CHAPTER THREE

THE INDIAN OMBUDSMAN - THE LOKPAL AND LOKAYUKTA - A COMPARATIVE ANALYSIS.

So far two Lokpal and Lokayukta Bills have been introduced by the Congress Governments in the Lok Sabha in 1969 and 1971 respectively and one Lokpal Bill by the Janata Government in 1977. The object of this chapter is to analyse the provisions of these Bills to have a comparative evaluation in the light of the corresponding legislations in other countries.

3:1. THE METHOD OF APPOINTMENT;

Ombudsman is traditionally Parliament's nominee. In most of the systems, he is appointed, elected or recommended by the Parliament. In some, he is appointed by the executive head on the recommendation of the Prime Minister and the leader of the opposition. The Australian Commonwealth Ombudsman and the parliamentary Commissioner for Administration in England are appointed by the head of the executive on the recommendation of the Government. This means that in practice the appointment is made by the Prime Minister, which is contrary to the

1. The Lokpal and Lokayuktas Bill, 1969 ( Bill No: 51 of 1969 ), introduced on May 9, 1969 (hereinafter called Bill of 1969);
2. The Lokpal and Lokayuktas Bill, 1971 (Bill No:111 of 1971), introduced on August 11, 1971 (hereinafter called Bill of 1971);
4. Ombudsman is elected by Parliament in Denmark & Norway.
5. Ombudsman is elected by Parliament in Sweden, Finland, Quebec (Canada), Hawaii and Nebraska (United States).
6. Ombudsman is appointed by the Executive head on the recommendation of the Parliament in New Zealand, Alberta, Manitoba and New Brunswick (Canada).
7. Ombudsman Act, 1976, Sec.21(1).
very idea of parliamentary Ombudsman. He is not to be an agent of the Government. He is to be a representative of the parliament. This method of appointment has been criticised. Efforts have been made to get this changed in the U.K. A Private Member's Bill was introduced requiring consultation with the House of Commons Select Committee on the appointment of a Parliamentary Commissioner. It did not become law. The House of Commons Select Committee on the Parliamentary Commissioner for Administration has regretted that at no stage before an announcement is made of a new appointment is the House of Commons or any part of it, advised, much less consulted.

Justice in its report has recommended that there should be an obligation to consult the Select Committee of the House of Commons before the appointment of a new Commissioner or alternatively, the Select Committee should be asked for nominations and the appointment be made by resolution of the House of Commons. Without making any formal alteration in the Act, the appointment of the present Parliamentary Commissioner for Administration was announced in the House of Commons after consultation with the Chairman of the Select Committee. It is a welcome change from the past three appointments in 1966, 1971 and 1976 which were treated like internal civil service appointments.

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13. This was disclosed in a personal interview with the Chairman of Select Committee, Mr. Antony Buck in London on Dec. 21, 1973.
In India, the process of appointment of Lokpal was initially examined by the Administrative Reforms Commission. It suggested that the appointment of Lokpal should, as far as possible, be non-political and recommended that he should be appointed by the President on the advice of the Prime Minister which he would tender after consultation with the Chief Justice of India and the leader of the opposition in the Lok Sabha. This was a novel combination for the appointment of Lokpal, virtually providing for participation of all the three organs of the state and thereby making a representative of the executive, the parliament and the judiciary.

Prof. M.K. Jain felt that by not involving the Lok Sabha directly, it gives impression that the Lokpal will be merely an appendage of the administration since he is to be appointed on the advice of the Prime Minister. This is not well founded because in the Lok Sabha, the Prime Minister with his majority can always get his nominee through and the role of the opposition will be merely that of an 'on-looker.' Moreover, by bringing the matter to the floor of the House, there will be every possibility of the matter being politicised. It is essential that in the appointment of the Lokpal, there should be no dissent otherwise his acceptability will be affected. Secondly, the question will arise, why only

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16. In a personal interview, Mr. Peer Lorenzen, the Deputy Ombudsman of Denmark on 17th and 24th Oct., 1973 at the University College, London mentioned that when Prof. Stephen Huititz was contacted for appointment as the 1st Ombudsman of Denmark, he made it clear that he would accept the position only if there will be no dissent in the parliament. He remained Ombudsman for sixteen years. A convention has developed to keep the Ombudsman out of politics and not to appoint a person with strong political views.
the Lok Sabha should be associated. Rajya Sabha is also the integral part of the parliament. If the appointment of the Lokpal is made a matter of discussion in both the Houses, it can result in undesirable situations. Consequently, it should be avoided.

