrutiny of courts. A brief survey of the Ombudsman activity in Scandinavian countries does not bring forth instances either where the courts may have been a help in resolving the legal problems with which the Ombudsman may have been faced with or where the courts may have been instrumental in making the functioning of the Ombudsman more difficult. It could possibly be because in Scandinavian countries, the Ombudsman have been given wide area of operation with the result there are lesser chances of jurisdictional disputes. It is also true that the nature and the extent of judicial review is not the same in Scandinavian set up as one would experience in India or in the United States. In this background, in the long history of Ombudsman, the courts have not come in clash with the Ombudsman.

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221. This statement is based upon the limited literature available in English about the functioning of the Scandinavian Ombudsmen.
A Swedish Judge and then an ombudsman, Ulf Lundvik has explained the nature of review which is exercised and is possible against the ombudsman's decisions. Those cases in which the ombudsman resorts to prosecution, the final word is not that of the ombudsman but of the court. In other cases where admonition is administered, a limited reconsideration is possible. In the first instance, there is nothing which prevents the ombudsman from re-opening a case himself. On further evidence or on finding that he has overlooked some provision of the law, the ombudsman can change his opinion and revoke the admonition. Such incidents have been very rare. Secondly, the official, when dissatisfied with the admonition, may ask the Ombudsman to prosecute him and so let the court decide whether he has committed a fault or not. Here again, there is no legal obligation for the ombudsman to comply with such a request and in very few cases has the ombudsman ordered prosecution. It should be made obligatory that whenever asked, the ombudsman should prosecute the concerned official. Thirdly, the official concerned can refer the matter to the Parliamentary Committee. It is supposed that if the Committee should find the complaint well founded, it would take some form of action, such as stating it in its report that it considered the Ombudsman decision to be wrong. It has been pointed out that to let the appeal lie to the ordinary courts would not be consistent with the Swedish law. Cellhorn has mentioned a case where the Ombudsman acting upon a private complaint had said that the court official had improperly attached the complainant's property in order

222. Ulf Lundvik, 'Comments on the Ombudsman for Civil Affairs' in Rovat, supra note 44, p.47.
223. Ibid.
224. Ibid.
225. Ibid.
to secure the payment of personal taxes. In accordance with the Ombudsman's advice, the impounded property was returned to its owner. Later, a Supreme Court Judge convinced the Ombudsman that he had misinterpreted his applicable statute. The Ombudsman acknowledged his own error by reporting it to Parliament and at the same time, paid out of his personal funds the amount of the lost revenue.226

Outside the Scandinavian orbit, care has been taken in drafting ombudsman legislations so that the clash between the Ombudsman and the Judiciary could be avoided. This is clear from such provisions like: no proceedings, civil or criminal, shall lie against any ombudsman, or against any person holding any office or appointment under the Chief Ombudsman, for anything he may do or report or say in the course of the exercise or intended exercise of his functions under the Act, unless it is shown that he acted in bad faith,227 that the ombudsman shall not be subject to the direction or control of any other person or authority on the discharge of his functions and no proceedings of Ombudsman shall be called in question in any court of law.228 In pursuance of this very object, some of the legislations have provided a provision to the effect that the ombudsman may apply to the Supreme Court for declaratory order determining his jurisdiction to investigate any case or class of cases.229

226. Gelilhorn, supra note 43, p.239.
227. The Ombudsman Act, 1975 (New Zealand), Sec.26(1).
228. Almost similar provision has been provided in Ombudsman Act, 1976 (Commonwealth of Australia), Sec.33(1) and in legislations of Western Australia, Saskatchewan, South Australia, Victoria, Queensland.
229. Constitution of Fiji, Article 117(1).
229. The Ombudsman Act, 1975 (New Zealand), Sec.13(9). Similar provision has been provided in the legislations of Western Australia, Saskatchewan, South Australia, Victoria, Queensland.
Inspite of all this care and the fact that the ombudsman is a fact-finding body and not a decision-taking body, litigation under different ombudsman legislations cannot be ruled out. This is because it has to function within the requirements of a legislation and exercise numerous discretionary powers. It has been observed by Fijian Ombudsman that although no proceedings of the ombudsman can be called in question in any court of law, yet this provision does not provide immunity from court adjudication if his jurisdiction is challenged in any particular case. It is mainly in two areas, i.e. exercise of jurisdiction and discretionary powers, there is potential for ombudsman litigation. A reference to the English Parliamentary Commissioner Act would be relevant here. The Act prohibits the Commissioner from investigating any action in respect of which the complainant has or had a remedy in any court of law or a right of appeal, reference or review before a statutory or prerogative tribunal. This prohibition is qualified by a proviso allowing him to investigate if he is satisfied that in the particular circumstances, it was not reasonable to expect the complainant to resort to the legal remedy. This means that the Commissioner by using his discretion can even take up those complaints which otherwise may not fall within his jurisdiction. The reports of the Commissioner do not reveal how often he has made use of the proviso. It is difficult to state in what

