CHAPTER IX.

CONCLUSION:

The institution of Ombudsman which originated during the laissez faire period to act as the attorney of Parliament in order to supervise the observance of laws remained virtually unknown till about 1960. But after 1960, the institution in a span of less than two decades, has become a world wide phenomenon. This is an index of its need in the context of the changed role of a modern welfare state. It has already established its usefulness and has become an integral part of legal systems in common-law and non-common-law, developed and developing countries. Its supervision has extended from Governmental authorities to Universities and colleges, hospitals, corporations and newspaper companies. It is clear from its present position that it would be an indispensable institution in years to come.

From 1963, the institution of Ombudsman has been a subject of discussion in India. Inspite of wide demand and support, the institution as yet has not been introduced at the central level. Even in the States, it has remained confined to Maharashtra, Bihar, Rajasthan, Uttar Pradesh and Karnataka. The reason is not far to seek for this slow pace of growth. It is but natural for an institution of this kind to meet initial opposition from those whose actions it is intended to supervise.

The process of adoption of any foreign institution has to be well thought out. This is necessary because no institution can perhaps be transplanted in its entirety from one system to another. It may have to be moulded to make it suitable to a particular system. The institution of Ombudsman is both flexible and adjustable to suit the
requirements of a specific set up. It has proved workable in systems with or without a set of administrative courts. It is working in unitary as well as in federal systems.

The large size of India will cause no problem for the successful functioning of the institution. In a federal set up, the institution is more easily adjustable. Different ombudsmen can be provided at different levels, with the result at each level there will be a 'Crisisvemian'. It will be advisable to retain the Indian nomenclature of Lokpal and Lokayukta as initially coined by Dr. L.M. Singhvi which have already become part of our vocabulary and legislative lexicon. The collegiate system of ombudsmen is being adopted more and more in different countries. It is suggested that in India, at the Centre, there should be a chief Lokpal and certain number of Lokpals, each one assigned certain specific area of jurisdiction, on the pattern of Swedish and New Zealand schemes. Similarly, there should be a Chief Lokayukta and Lokayuktas in each state with Up-Lokayuktas at the district level. The Up-Lokayuktas and Lokayuktas should be under the administrative control of the Chief Lokayukta whereas the Lokpals should be under the control of the Chief Lokpal. The whole set up will be somewhat similar to that of procuracy in the Soviet Union. The Chief Lokpal should be appointed by the President on the recommendation of the House of People. The process should be that a panel of names be suggested by the Chief Justice of India. The Prime Minister and the leader of the opposition should jointly reach consensus on a particular name which should be approved by unanimous vote of the House. A convention should be developed that the appointment is to be made only on a unanimous vote. The appointment of the Lokpals should be made in the same way as in case of the Chief Lokpal but
the panel should be suggested jointly by the Chief Justice of India and the Chief Lokpal. In case of the State Lokayuktas, chief Lokayuktas and Up-Lokayuktas, the appointments should be made by the Governor on the recommendation of the State Assembly by following the same process as in case of the Centre. In this manner the appointments will be made with the participation of the three organs of the Government. The process will also ensure that they are acting as the agents of the Parliament and of the State legislatures and not merely as the nominees of the Government. It is fundamental for the success of the institution that provisions should be made to secure complete independence of the Lokpal and Lokayuktas from the executive. It will be equally necessary to keep them free from political pressures. They should be provided with their own staff to carry out investigations and other office work. The Chief Lokpal and Chief-Lokayuktas should be authorised to appoint their own staff and should have administrative control over them. If the Lokpal and Lokayuktas are made to depend upon Governmental agencies for the performance of their investigatory functions, they will fail in their object and purpose. This has been the experience of our State Lokayuktas.