Bills of 1963 and 1971 introduced certain changes. They provided that the President shall appoint the Lokpal after consultation with the Chief Justice of India and the leader of the opposition in the House of People or if there is no such leader, a person elected in his behalf by the members of the opposition in that House in such manner as the speaker may direct.\(^17\) The President was not specifically required as recommended by the Administrative Reforms Commission to appoint the Lokpal on the advice of the Prime Minister. The Joint Committee of the Parliament on the Bill of 1963 approved the aforesaid appointment procedure. In a dissenting note, one of the members, Shri Sunder Narain Sinha suggested that since the leader of the opposition was to be consulted, it was only proper that the leader of the Group in power, namely, the Prime Minister should also be consulted.\(^18\) This suggestion was not accepted by the Committee, presumably because it was of the view that the appointment by the President means appointment by the Prime Minister.\(^19\) The Constitutional position is that the President is required to act upon the advice given by the Council of Ministers.\(^20\) In another note of dissent, Shri. Maharaja Lartap Keshari Deb suggested that a Subcommittee may be formed consisting of the Prime Minister,

\(^{17}\) Clause 3(1)(a) of the Bills of 1963 and 1971.  
\(^{19}\) Ibid., Constitution of India, Article 74(1).  
\(^{20}\) Constitution of India, Article 74(1).
the Chief Justice and the leader of the opposition to make a recommendation to the President for the appointment of Lokpal. In some other notes, it was recommended that the Chief Justice’s counsel should be made binding and in the interests of equity as well as maintenance of good relations between the two Houses, the leader of the opposition (for purposes of appointment of Lokpal) should be jointly elected by the opposition members of both Houses. When the bill came for discussion before the Lok Sabha, the emphasis was that the appointment of Lokpal should be free from the influence of the Government. It was suggested that the words ‘after consultation should be substituted with ‘in consultation’, i.e., in consultation with the Chief Justice of India and the leader of the opposition, so that it becomes imperative on the President to appoint only that person who has been recommended by them. In reply, the Minister of State in the Ministry of Home Affairs informed the House that the Lokpal is not contemplated to be constitutional dignitary, he is not going to be appointed by this House or any other House or the Supreme Court. He made it clear that the Lokpal will be appointed by the Government. He added that the President shall not be exercising the authority to appoint the Lokpal independent of the executive Government because the President has no right to appoint anybody without the advice of the Council of Ministers. A point of order was moved by member O.P. Tyagi that the Minister has gone beyond the

21. [Source 19, p. XIX.]
22. [Source XXII.]
23. [Source XIV, XXI.]
The position of the Government was once again reiterated when the Minister of Home Affairs, intervening in the debate, said that the Lokpal is an important authority that we are creating by an Act of Parliament but not as an agent of Parliament as the Parliamentary Commissioner is under the U.K., Act. This stand of the Government was contrary to the fundamental principle underlying the institution of Ombudsman. The sine qua non of Ombudsman is, freedom from political connections. The history of the origin of Ombudsman in Sweden draws a line between the King's Ombudsman and the Parliamentary Ombudsman. It is the Parliamentary Ombudsman that we are dealing with who cannot be made the spokesman of the Government. The provisions regarding appointment as incorporated in the Bill were approved by the House. The Bill, however, lapsed because the Lok Sabha was dissolved before it could be taken up for consideration by the Rajya Sabha. The Bill of 1971 was not otherwise taken up for consideration.