231. Parliamentary Commissioner Act, 1967, Sec.5(2).
situations the Commissioner has investigated inspite of a legal remedy available unless there is a subsequent successful recourse to law by the affected party. The difficulty becomes more apparent because in the view of the Parliamentary Commissioner, there is no need even to record reasons for exercising discretion under the said proviso. On the other hand, Lord Denning is clear that if they happen to find a situation in which there is arbitrary and utterly unreasonable exercise of discretion by the Parliamentary Commissioner, the Courts will not hesitate to interfere. He emphasised that he would not give up the power of the Courts. During the last thirteen years of the Parliamentary Commissioner's functioning, no such interference has been reported.

In those situations where the aggrieved party has already resorted to the legal remedies available to him, the Commissioner will normally refuse to investigate the complaint. Even this area has been problematic. Two possible situations can arise. One where the party resorts to legal proceedings in a court and the court decides against him since it does not have the power to interfere. From the Court, the party comes to the Commissioner with regard to the same aspect of the matter. In a particular case, the Commissioner did accept for investigation a complaint under such circumstances. It has been commented that it 'seems strange' for the

233. One such case is that of the revocation of television licences in 1975. Parliamentary Commissioner for Administration, Special Report, 1974-75, i.e., 630. See also Concrete v. Home Office (1976) Q.B. 629.
235. Supra note 8.
Commissioner to say that he acquired jurisdiction when the proceedings before the Court proved unsuccessful and has been argued that the fact that the Court failed to provide redress is besides the point because it is the availability of proceedings, and not their substantive outcome, that constitutes the remedy. The stand of the Commissioner was that a remedy by way of court proceedings was available only in the sense that it was open to the complainant to go to the High Court in order to discover that the Courts were powerless to help him. Consequently, the Commissioner concluded that this was not a complaint excluded from his general jurisdiction and, therefore, there was no need for him to exercise his discretion to investigate. In another case, the complainant first went to the Court and the Court dismissed his petition as it was barred by limitation.

He thereafter put his complaint to the Parliamentary Commissioner through his Member Parliament. The Commissioner investigated the complaint, came to the conclusion that there was maladministration, got the order modified and the complainant was paid costs throughout. It is understandable that there may be circumstances which may have prevented the complainant from taking the matter to the Court in time and the Court was bound by the law relating to limitation. In the net result, the complainant would have been without a remedy had the Commissioner decided otherwise. It is important for the Commissioner to take into consideration

237. Roy Gregory and Peter Putchessson, The Parliamentary
Ombudsman. 239(1975).

239. Supra note 236, p.57. The issues raised in this case have been discussed by Pulka, supra note 232 where it has been argued by him that this complaint ought to have been argued excluded and even the discretion ought not to have been exercised because the aggrieved party had actually resorted to the legal remedy available.

239. Regina v, Secretary of State (1976) 3 W.L.R. 233.

the facts of each situation before ruling out a complaint from his jurisdiction or admitting it, since the complainant may have first approached the Court.

The second situation is somewhat different. If a case has already been the subject of legal proceedings and the commissioner is asked to investigate only a particular aspect for which the complainant considers that a remedy was not or is not available, and the commissioner exercises discretion in favour of the complainant on the ground that the acknowledged person's complaint was about something which was not the subject matter of Court of Appeal, this can lead to further litigation and complicate the situation.

In the Bradford case, the local authority put two children of tender age under the care of foster parents whereas the mother wanted their custody. Care proceedings were taken in the Court which decided in favour of the local authority. Thereafter the complaint was sent to a councillor of the area to be forwarded to the Local Commissioner (Ombudsman). He decided not to forward the same. The mother sent the complaint directly to the Commissioner as it could be done under the law after such refusal. The Commissioner decided to investigate the complaint. The local authority moved the High Court for an order of prohibition which was refused.