A wrong belief is held sometimes by some that the institution is meant only to curb and eliminate maladministration. The experience of the institution has been that the Ombudsman therapy has been used in variety of areas including the sensitive areas of military and the judiciary. To confine its task to dealing merely with maladministration would virtually amount to ignoring the institution's potential. It would depend upon the needs of each country to identify the areas in which the Ombudsman treatment is required. It is not the case that Ombudsman will be a panacea for all ills of a country but certainly it will be highly useful in bringing to light misdeeds so that those who are responsible could no more plead ignorance.
The Constitution of India in Article 350 provides that every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State as the case may be. The potential utility of this provision has perhaps escaped the notice of many. It is common knowledge that hundreds and thousands of representations are made, most of which remain unacknowledged and even those which are acknowledged remain under passive consideration for many years and after a long gap, one is merely informed "representation considered and rejected." This could have been a fertile provision for writ litigation in the High Courts. If a representation is not favoured with a reply within a reasonable time from the authority concerned or if the reply is not a speaking-reply one could legitimately move for the writ of mandamus or certiorari. The possibility of favourably exploiting this provision in future cannot be ruled out. This will mean more burden on the courts whose dockets are already so full. This can be avoided with the introduction of Lokpals and Lokayuktas. Their introduction will further help in making this important provision of the Constitution more real than illusory. Whenever a representation will fail in getting a reply from the competent authority, the aggrieved will be in a position to put in a complaint to the Lokpal or the Lokayukta at whose behest the authority will expedite the consideration of his representation and if he is still not satisfied with the reply, it will be open to him to request the Lokpal to investigate his complaint. It may not be wrong to say that the very idea of Ombudsman is embodied in this provision of the Constitution. This is because the key note of the provision is 'the redress of any grievance' through a representation. This is exactly what the Ombudsman stands for.
The Bills of 1961 and 1971 on which state legislations are also based had included complaints in the nature of grievances and allegations against public servants and Ministers. The Bill of 1977 was limited to misconduct on the part of public men. In the Indian context, there is need for separate Lokpals to deal with misconduct on the part of public men and public servants on the one hand and on the other, another Lokpal to deal with grievances. One Lokpal will not be sufficient to cope with complaints in both the areas. It is pertinent to note that the definition of public men had included the Prime Minister, Ministers and Members of Parliament. It is understandable that Members of Parliament and state legislatures will resist any attempt being made for their inclusion for Lokpalic scrutiny. But their exclusion will not be desirable. It would give an impression that the legislative masters do not wish to have any check on themselves whereas they always wish that checks should be imposed on others. If they include themselves, they will be better able to create an atmosphere and opinion for the inclusion of various other categories of people. This is very essential. The inclusion of legislators will not in any manner hamper their role which they are expected to play in their respective legislative houses. The Lokpal will not investigate what they do inside their legislative bodies. This will be looked after by the committees of the legislature concerned. It is their conduct outside the house which should be subjected to the scrutiny of the Lokpal or that of the Lokayukta. This will not be in violation of any constitutional protection provided to them. In fact, it will provide them an opportunity to vindicate their position as and when false accusations are levelled against them. It also needs to be pointed out that there will be no justification to make special
provisions for legislators in regard to the definition of misconduct applicable to them, the routing of complaints, the holding of inquiry in camera or the imposition of more stringent punishment in case the complaint is found to be not well founded. If all these provisions are not necessary in case of Ministers including the Prime Minister and Chief Ministers, they cannot be justified for the legislators. One often finds our legislators being accused of something or the other. Even if they yield no executive powers, still they do influence in large number of cases the decisions of the executive. It would be a step forward if our legislators are included within the purview of the Lokpal and Lokayuktas. The inclusion will help to improve the stature of our legislators.