A similar process of appointment was provided by Section 3 of the Bihar Lokayukta Act, 1973. It came up

27. C.M. IVagi, C. 236 (Ug., 1969).  
28. C.M., Y.B. Chavan, C. 868 (August 13, 1969). It seems that the then Minister of Home Affairs was not familiar with the provisions of the Parliamentary Commissioner Act, 1967. Under Sec. 1(2), the Commissioner is appointed by Her Majesty (which means on the advice of the Government) and the Parliament plays no role in his appointment. So how could the Parliamentary Commissioner be an agent of the Parliament?  
for review of the Jatna High Court in the case of Ram Narain Singh v. S.V. Soni.

The division bench held that the appointment of Lokayukta as envisaged in Sec. 3 has to be made by the Governor with the aid and advice of the Council of Ministers. It was further pointed out that if it were not so, it would be against the concept of parliamentary form of Government. It was added that 'although leader of the opposition will have an effective role to play, the State Government would have no hand in the appointment'. This appeared to the court to be 'inconceivable' unless there was something in the Statute which could 'irresistibly lead to the conclusion that the legislature had not contemplated aid and advice of Council of Ministers in making of the appointment'. This clears the controversy that even if the statute does not specifically provide for consultation with the Council of Ministers, still the executive head cannot act otherwise. It would be appropriate if this consultation is specifically provided in the legislation itself rather than leaving it to be governed by the general position that the President or the Governor can only on the aid and advice of the Council of Ministers. In the instant case itself, a note of the then Chief Minister to the Governor regarding the appointment of Lokayukta was filed before the High Court which read as follows:

In this connection I have already deliberated with you. In my opinion, it is not necessary to obtain the opinion of the Council of Ministers in this connection.

32. [1976 Jatna 36.
33. Id., 44-45.
34. Id., 41.
In view of this note, it was contended that the appointment had been made without the aid and advice of the Council of Ministers. From this note, it is clear that the Chief Minister had not participated in the appointment of the Lokayukta and yet the appointment was held valid by the Court. It was held valid on the basis of article 163(3) of the Constitution of India which reads:

The question whether any, and if so what advice was tendered by Ministers to the Governor shall not be inquired into in any court.

The Court interpreted this provision by saying that even where facts are admitted no conclusion is possible without inquiring into it and since inquiry is barred, it would not look at the note of the Chief Minister. Accordingly, this meant that even if any information is volunteered, the court will ignore it. 'Inquire' means, to make search, seek information, ask for or ask to be told. If a particular document is a part of the record of the court which the court had never asked for, to make use of the document cannot tantamount to 'inquire'. It is submitted that the reasonable interpretation of article 163(3) would be that the Court will not ask for the details of the advice tendered to the Governor but if the information is supplied suo moto, it would decide in accordance with it. Otherwise, if the Lokayukta is appointed by the Governor and the State challenges it on the ground that the Council of Ministers was not consulted, the Court will still have to hold it valid in view of the interpretation given to article 163(3). This would mean that the Governor could make all the appointments without consultation and the State Government could be rendered helpless.

35. Id., 46.
The Bill of 1977 modified the procedure for appointment. It provided that the President shall after consultation with the Chief Justice of India, the Chairman of the Council of States and the Speaker of the House of People, appoint, by warrant under his hand and seal, a person to be known as the Lokpal. This modification provided for the participation of both the Houses of Parliament through the Chairman and the Speaker and thereby ensured the Lokpal, a parliamentary base. But once again, the Government has chosen to be silent about its own participation. It is desirable that this aspect should be specifically and explicitly spelled out. If the intention is that the Prime Minister should have no say in the appointment of the Lokpal, it would perhaps be welcomed since this will ensure that the Lokpal will not be the nominee of the Government. If, on the other hand, it is intended that the Lokpal is to be appointed after consultation with the Prime Minister, it would be equally important to include the leader of the opposition. In fact, the Joint Committee of the Parliament on this Bill had recommended that in order to associate the Parliament with the appointment of the Lokpal, provision may be made to enable the Chairman and the Speaker to consult the leaders of various parties and Groups in their respective Houses of Parliament. This aspect cannot be overlooked in the appointment of the Lokpal. The Government did not incorporate this suggestion when the Bill was brought before the House.