The local authority then moved the Court of Appeal. The appeal was not allowed as the local commissioner made it clear that he would not be investigating any matter which has been the subject of the jurisdiction of the Courts.


242. Regina v. The Local Commissioner for Administration for the North area of England, in the High Court of Justice, Queen's Bench Division, Mr. Justice May, decided on July 3, 1973.

these proceedings, the foster parents had applied to the county court for adoption orders. The adoption proceedings were adjourned till the final disposal of the appeal. After the appeal had been determined against the local authority, the court ordered the children to be adopted by the foster parents without the consent of the mother. The picture that emerges from this case is that if the matter has been first agitated in the court, the Commissioner can still investigate those aspects of the matter which were not dealt with by the court. This seems reasonable but invariably the difficulty that will have to be faced will be to sift out what has been examined by the court and what has not been examined and the practical consequences of it. Particularly in this case, after the adoption order of the court was passed in favour of the foster parents, even if the Commissioner finds maladministration on the part of the local authority, what relief will he be able to offer to the mother who was only interested in the custody of her children. On the report of the Commissioner, will the local authority be in a position to ask the court to cancel the order of adoption since the Commissioner has viewed it otherwise? Mr. Barry Dayton is of the view that such a situation undermines the position both of the courts as also of the Commissioner. In sum, it has been aptly observed by Prof. H. R. Wade that a 'certain overlap between the Commissioner and the legal system must be accepted as inevitable, and this, though untidy, is doubtless in the public interest.'

244. These facts were given by Mr. Barry Dayton, Barrister, Gray's Inn, London on 4.12.1973 in a personal interview with him. He had argued the matter both before the High Court and the Court of Appeal on behalf of the Bradford Metropolitan Council.

245. Ibid.

speaking of the Commonwealth constitutional complications has expressed the view that in case of a clash, the ombudsman must find himself open to the same "certioraris and declaratory orders." This is probably unavoidable specifically in the area of jurisdiction and discretion.

Another issue is that if the Commissioner refuses to investigate a particular complaint, will he be subjected to the writ of mandamus or not? This was examined in Fletcher's case who had obtained claimed that the Commissioner had wrongly refused to investigate his allegation of neglect of duty against the official receiver. Mandamus was refused by the Queen's Bench of the High Court as the Lord Chief Justice noticed that under the Act, the Commissioner has the complete discretion. Subsequently, the Court of Appeal also agreed with the High Court and refused leave to appeal to the House of Lords. When the matter was taken to the Appellate Committee of the House of Lords, Lord Reid pointed out that the Parliamentary Commissioner Act provides that the Commissioner "may investigate", and "may" be said, seemed to place no obligation or duty on him. So Fletcher was refused leave to take his case to the House of Lords. Mr. David Foulkes reacted to this brief rejection of the application as "unfortunate!" 'May' does not mean, an absolute discretion, exercised in any manner whatsoever. There may be a situation where the refusal by the Commissioner may be so clearly wrong as not to amount to an exercise of discretion and so be subject to control by the courts. It can equally be argued that a

247. 'Albert C. Bell, "Commonwealth Constitutional Complications", in Rosat, supra note 44, 231 at p. 234.
251. Foulkes, supra note 232, p. 393.
public power carries with it an enforceable duty to act.253 If there are two persons who are adversely affected by the same order, the Commissioner will not be justified in investigating the case of one and refusing the other. In the light of this, it cannot be said that the Commissioner can never be subjected to mandamus.

It would not be out of place to mention here that although Ombudsmen enjoy wide discretionary powers, they have not been accused of using their discretion in arbitrary or capricious manner. This is how it should be because Ombudsmen are chosen for their independence, their sense of fair play and their zeal to remove injustices. But this by itself does not mean that there should be no check on them. The very fact that the exercise of discretionary power will be subject to judicial scrutiny will be a good caution to the Ombudsmen to exercise it reasonably and fairly. It has been desired by an experienced Ombudsman, Tirtham that whenever an Ombudsman finds it necessary to exercise his discretion against the complainant, he should make it a point to explain to the complainant as fully as possible the reasons for his decision even if there is no requirement in law for reasons to be stated.254 This is a fundamental requirement to act in accordance with natural justice.