In view of the fact that it is not practicable to have a single Lokpal for the entire country, in demarcating the areas of jurisdiction of the Lokpal at the Centre and of the Lokayukta in the state, the scheme of the constitution will have to be adhered to. In order to maintain harmonious Centre-State relationship, it is necessary that the Parliament should not impose a central authority upon the States. In this regard the issue of Chief Ministers needs special mention. The inclusion of Chief Ministers within the purview of the Central Lokpal will not only disturb the balance of Centre-State relations but will also give rise to intricate practical as well as constitutional problems. In accordance with Article 164(2) of the Constitution, the Council of Ministers is collectively responsible to the Legislative Assembly of the State. Consequently, the Chief Minister cannot be made responsible to the Parliament. It will also not be fair for the Prime Minister to ask the Chief Minister to step out because of an adverse report from the Central Lokpal.
Whenever the Prime Minister may conceivably desire to topple a Ministry in the state, which is being governed by a party different from that of the Centre, a complaint may be got lodged with the Lokpal and if an adverse report is given, the Prime Minister may then ask the concerned Chief Minister to bow out of office. In this manner, the Central Lokpal may be used to embarrass State Governments and political humiliation may be inflicted on them. A Chief Minister placed in such a situation may, on the other hand, decide to defy the Prime Minister. On getting the directive from the Prime Minister, he may go to his legislative assembly for a vote of confidence and if he is successful, he may refuse to oblige the Prime Minister. In this background, it will also be not reasonable for the Governor to report to the Centre that a 'situation has arisen in which the Government of the state cannot be carried on in accordance with the provisions of the Constitution.' In the alternative, if the report of the Lokpal is sent to the Chief Minister, without any directive of the Prime Minister, to be dealt at his own level, it will amount to making him the Judge of his own cause which will not be fair and reasonable. If he chooses to ignore the report, nothing can be done about it except that the opposition may raise the issue without any tangible result. In the ultimate analysis, there will be stalemate which needs to be avoided. Moreover, separating the Chief Minister from other Ministers will not be in conformity with the fundamentals of a cabinet system. The Chief Minister is not a distinct or separate entity from other Ministers. He only heads the team of Ministers. It may not be workable for the Lokpal to inquire into the actions of the Chief Minister without looking into the actions of other Ministers who do not fall within his jurisdiction. The best way out for avoiding all this is that the Chief Minister should not be included within the investigatory area of the Central Lokpal. They should be
included in the jurisdiction of the State Lokayuktas. The initiation of an investigation will not be dependent upon the Government itself. It will also be necessary that a provision should be made for a standing Committee of the Legislative Assembly to whom the Lokayukta will report. The Committee in turn will bring the report before the Assembly with concrete proposals as to what action should be taken and ultimately the Assembly will decide about it. A similar Committee of the Parliament will be necessary at the centre to deal with the reports of the Lokpal particularly in case of the Prime Minister and Members of Parliament.

It needs to be emphasised that the Lokpal and Lokayuktas will cause no threat to the concept of Ministerial Responsibility as provided for in our constitution in Articles 75 and 164. This has been the experience of Ombudsmen in those systems which are governed by Parliamentary form of Government. After its functioning for thirteen years in the UK, there is no reason to entertain any doubts about its compatibility with the doctrine of Ministerial Responsibility in its operative aspect. Infact, it needs to be understood that instead of weakening, it will strengthen it. When the Lokpal and Lokayuktas will supply the details to their respective Houses, the House will be able to discharge its constitutional obligation in a much more effective manner. Today, the major hurdle is that it is difficult for the Parliament to get at the facts which are normally in the safe custody of the executive. The Lokpal and Lokayuktas acting as the delegate of the Parliament and State Legislatures respectively will report to their respective legislative bodies which could then hold such persons responsible who are guilty of omissions and commissions. In this manner, it will make the legislative
control more real and would not remain merely a constitutional myth. In view of the majority that the Government enjoys in the House, the legislative control has been gradually weakening. This trend can be minimised if not totally stopped so that public confidence in the Parliamentary institutions is not shaken.

Another point that is argued against the Lokpal and Lokayuktas is that it will lift the veil which the Ministerial responsibility provides to the officials and the cover of anonymity will no more be available to them. This argument fails to take note of the fact that there have been numerous instances in the legislatures when officials have been mentioned by name and have come in for criticism. Officials are specifically held responsible for financial irregularities. Officers of the Government are identified in the Parliamentary Committees and Committees of State Legislatures. The reports of Commission of Inquiry name the officials. Moreover, it needs to be realised that the traditional principle of Ministerial responsibility as it initially provided the cover of anonymity in the U.K., is no more applicable in the changed context of the role of a Welfare State operating a parliamentary system. There is no justification to retain the principle in its virginal purity. The reports of the Lokpal and Lokayuktas will help in exposing baseless accusations which are often levelled against officials. Officials will have the opportunity to explain their conduct to the Lokpal and Lokayuktas which otherwise they do not get before the Parliament or State Legislature. The Lokpal and Lokayuktas will provide the required strength to make the Ministerial responsibility real, effective and efficacious.