Mr. Rajeev Bhavan has raised another issue by pointing out:

37. The Bill of 1977, cl. 4(1).
(S)ince the consultative process by which the Lokpal is appointed is not binding on the President and the advice of the Prime Minister is binding on the President, these provisions conceal the important fact that it may well be the Prime Minister who appoints the Lokpal. Under the Constitution, it is not the advice of the Prime Minister which is binding, it is that of the Council of Ministers. He as the leader communicates to the President. It would be wrong to equate the two as it has been clearly brought out in the Report of the Shah Commission. Once again, if it is intended that the Prime Minister and not the Council of Ministers is to be associated in the consultative process of the appointment of Lokpal, there will be no organisational difficulty. The consultative group comprising of the Prime Minister, Chief Justice, Chairman and the Speaker, (leader of the opposition if included) could meet together, decide upon a common candidates and advice the President for warrant of appointment accordingly. Whereas, if it is intended that it is the Council of Ministers which is to be consulted, it would bring in the practical difficulty of how to decide upon a common candidate. Under the circumstances, it would be better if the Prime Minister is expressly included in the consultative process of the appointment of Lokpal.

41. Constitution of India, Article 74(1).
It would be worthwhile to consider the suggestion given by Member Rupesh Gupta in his dissenting note to the Report of the Joint Committee on the Bill of 1977. He has suggested that the Lokpal should be appointed by the Parliament in the manner in which the constitutional amendments are made, that is, by a clear majority of the total members and by a majority of not less than two-thirds of the members present and voting in each House. This he believed will make the process of consultation for arriving at a consensus real and effective. Such a direct election of the Lokpal will not be without precedent. In Sweden, there is tradition that an Ombudsman must be acceptable to all parties and they have been elected by acclamation ever since 1971 when the unicameral system was introduced. Previously, the appointments were made by 43 electors, 24 from each of the two Chambers of Riksdag. In Finland, the Ombudsman is elected by Parliament through a secret ballot and without formal nomination of candidates. In Denmark and Norway, the Ombudsman are elected by their respective Parliaments. Interestingly, the Government of Alberta in Jan., 1967 ran a large advertisement in newspapers across Canada, seeking applications for the appointment of an Ombudsman. 230 applications were received out of which an Ombudsman was chosen by a Committee of the legislature. In electing the Lokpal, the big snag will

43. supra note 39, p. XVIII.
46. The Ombudsman Act, 1954, Section 1.
be that it will have political overtones. His insolation from the political parties is very much desirable. Prof. P.K. Tripathi has given a useful suggestion. If the Chief Justice of India could give a panel of names and the Prime Minister and the leader of the biggest opposition party could jointly reach a consensus on a particular name which could be approved by a unanimous vote in the House. Following this suggestion, if a convention could be developed that the Lokpal is to be appointed only by a unanimous vote in the House, it would strengthen the position of the Lokpal and he would truly become the representative of the Parliament.

QUALIFICATIONS:

Administrative Reforms Commission did not recommend any special background or qualifications for the Lokpal. In tune with this report, the Bills of 1968, 1971 and 1977 made no specific provision for it. The Joint Committee on the Bill of 1963 did not recommend any such requirement. In a dissenting note to the Report, it was pointed out that whenever a demand for an enquiry is made in or outside Parliament, it is invariably for a Judicial enquiry. In view of this and in order to inspire confidence, appointment of the Lokpal should be made from amongst the acting or retired Judges of the Supreme Court or an eminent lawyer of integrity and standing and that of the Lokayukta from amongst the Judges of High Courts whether retired in service and lawyers of integrity and sound knowledge. This, it was argued will help them to examine all matters with impartiality and with a judicial mind. When a similar demand was made in the Lok Sabha, the Government justified its stand by bringing it to the notice of the House that they had the benefit of evidence.