Indian Ombudsmen, Lokpal and Lokayuktas, are designed to be statutory institutions. The administrative reforms Commission was of the view that unless very careful provisions are made in the Constitution to provide against the conflict of jurisdiction between the Ombudsman and the courts and

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254. Tirtham, supra note 230, p. 132.
suitable procedures devised, such conflict of jurisdiction and responsibility might make the remedy worse than the disease. The Commission suggested that the ombudsman in India should be independent of the executive as well as of the legislature and the Judiciary and that their proceedings should not be subject to Judicial interference. Justice P.B. Mukharji did not agree to it and pointed out in his lectures that the ombudsman will, in time become the Super-parliament, the super-legislature, the super-minister and the super-Judge. He warned that he will pave the road to dictatorship in India, a reign of espionage under the cover of bureaucratic tyranny, and a grievance-oriented state constitutionally encouraging a society of grumblers and critics. Justice D.B. Mutharji also in his dissent made it clear that under our Constitution no person or authority wieldling any statutory power to investigate, assess and pronounce upon such matters as the conduct of individuals can claim immunity from the overriding correctional powers of the High Courts and the Supreme Court. In the light of this controversy, it would be appropriate to examine the issue in some detail.

Statutory bodies under the Indian Constitution function subject to the control of the High Court under article 226 and of the Supreme Court under articles 32 and 136. These provisions have proved highly useful in keeping the various bodies within limits warranted by the philosophy underlying the rule of law. Mr. A.K. Jaffar and Dr. Mohan Gurusamy have advocated that the

255. [Footnote]
256. Id., p.13.
257. Id., p.20.
261. Id., p.224.
In India should not be subject to the control of High Courts but the Supreme Court's review should be retained. Probably, this view is based upon the fear that if the High Court review is retained, it is likely to interfere in the day-to-day functioning of the institution by obtaining 'stays' against its investigations. But the retention of the Supreme Court jurisdiction will not be of much consequence. Under article 136, the Supreme Court can grant relief only if there is a violation of a fundamental right or' keeping in view the fact that these institutions are only recommendatory bodies and not action-oriented, the question of relief under this provision is not likely to arise. The other reason is that under article 136, it is necessary for the Supreme Court's interference that the body must be a tribunal. The Supreme Court has explained that in order to be a 'tribunal' within the meaning of article 136, a body should be exercising some 'therent Judicial powers' of the state. Since the Lokpal and Lokayuktas will be investigatory and recommendatory bodies, it would be difficult to bring them within the meaning of a 'tribunal'. The Disciplinary Proceedings Tribunal in Madras which holds inquiry on charges against Government servants and the Advisory Board under the preventive detention act have not been held to be tribunals. With the result the Lokpal and the Lokayuktas will not fall within the ambit of Supreme Court's jurisdiction under article 136.

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262. (See, Bharat Bank Ltd. v. Employees of the Bharat Bank Ltd., Delhi, 1950 Cri. 139; Urenathan v. R., 1955 Cri. 97, 1954 Cri. 329; Bestar Company Ltd. v. N., 1965 Cri. 20; 1957 Cri. 70; 1958 Cri. 2155; conference, Hill, 1977, 2155.)


265. (See, Joseph Shri, 'Panchayats in India', (1969) 1 SCC 37 at 3, 46; V. Gupta, Joint Committee on The Lokpal Bill, 1977, Evidence, B.D. 11 No. 314, 45 (Feb., 1979).
the High Court's jurisdiction under article 226 is excluded, it would have the effect of there being no judicial review of the High Courts and of the Supreme Court at all. Infact Justice V.R. Krishna Iyer, Chief Justice R.L. Parasimhan and Prof. M.P. Jain have advocated complete immunization of the Lokpal from judicial review. Justice Iyer feels so strongly about it when he says that the giving of jurisdiction to a court over the Ombudsman would 'undermine' the institution and make it 'immobile.' He adds that it will not be allowed to work for a day. Former Chief Justice of Orissa High Court, Parasimhan's main fear is that the jurisdiction under article 226 will be frequently invoked not with the intention of final relief but only to put a temporary stop and to delay the proceedings of the Lokpal. He has suggested that as in the case of election matters under articles 324 and 329(b) where any action of the Election Commission can be questioned only after the election has taken place and not during the course of it as a result of which no election is held up at the interlocutory stages, a similar provision should be introduced in the Constitution for the Lokpal. This will not be workable. The two bodies differ fundamentally. The Election Commission has certain specific duties assigned under the Constitution and it carries them out through its 'orders' whereas the Lokpal will have no authority to pass orders since he is contemplated to be an