The experience of Orbusmen in Scandinavia and elsewhere has been that it has contributed a good deal by its efforts to provide better administration and better administrative justice in order to ultimately develop sound
administrative jurisprudence. The presence of the ombudsman has proved that the administration remains on its toes and takes additional care to avoid acting in a manner which is likely to meet the disapproval of the ombudsman. On the other hand, the office of ombudsman has made no adverse impact upon civil servants. There is no evidence to show that the Ombudsman has caused any disruption in the administrative process. As an impartial observer, the Ombudsman has been able to assist the administration by bringing to its notice what is needed to reform a particular situation or a process. It has proved to be a potent instrument to deal with maladministration. It needs to be remembered that the Ombudsman acts not only as an invigilator over civil servants but also equally a shieder of their interests. It has proved that it helps in making the administrative process 'natural justice' oriented without at the same time producing any adverse side effects.

Under the Indian constitutional scheme some care will have to be taken in order to avoid conflict of reports pertaining to civil servants. The Constitution in article 311(2) provides for 'reasonable opportunity' to the civil servants before they can be reduced in rank, removed or dismissed. If the Lokpal and Lokayuktas are contemplated merely to prima facie bring it to the notice of the competent authority the wrongs committed by a particular civil servant, it would then be necessary to hold a full-fledged inquiry as envisaged in clause 2 of article 311. In this case, there will be no conflict of reports because the report of the Lokpal or the Lokayukta as the case may be will not be based upon a full inquiry. It will only be recommending that the matter needs a fuller probe in order to reach some final conclusion. It will be ultimately the departmental inquiry which will establish whether any action is called for
or not? It will not make any difference even if the departmental inquiry report is different from what had been initially reported by the Lokpal or the Lokayukta. The usefulness of the Lokpal or the Lokayukta recommendation will be that it will bring to the notice of the concerned authority what otherwise would have remained hidden. Moreover, if the Lokpal or Lokayukta report would warrant any punishment short of what is provided in clause 2 of article 311, there will be no embargo on the competent authority to take action in this regard. On the other hand, if the Lokpal or the Lokayukta will be providing full opportunity as is done by the Lokayukta of Maharashtra to the civil servant in question, in that case there will be no need for a de novo inquiry at the departmental level. It is nowhere stipulated in article 311(2) as to who is to hold the inquiry. The Lokpal inquiry will not be in violation of constitutional provisions as long as it would meet the requirements of reasonable opportunity. Even otherwise no purpose will be served in duplicating the inquiries. It would not be necessary for the Lokpal to go in for a full inquiry in every case. It will be necessary only in those cases wherein he feels that it may be necessary to impose one of the three punishments provided in article 311(2). In order to carry out this scheme, it would be necessary to provide in the legislation itself that in those cases where the Lokpal proposes to recommend any one of the three punishments provided in clause 2 of article 311, he will afford an opportunity to the concerned civil servant of the nature contemplated in the constitution. And by way of abundant caution, the constitution should be amended to add another ground to the proviso to clause 2 of article 311 whereby it is made clear that clause 2 will not be applicable in cases where the action has been taken on the recommendation of the Lokpal who had provided a
a reasonable opportunity. It will prove helpful to the Government. For it will not have to hold a de novo inquiry and at the same time the interests of the civil servants will be safeguarded.

There will also be no conflict in the functioning of the Lokpal and the provisions of Article 320(3) where the Public Service Commission is required to be consulted on all disciplinary matters affecting the civil servants. The Supreme Court has held that this provision is not mandatory and the absence of consultation will not entitle the civil servant any relief under Article 226 of the Constitution. Otherwise also, when a matter has been independently examined by the Lokpal, there will be no justification for duplicating the process by referring the matter to the public service commission for purposes of advice. There will be no need for any modification in the provisions of the Constitution in this regard. In fact, proviso to Article 320(3)(e) authorises the Government to specify such matters where consultation with the public service commission will not be necessary.