50. Joint Committee Report, supra note 13, p. XXX.
before the Joint Committee of legal luminaries 51 and of those people 52 who are very much respected in the legal field and that they were almost unanimous in their opinion that none of the retired Judges should be considered for the post of Lokpal 53. It was made clear that Government does not wish to restrict the choice for the Lokpal and the retired Judges of the Supreme Court or of the High Courts are not excluded for this purpose. Therefore, it was not necessary to include any provision in the Bill of this type. 54 On the other hand, in a dissenting note (signed by 15 members) to the Joint Committee Report on the Bill of 1977, demand was made to specifically disqualify the sitting and retired Judges from being appointed as the Lokpal. The reason assigned was that the executive can always dangle such juicy posts as carrots before such Judges which in principle and effect is likely to undermine Judicial independence. 54-55 No doubt, the Judges of the Supreme Court as also of the High Courts have been held in high esteem and have inspired the confidence of the public. It is also true that the success of the institution will depend upon the public image of the person occupying the position. But limiting the choice only to them will not be healthy. The State legislations of Maharashtra, 55 Bihar 56 and Rajasthan 57 have followed the pattern of Central Bills of not specifying any such requirement.

51 K.C. Setalvad, C.K. Dayhary, Dr. L.K. Singhvi, Salohan Kumar Manangalan, Prof. L.K. Tripathi
52 K.K. Sapru, S.H. Mall, K. Sant, Dr. N. Ramzan, N. Seemalnava Rai
53 The rationale of this opinion was that if they are specifically made eligible for the appointment of Lokpal, it would make them look forward to the Government during their tenure as Judges.
55 The Maharashtra Lokayukta and Upa-Lokayukta Act, 1971, Sec. 3.
56 The Bihar Lokayukta Act, 1973, Section 3.
57 The Rajasthan Lokayukta and Upa-Lokayuktas Act, 1973, Sec. 3.
The legislations of U.P. and Karnataka have limited the choice to Judges. Section 4 of the U.P. Act provides:

The Lokayukta shall be a person who is or has been a Judge of the Supreme Court or a High Court.

The difficulty which will arise in the implementation of this provision will be that if the State Government is interested in appointing a sitting Supreme Court Judge, can it really do so and will ever a sitting Judge of the Supreme Court would like to relinquish his position in order to take up as the State Lokayukta? This difficulty has been guarded against in the Karnataka legislation which provides:

Governor shall appoint a person who has held the office of a Judge of the Supreme Court or who holds or has held the office of a Judge of a High Court to be known as the Lokayukta for the State.

With the result, only the retired and not the sitting Judges of the Supreme Court can be asked to take up this position. In actual practice, the choice in States so far has fallen on Judges (both retired and sitting), with the only exception of the first Lokayukta of Bihar who was a retired civil servant.

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53. The Karnataka Lokayukta Ordinance, 1979, Sec. 3.
   J.R. Shrimpi: Judge of the Bombay High Court.
   N.D. Kamat: Former Judge of Bombay High Court.
Rajasthan: B.D. Bia: Former Judge of the Punjab High Court, Chief Justice of Delhi High Court, Judge of the Supreme Court.
   R.K. Gupta: Judge of Rajasthan High Court.
Bihar: Shyam Pandan Irasad Singh: Former Chief Justice of U.P. High Court.
Karnataka: C. Ranganath: Former Chief Justice of the Karnataka High Court.

60. Dr. S.V. Sohoni: Retired from Indian Civil Service.
A perusal of different ombudsman legislations would show that in a majority of countries, the law does not provide for any specific background or qualifications. The Scandinavian countries do uniformly stipulate a strong legal base for the Ombudsman. In practice, however, whether or not any such qualifications have been provided, the appointments have normally been made of persons with legal background, judges, lawyers and law professors.

61. Australia, New Zealand, United Kingdom, Northern Ireland, Fiji, Guyana, United Republic of Tanzania, Canadian provinces: Alberta, Manitoba, New Brunswick, Nova Scotia, Quebec.