266. supra note 203.
269. supra note 203.
270. Parasimhan, supra note 267, pp.33-34.
272. Parasimhan, supra note 267.
investigatory and recommendatory body. An order issued by a competent authority based upon the recommendation of the Lokpal may be challenged but in that case, the Lokpal is not subject to review. It will be the order of the authority which will be the subject of review. Prof. Jain's view is that no reference should be permitted to be made to the proceedings before the Lokpal in any court of law, since as an officer of the parliament, he should be given the same immunity as is available to the legislature in matters of its internal proceedings.273

In view of the nature of functions of the Lokpal and Lokayuktas, judicial review will be exercised only in a limited sense. The reports of the Lokpal will not be, and cannot be, open to review of the Courts. But otherwise, starting from the appointment of the Lokpal himself as also the initiation of any investigation upto the time of making a report, the whole process will come within the scrutiny of Courts. This is because it being a statutory body, will have to function within the norms of the Constitution and of the Statute under which it is created. Mainly jurisdictional matters will come up, as to whether the Lokpal can investigate a particular matter or not. The first two attorney generals of India, M.C. Setalvad and C.K. Raphary have been of the view that the exclusion of Lokpal's enquiries from the purview of articles 32 and 226 would be dangerous and fraught with other implications.274

The issue needs to be viewed in the entire perspective of the Indian Constitutional set-up. Statutory bodies, without exception, are subject to the review of the High Courts and

274. Supra note 124, p.171.
of the Supreme Court. If an exception is made in favour of the Lokpal by a Constitutional amendment, what possible consequences will ensue? Will it not pave the way for a demand from other bodies to be included in the Lokpal category? Will it not make the Lokpal a super body? No doubt, the Lokpal will be subject to the removal process of the Parliament but that will not be sufficient. Moreover, if the Lokpal and Lokayuktas are made all powerful and beyond scrutiny, they will not be able to command the confidence of the general public which is the sine qua non of this institution. On the other hand, it is also equally necessary to ensure that the Lokpal be not hampered through the frequent use of writ jurisdiction of the High Courts and of the Supreme Court. We have limited experience so far of some of the State Lokayuktas. Two cases have been reported in connection with the Bihar Lokayukta, one pertaining to his appointment and the other challenging the vires of the Bihar Lokayukta Act, 1973. Both Writ Petitions were dismissed, one on merits and the other in limine.275 The facts of the case when the appointment of the Bihar Lokayukta was challenged were unfortunate but otherwise the two Bihar writ petitions have helped in clearing out some of the doubts rather than hampering the functioning of the Lokayuktas. Availability of judicial review will provide more sanctity to the actions of Lokpal and Lokayuktas for if any one is aggrieved because of their action, he can move the court. If the Court upholds the action of the Lokpal, it will establish that he is operating in accordance with law and if the court finds otherwise, it will be a good reminder

276. Ibid.
for the Lokpal to remain within the requirements of law. The Courts will also have to exercise the jurisdiction with restraint so that their 'stay orders' do not clog the functioning of the Lokpal.

In order to regulate judicial review over the Lokpal and the Lokayuktas, the Bill of 1963 included a protective clause whereby it provided:

16(1) No suit, prosecution or other legal proceeding shall lie against the Lokpal or the Lokayuktas or any member of their staff and employees in respect of anything which is in good faith done or intended to be done under this Act.

(2) No proceedings of the Lokpal or the Lokayuktas shall be held bad for want of form and except on the ground of jurisdiction, no proceedings or decision of the Lokpal or the Lokayuktas shall be liable to be challenged, reviewed, quashed or called in question in any court.