The exclusion of personnel matters from the jurisdiction of the Lokpal and Loknayukta is not justified. They need to be included in view of the fact that there is lot of arbitrary exercise of power in matters of seniority, appointments, promotions and the courts are constantly faced with writs regarding these matters. Even otherwise, independent officers are harassed by continuous transfers completely dislocating their lives. There are well known cases where officers of the highest rank have been suspended for years without any chance, and cases where promotions have been denied for extraneous considerations. This is an area which requires constant supervision by an agency like
The high morale of civil servants can only be built up when not only are they exonerated of baseless accusations but also when their own grievances regarding conditions of service etc. are properly redressed. In the U.K., a wrong view has been taken that the parliamentary commissioner is not supposed to settle complaints between the employer and the employee. No such limitation has been imposed in other Ombudsman Jurisdictions. It will not amount to giving of equal treatment to public servants if they are barred from bringing their grievances to the Lokpal or the Lokayukta against the Government during the course of their employment.

The relationship of Lokpal and Lokayuktas with the Judiciary is another important matter in examining their constitutional feasibility. There are two aspects of the matter, one the use of Lokpal in supervision of judiciary and the other, the exercise of judicial review over the Lokpal and Lokayuktas. As regards the first, it is submitted that it warrants serious consideration. In different systems, problems of judicial indiscipline and corruption have been experienced. In order to deal with them, commissions comprising of Judicial and non-Judicial members have been constituted in the U.S.A. and have been recommended in New Zealand and the U.K. In Sweden and Finland, Ombudsman supervises this area. Recommendations have been made in India for the Constitution of Vigilance Cells under the control of members of Judiciary to deal with complaints against even the superior judiciary. There have been number of instances when Judges have found themselves helpless against attacks on their integrity as well as against their judicial performance. They cannot publicly defend themselves because of judicial self-restraint which they
are expected to observe. It will equally be not a healthy situation if Judges have to become litigants in their own courts. It is suggested that the services of the Lokpal and Lokayuktas should be utilised to deal with this sensitive and yet important area. He should be required to make reports on such complaints to a Judicial body comprising the Chief Justice of India and two other senior Judges. This Judicial body in turn should examine the report and in appropriate cases should refer the matter to the Parliament for necessary action. The idea of Lokpalic supervision of Judiciary may appear to undermine the independence of Judiciary but on a deeper examination, it will not be so. Infact, it will strengthen it since in actual operation it may result in establishing that in most of the cases, the allegations are baseless. And if in some cases, they are found to be otherwise, the independence of Judiciary does not warrant that such cases should not be brought to light. Reports of the Lokpal will be useful in two ways. In those cases in which a Judge is found to be innocent, the report will speak itself for the clean conduct of the Judge and will enhance the prestige of the Judiciary in public mind. As regards those cases in which the Judge is found to be guilty of misbehaviour, the report will prove to be a good deterrent to others. Ultimately, the Lokpal will prove not as an invigilator of Judicial conduct but as one-in-aid of the Judiciary. The issue of justice to Justices is a serious and controversial matter. It should no more be ignored otherwise the faith of the people in the Judiciary will be shaken and Justice might remain a cloistered virtue.

The Lokpal can be useful in more than one way in its co-relation with Judiciary. It can bring to the notice of the Chief Justice of the High Court as also of the Supreme Court such cases which deserve reconsideration and they may be re-opened before the next appellate court or before a larger
bench of the same Court. This will not be something new in our Lokpalic set up. The Ombudsman in Sweden and Finland and the Procureur in J.S.E. are already doing this. The Lokpal will have to exercise due care and caution in asking for reconsideration so that cases are re-opened only in highly exceptional situations warranting such a course of action in the interest of justice. If it is allowed to become a frequent exercise, it will lose its purpose and will cause more problems.