62. The Instrument of Government in Sweden, Article 96 provides that the Ombudsman shall be of known legal ability! The Finnish Constitution Act, 1919 (as amended Jan. 15, 1971), Article 49 states that the Ombudsman shall be a person known as eminently versed in the law! The Swedish Ombudsman Act, 1954 (amended by Act No. 253 of June 9, 1971), Sec. 2 specifies that Ombudsman shall be a 'law graduate'; The Norwegian Ombudsman Act, 1967, Sec. 1 requires that the Ombudsman must have the qualifications demanded for a 'Judge of the Supreme Court.'

63. Norway's first Ombudsman, 'Andreas Rolfsen, was a Judge of the Supreme Court; the second appointee of Norway, Erling Sande, was again a Supreme Court Judge; Swedish Ombudsman, Alfred Bevianius was a Judge for 44 years before he was first appointed the 'temporary Ombudsman' and then Ombudsman; Ulf Lundvall who retired as Ombudsman of Sweden on Dec. 1973 was formerly a Judge; Fijian Ombudsman Koti Nikaram was a puisne Judge of the Fiji Supreme Court, the present Ombudsman of the province of Ontario (Canada), Hon'ble Donald Horn was formerly a Justice of the Supreme Court of Ontario for over eighteen years.

64. The present Parliamentary Commissioner for administration in U.K., G.H. Clothier is a barrister and a former Judge; the first Ombudsman of the province of Ontario (Canada), Arthur Maloney was a well known criminal lawyer; the Ombudsman of the province of Saskatchewan, David T. Tickell was the crown solicitor in the attorney-General's Department; Dr Sir Guy Andres, New Zealand's first Ombudsman was a trained lawyer; the Ombudsman of the State of Alaska (U.S.A.), Francis H. Flavin was a lawyer.

65. Danish Ombudsman, Mr. Stephan Hurnitz; Australian Commonwealth Ombudsman, Jack H. Richardson was Robert Garran Professor of Law at the Australian National University. The Ombudsman of British Columbia (Canada), Dr. Karl Friedmann at the University of Calgary. Ombudsman of Quebec (Canada), Dr. Luce Patenaude was a law professor at the University of Montreal.
In New Zealand, the present Chief Ombudsman is a former civil servant. In the U.K., the first three parliamentary Commissioners were former civil servants. The appointment of the civil servants has been defended in the U.K. on the ground that the Commissioner should be someone who has a first-hand knowledge and experience of the inner workings of Whitehall departments. This can, however, be equally embarrassing for the incumbent if he is asked to investigate a complaint of a department to which he belonged earlier as it happened in the case of Sir Ian Garre. In a Report by Justice, it has been criticised that the office should always be held by a former civil servant, has pointed out that a person from outside the civil service would look at methods in the Deparments with different preconceptions and, therefore, possibly more critically and would bring a greater degree of independence to the office. In view of the criticism, the present holder of the office is a barrister. This does not mean that a former civil servant should be ineligible for appointment. It may be desirable that some reasonable quarantine period is provided (may be two years). With the result, no civil servant may be asked to take up the office earlier.

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66. Sir George L. Laking was formerly Secretary of Foreign Affairs
69. Sir Ian Garre, former Parliamentary Commissioner of England found himself investigating complaints against his former Department over invalid tricycles, the Invalid Tricycle Action Group criticised his report for failing to acknowledge his own previous interest (HC 529 of 1974-5). Sir Ian issued a statement denying that he had been influenced by the fact that he was the senior civil servant responsible for that policy between 1961-71. The Select Committee on the Parliamentary Commissioner made a special report to rebut the allegations against the Commissioner and to express their satisfaction at his impartiality. (HC 168 of 1975-6).
71. C.B. Clothier.
72. The Nebraska Public Counsel Act, 1969, Section 31-3, 242 provides, 'No person may serve as Public Counsel within two years of the last day on which he served as a member of the Legislature.'
than two years from the date he retires from civil
service. The reasonable time lapse will help in breaking
up his direct bearing with the civil service. In
France, the Federal Republic of Germany, formal
parliamentarians have been appointed Ombudsmen. In
Nova Scotia, a Professor of French was appointed the
Ombudsmen. It is evident from this that legal background
cannot be considered as the sole criteria for the
appointment of Ombudsmen.