This provision was repeated in the Bill of 1971 and was included in the State legislations of Orissa, Maharashtra, Rajasthan, Bihar, Uttar Pradesh, and Karnataka. It was also included in the Bill of 1977 with the one difference that the exception was not made even with regard to the ground of jurisdiction. This was done because of the

277. Emphasis added.
278. The Lokpal and Lokayuktas Bill, 1971, cl.16.
279. The Orissa Lokpal and Lokayuktas Act, 1970, Sec.16.
280. The Maharashtra Lokayuktas and Upa-Lokayuktas Act, 1971, Sec.16.
282. The Bihar Lokayuktas Act, 1973, Sec.16.
283. The Uttar Pradesh Lokayuktas and Upa-Lokayuktas Act, 1975, Sec.17.
284. The Karnataka Lokayuktas Ordinance, 1979, Sec.16.
reason that under this proposed legislation, the Lokpal was contemplated to deal only with the misconduct of political persons,236 and since there was no schedule of 'exclusions' as in case of other legislations,237 it was thought that no jurisdictional disputes would arise. The Bill of 1977 specifically barred the Lokpal from inquiring into any matter where he had bias,238 so that objective consideration of the matter could be ensured. In order to determine any dispute which may arise in this regard, the Bill provided:

11(1) ... the President shall, on an application made by the party aggrieved, obtain, in such manner as may be prescribed, the opinion of the Chief Justice of India and decide the dispute in conformity with such opinion.

Here again, the solution provided is not the court but the opinion of the Chief Justice of India. The idea being to avoid disputes being taken to courts. Dr. Rajeev Dhavan does not approve of this and points out that it will make the Chief Justice virtually a Lokpal over the Lokpal and in the long run, the provision can be subjected to considerable abuse and will also undermine the Lokpal's position.239 In the functioning of the State Lokayuktas, situations have arisen when bias has been alleged against

236. Ids, cl.2(g).
237. The Lokpal and Lokayuktas Bills, 1961 and 1971, cl.3(1)(a) read with schedule 2; Maharastra Lokayukta and Upa-Lokayuktas Act, 1971, Sec.3(1)(a) read with schedule 3; Madharastra Lokayukta and Upa-Lokayuktas Act, 1975, Sec.3(1)(b)(i) read with schedule 3; The Karnataka Lokayukta Ordinance, 1979, Sec.3(1) read with schedule 2.
238. The Lokpal Bill, 1977, cl.11(1).
the Lokayuktas. But there has been no remedy since the state legislations have not provided for a similar provision as mentioned above. It would be better, if a provision is made that in case of any bias against the Lokpal or the Lokayukta, the party should be free to take up the matter before the High Court. A sound jurisprudence has been developed by our High Courts and the Supreme Court in regard to principles of natural justice which would prove helpful in dealing with matters arising from the functioning of the Lokpals and Lokayuktas. The possibility of some frivolous cases cannot be ruled out but that should not be the reason to exclude the jurisdiction of the Courts. Infact, it will be useful both for the party who alleges bias as also the Lokpal and the Lokayukta. They will be able to establish their respective positions.

There are two basic points which arise from the protection clause. Proceedings can be initiated on the ground of malafides - that the act was not done in good faith - and the proceedings of the Lokpal and the Lokayuktas can also be challenged on the ground of jurisdiction. Both grounds are important and the ground of jurisdiction, in particular, can cause hindrance to the functioning of the two bodies. In order to avoid this, the Lokayukta of Maharashtra has suggested that the Lokayukta should be permitted to make a reference to the High Court for its opinion on any disputed question of jurisdiction.

provision is already a part of some of the commonwealth legislations as examined earlier. A provision of this nature will prove useful both at the Central and State levels for in case of doubt, the matter could be referred to the Supreme Court or the High Court as the case may be for its opinion.

Jurisdictional issues can arise under different situations. The Bill of 1963 had provided that if the complainant has or had any remedy by way of proceedings before any tribunal or court of law, then the Lokpal or the Lokayukta shall not conduct any investigation. This prohibition was, only with regard to 'pividesces' and not in regard to 'allegations'. It has been incorporated in the later Bills and legislations with the exceptions of Rajasthan legislation and the Central Bill of 1977, both of which are confined to 'allegations' alone and thereby there has been no deviation from the initial proposal. This exclusion will restrict the jurisdiction of the Lokpal and Lokayuktas considerably in matters of 'pividesces'. The exercise of the power by the High Courts to issue writs under article 226 is discretionary and in that light, it would be hard for the Lokpal to determine whether he has jurisdiction or not in a given situation. Though no doubt, the superior courts have by now developed their jurisprudence, still in many cases it is possible to take different views.