As regards subordinate judiciary, substantial number of complaints come to the High Courts and the High Courts have no separate body to inquire or investigate into those complaints. They are normally referred to the District Judge. In some of the High Courts, there are separate cells manned by District Judges who investigate these complaints and report to the High Court. In view of the need, particularly as focussed by the Supreme Court in Shamsher Singh's case in 1975, it is suggested that State Lokayuktas can be assigned the duty to report after investigation the High Court for necessary action. This will not undermine the control exercised by the High Courts over subordinate courts under Article 235 of the Constitution.

So far as Judicial review over the Lokpal and Lokayuktas is concerned, it is necessary that it should be retained. This will be in line with the general scheme of the Constitution that no statutory or constitutional body should be outside the supervisory powers exercised by the Supreme Court and High Courts under Articles 32, 136, 226 and 227. It should not be the case that Lokpals and Lokayuktas be super bodies subject to nobody's control or review. Any institution manned by human beings needs to be supervised. It is important that in order to balance the power given to it, necessary checks should be imposed on the Lokpal and the Lokayuktas. At the same time, in formulating
the checks, care will have to be taken that they should not be so stringent that the very functioning of the institution may become impossible and it may be kept more pre-occupied in litigation than in the performance of its own duties. Since these bodies are investigatory and recommedatory only, there is not likely to be much of court hampering in their functioning. There has been the experience of Ombudsman in other countries, on the basis of their reports and recommendations, actions will be taken by the competent authorities. Jurisdictional disputes cannot, however, be altogether avoided though they can be minimized by proper formulation of provisions. No such provision in the state legislation which once cause litigation is that generally the Lokayukta shall not conduct an investigation where there is a remedy available by way of proceedings before any tribunal or court of law but he may do so if he is satisfied that for sufficient reason, the complainant cannot have recourse to such a remedy. The better course will be that no such embargo should be put on the jurisdiction of Lokpal and Lokayuktas as they are merely required to sift out the disputed facts on the basis of which the competent authority is to take action. Even if there is a remedy available, that should not cur their jurisdiction. It should also be provided that in case of doubt whether it has jurisdiction or not, the Lokpal or the Lokayukta may refer the matter for the opinion of the Supreme court or the High court as the case may be. In general, while exercising discretion, the Lokpal or the Lokayukta should be required to assign reasons. This will prevent the abuse of their discretion in an arbitrary or unreasonable manner. It will also inspire public confidence in the functioning of these institutions. In fact, this requirement will have a salutary effect on the administration in making it also
natural justice oriented. In short, it has to be ensured that these bodies function within the rule of law and at the same time they should not be dragged daily in civil courts. Besides the judicial review of High Courts and the Supreme Court, the reports of Lokpals and Lokayuktas should be subjected to the scrutiny of the standing committees of the parliament and state legislatures so that in case of any doubt, they may be required to explain. This practice has proved very useful in the UK and deserves a serious consideration in our parliamentary set up.

It has so far been thought to give the Lokpal and Lokayuktas only statutory and not constitutional status. For the success of these bodies, it is not only important but vital also that they should be given a constitutional status. The fundamental of these bodies should be incorporated in the constitution. This is the position in most of the countries which are governed by written constitutions. Statutory bodies can be more easily and summarily tampered with whenever the Government finds them inconvenient whereas a constitutionally created body will be free from such danger. There are some who are of the view that to begin with, Lokpals and Lokayuktas should be given statutory status and later on if they are successful, they may be included in the constitution. Initial period is very crucial for the success of these bodies. If they fail once, it will be difficult to revive them even with constitutional status. Consequently, the suggested trial period is hardly justified. Thus, these bodies should be given a constitutional status by suitable amendment of the constitution.

Institutions take time to develop and grow in stature. If we wish these institutions to begin on a
positive note, it will be necessary for the different organs of Government to co-operate. Without the necessary co-operation, shells and troops will fail in their purposes. The matter warrants action and not merely long drawn consideration of the Parliament. It has lingered on too long already. The sooner we adopt it constitutionally, the better it will be.