It has been justifiably observed that finding
the right man for the Ombudsmen could even prove a more
difficult exercise than drafting the legislation for the
creation of the office. Seeking in view the nature
of duties that the Ombudsmen has to perform, it has been
counselled that he must be a person with wide knowledge,
high prestige, personal merit, great energy and abundant
courage. He must be able to stand against criticism,
concerned more about discharging a job of social worth
than with his personal popularity. Socrates has listed
four belongings of a Judge: to hear courteously, to answer
wisely, to consider soberly and to decide impartially.
This can be a good description of an ideal Ombudsmen as well,
with this as the general background, if a person with

73. The first Mediator of France, Antoine Pinay had been
Minister of Finance from 1953 to 60 in the Governments
formed by De Gaulle. The second Mediator, Aimé Jacquet had
been a leading member of the group of Republican
Independents in the National Assembly.
74. First Ombudsmen, Fr. Johannes Baptist Toeler, at the
time of appointment was President of the Land Assembly
and head of its Petitions Committee.
75. Harry J. Smith had been principal of King's College
at Dalhousie University and at the time of appointment
was a professor of French at Nova Scotia Teacher's College.
76. B. A. Land, Interim Report of the Committee on
Administrative Inquiries, Australia, 15 (Jan., 1973).
77. The Royal Bank of Canada Monthly Letter,
Supra note 29, p.4.
legal training is needed, he will be able to run his office effectively and efficiently.\textsuperscript{78} Sitting Judges should be avoided under all circumstances. Retired Judges should not be legally barred from being appointed as Lokpal and Lokayuktas but they should not be the only source for these appointments. eminent lawyers, law teachers, public men and senior administrators with legal background could be the useful avenues for picking up people for these positions.

The Administrative Reforms Commission had recommended that the Lokpal should be demonstrably independent and impartial.\textsuperscript{79} This recommendation was incorporated in all the three Bills.\textsuperscript{80} In order to ensure that the Lokpal is above suspicion, the Bill of 1977 provided that he must resign from the membership of the Lokpal in case he is a member at the time of appointment. If he holds any office of trust or profit, he is to resign from that. If he is connected with any political party or carrying on any business, he has to sever his connections. If he is practising any profession, he is not to continue with it.\textsuperscript{81} Provisions of this nature have been included in the legislations of Denmark,\textsuperscript{82} Fiji,\textsuperscript{83} Ireland,\textsuperscript{84} and New Zealand.\textsuperscript{85}

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\textsuperscript{78} See, andersen, supra note 29, p. 40; and,  
\textsuperscript{79} supra note 18, para. 75(a).  
\textsuperscript{80} Bill of 1973, cl.4; Bill of 1971, cl.4; Bill of 1977, cl.5.  
\textsuperscript{81} Bill of 1977, cl.5.  
\textsuperscript{82} Directives adopted by Folketing on Feb. 9, 1962 in pursuance of anti-Ombudsman Act, 1954 (Act No:293) Art.15.  
\textsuperscript{83} Constitution of 1971, article 112(3).  
\textsuperscript{84} Instructions for the Parliamentary Ombudsman (amended on Jan. 1, 1972), article 14.  
\textsuperscript{85} Ombudsmen Act, 1975, Sec.4.  
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whereas legislations of Australia, U.K., and Sweden are silent. Even where no such bar has been specifically provided, Ombudsmen have not occupied dual positions and have not played dual roles. There are no such examples where the Ombudman was also simultaneously a member of the Parliament or a member of a political party or continued with his office, business or profession. It is an admitted fact that Ombudsmanship is not a part-time job and it cannot be mixed up with any other office or position. In fact, during his tenure as Ombudman, he has to sever all his links and connections and has to bring all the impartiality to the office that he occupies. Another provision of consequence in the Bill of 1977 was:

In order to hold office, the Lokpal shall be ineligible for further employment to any office of profit under the Government of India or the Government of a State.