293. The Lokpal and Lokayuktas Bill, 1963, cl.3(1)(b). The difference in the meaning and scope of these two terms has been dealt in chapter Three of this work.
294. Id.3(1)(b) of the Orissa Lokpal and Lokayukta Act, 1970; The Lokpal and Lokayukta Bill, 1971; The Maharashtra Lokayukta and Up-lokayukta Act, 1971; The Bihar Lokayukta Act, 1973; The Uttar Pradesh Lokayukta and Up-Lokayukta Act, 1975.
Prof. S.K. Aggarwal is of the view that it is only when the Lokpal or Lokayuktas will feel absolutely certain that it is not at all possible to move the High Court through a writ, that they can exercise their jurisdiction. Another limitation on the exercise of writ jurisdiction is that it deals with the matter on technical issues and not fundamentally on merits. Writs only touch a part of administrative actions and do not scrutinise controversial and disputed questions of fact. The Lokpal, on the other hand, is to probe the facts and report on that basis. He cannot go into technical questions. By and large, there will be no overlapping in the two jurisdictions, the Lokpal examining the case on merits by probing into facts and the High Courts on technical issues. In New Zealand legislation, only that area has been excluded from the ombudsman’s jurisdiction where the courts can review the matter on merits.\(^{297}\) It has been rightly pointed out by Prof. Laver that the availability of prohibition and certiorari would probably not exclude the ombudsman, since they rarely enable a review on the merits to be undertaken. Still in order to avoid any kind of doubt as also any practical problem, it would be better if no embargo is put on the Lokpal and the Lokayukta on the ground of availability of 'any other remedy'.

In Indian legislations, the prohibition of 'any other remedy' is qualified by an exception which entitles the Lokpal and the Lokayuktas to investigate a matter even where there is a remedy if they are satisfied that the

\(^{299}\) Geoffrey Laver, Ombudsman, 23(1963).
person concerned could not or cannot, for sufficient cause have recourse to such remedy. This proviso on the one hand provides an "outlet" even when there is other remedy available and on the other introduces the problem of determining 'sufficient cause.' The Maharashtra Lokayukta has observed that this exception is full of pitfalls and more calculated to delay than anything else.' He explains that the Lokayukta will have to take some evidence before he can decide that there is sufficient cause and that will take time. Secondly, according to him, his finding on such a preliminary issue itself will be a nice handle to the person complained against to challenge the finding on any ground, however slimy and thus gain time. This can be avoided by lifting the embargo of 'any other remedy' as suggested earlier, with the result the Lokpal and the Lokayukta will not be required to justify the exercise of jurisdiction even when there is an alternative remedy available. The limitation of 'any other remedy' will prove a clear hindrance in the operation of these institutions by way of frequent court challenges. Even otherwise also, the purpose of the institution is to sift out the facts and to make a recommendation on the basis of which the action is to be taken by the competent authority. If the authority concerned in its considered view decides otherwise (which it can do so), there will be nothing to prevent the


agrieved party to take recourse to the court remedy if available under the law. In this manner, the availability of 'any other remedy' will not come in the way of the functioning of these bodies.

It is provided in different legislations and proposed legislations in India that the Lokpal and the Lokayuktas can in their discretion refuse to investigate or cease to investigate any complaint, if in their opinion, the complaint is frivolous, vexatious, not made in good faith, or there is absence of sufficient grounds for investigation or the availability of other remedies to the complainant. It is required that in doing so, they shall record their reasons and communicate the same to the complainant and the public servant concerned. It is further provided in the 'miscellaneous legislation and not in other legislations that the Lokpal or the Lokayukta shall not refuse to investigate or cease to investigate any complaint on the ground of availability of other remedies without making a preliminary investigation on the complaint and in all such cases he will furnish a report about the preliminary investigation or the complaint and in all to the Governor. The discretion given here is to be exercised on the basis of some specific grounds and in order to regulate this, reasons are required to be recorded.

It has been rightly contended by the Rajasthan Lokayukta that this discretion must also from its very nature be judicial as it involves the formation of opinion to decline to exercise the power of starting or continuing judicial investigations under the Act.


recording of reasons is important. It prevents the body from acting in an arbitrary manner and at the same time subjects it to judicial review. In appropriate cases, the High Courts will be well justified to interfere so that the Lokpal and Lokayuktas may exercise their discretion in a judicious manner.

There are two stages contemplated for the Lokpal investigations viz., (i) the preliminary stage to decide upon whether investigation is called forth or not and (ii) the actual investigation. Under different legislations, it has been left to the Lokpal and Lokayuktas to determine the kind of procedure they would consider appropriate in the circumstances of the case both for the preliminary and the actual investigation. The discretion in determining the procedure will be subject to the limitation that the copy of the complaint shall be forwarded to the public servant and the competent authority concerned and the public servant shall be given an opportunity to offer his comments on such complaint. The Bill of 1977 is different on this score when it provides that the public man concerned will be afforded an opportunity to represent his case. It is not necessary that the representation is to be in writing alone, it can be oral as well. The idea is to provide him an opportunity to defend himself. Besides this requirement, they have been left to regulate their own procedure. It has been rightly pointed out by the Lokayukta of Rajasthan that in determining the procedure, they should keep in view the generally recognised traditional norms of

the rule of law and the broad accepted notions of natural justice.\textsuperscript{307} Investigations are required to be in private though any investigation relating to a matter of definite public importance can be held in public and for that the Lokpal or the Lokayukta is required to record the reasons in writing.\textsuperscript{309} If the procedure will not be reasonable, just and fair, the courts will interfere to ensure that they do not act arbitrarily and oppressively.

The Bill of 1977 purported to go beyond the basic scheme of Ombudsman when it empowered the Lokpal to try in the summary form such persons who have wilfully given false evidence or fabricated false evidence or have committed offences under Sections 175, 171-90 of the Indian Penal Code. It further provided that before convicting any such person, the Lokpal will be required to give to the offender a reasonable opportunity of showing cause why he should not be punished.\textsuperscript{309} The Lokpal primarily being a recommendatory body, the power of conviction is not in tune with it. But this power will make the institution more meaningful. Our experience with Commissions of Inquiry has been unfortunate for in many situations they have felt helpless. In view of this, the power of the Lokpal will help him in taking such matters seriously and at the same time preventing the re-occurrence of them. The Bill further provided that the persons found to be guilty may make an appeal to the High Court\textsuperscript{310} so that the Lokpal does not become the final arbiter in this regard.

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\textsuperscript{307} Supra note 304, p.15.\\
\textsuperscript{308} Sec.10(2) of the Orissa Lokpal and Lokayuktas Act, 1970; The Maharashtra Lokayukta and Up-Lokayuktas Act, 1971; The Rajasthan Lokayukta and Up-Lokayuktas Act, 1973; The Bihar Lokayukta Act, 1973; The Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975; The Lokpal and Lokayuktas Bill, 1971; cl.14(2); The Lokpal Bill, 1977.\\
\textsuperscript{309} The Lokpal Bill, 1977, cl.22.\\
\textsuperscript{310} Id., cl.22(4).
\end{flushright}
In short, the purpose of a statutory institution is to function in accordance with the provisions provided under the law. In order to ensure this, the exercise of judicial review assumes importance. The Courts while reviewing the acts of the Lokpal and Lokayuktas will have to draw a balance so that neither the courts hamper their functioning nor allow them to act in contravention of law.

It remains to be examined as to what will be the effect of the ouster clause that no proceedings or decision of the Lokpal shall be liable to be challenged, reviewed, quashed or called in question, in any court. No such provision had been recommended by the Administrative Reforms Commission. It was included in the Bill of 1963 and thereafter it has been incorporated in all the legislations. If the intention is to oust complete judicial review, then the very purpose of putting certain limitations on the exercise of powers under the law is rendered nugatory for the reason that there is no sanction to get those limitations enforced. It is a settled proposition of law that the High Court and the Supreme Court Writ Jurisdiction cannot be ousted or restricted except by an amendment of the Constitution. In view of this constitutional position, it is submitted that the ouster clause in the Lokpal legislations will not have the effect of excluding the High Court review through its writ jurisdiction. No doubt, in some cases, judicial review may hold up the Lokpal investigations temporarily but it is very essential to keep the Lokpal within the rule of law.

311. id., cl. 25.
312. supra note 122.
313. The Lokpal and Lokayuktas Bill, 1963, cl.16.
The ouster clause will of course have the effect of excluding the interference of the subordinate courts in the functioning of the Lokpal. This is understandable as well as salutary.

There has been no move to amend the Constitution in order to exclude High Court and Supreme Court review over the Lokpal and the Lokayuktas. The apprehensions expressed by Chief Justice P.B. Kalkerji and Prof. A.K. Tripathi that these institutions will be free from any control, parliamentary or judicial, are not well founded in the present context. As long as judicial review is there to process the functioning of Lokpal, there is no danger whatsoever of its running contrary to the basic structure of the Constitution.