This bar was still more far-reaching in the Bills of 1963 and 1971, where no employment could be taken up even with any local authority, corporation, government company or society. Similar bar has been provided in the State legislations of Maharashtra, Bihar, Rajasthan, U.P., and Karnataka, where the Lokayuktas are in operation.

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88. Swedish Constitution, article 96-100.
89. Bill of 1977, cl.6(2).
90. Bill of 1963, cl.5(3); Bill of 1971, cl.5(3).
91. The Maharashtra Lokayukta and Upa-Lokayukta Act, 1971, Sec. 53.
92. The Bihar Lokayukta Act, 1971, Sec. 5(2).
93. The Rajasthan Lokayukta and Upa-Lokayuktas Act, 1973, Sec. 5(3).
94. The Uttar Pradesh Lokayukta and Upa-Lokayuktas Act, 1975, Sec. 5(2).
95. Karnataka Lokayukta (Ordinance, 1979, Sec. 5(2).
presently. There is no reported case where a Lokayukta on ceasing to hold the office might have taken up some employment. There is no comparable provision in the legislations of other countries. On the contrary, the legislations of Denmark, Fiji, New Zealand permit the Ombudsman to take up another office of emolument with the prior permission of Parliament in case of Denmark; and of the Prime Minister in case of Fiji and New Zealand. Again, there is no reported instance where the Ombudsman may have sought the permission to take up another office during his tenure. In the case of province of Saskatchewan (Canada), the Ombudsman resigned to take up as Chief Judge of the Magistrates Courts and of the province of Quebec (Canada) to take up as the Judge of the Federal Court of Canada. Such a blanket bar as contemplated in the Indian proposals and legislations will probably dissuade many a person to take up the office of Lokpal or Lokayuktas. It has been observed by Dr. Bajeev Thaven that the office will be attractive only to those who have retired or are in a semi-retirement position. He is fortified in this by the fact that out of nine appointments so far made of State Lokayuktas, six have been retired Judges, one retired civil servant and two sitting High Court Judges. Such a restriction will also appear at first sight to be out of tune with the Constitution. The only bar imposed

96. supra note 32, Article 15(2).
97. supra note 33, Article 112(4).
98. supra note 35, sec. 4.
100. Ibid.
101. Thaven, supra note 40 at p.283.
102. supra notes 59 and 60.
on the Supreme Court Judges is that on retirement, they
will not plead or act in any court or before any authority
within the territory of India and in the case of a
permanent Judge of a High Court, he cannot plead in the
High Court where he has been a Judge but can do so in
other High Courts and the Supreme Court. There is as
such no constitutional bar imposed on their taking up
employment with the Government. There are no instances
of Judges having taken up employment with the Government,
but retired Judges have been given assignments such as
Chairman of Law Commission, Commission of Inquiry, Jail
Reforms Commission. The list is only illustrative. Dr. Rajeev Dhavan is of the view
that in the light of the proposed restriction, none of
these options will be open to the Lokpal. It is
submitted that this is not the correct reading of the
constitutional position. The Constitution imposes
prohibition that the Chairman and members of the Union
Public Service Commission as also the State Public
Service Commission will not take up employment with
the Government of India or the Government of a State
on ceasing to be such Chairman or member. The ambit
of this prohibition has been explained by the Supreme Court

103. Constitution of India, article 124(7).
104. Id., Article 220.
105. R. Bidayatullah, former Chief Justice of India.
106. H.C. Chagla.
109. Tek Chand (Haryana Jail Reforms Commission).
111. Dhavan, supra note 40, p. 269.
112. Constitution of India, article 319.
that the employment can be said to be under the Government of India if the holder or incumbent of the employment is under the control of the Government of India vis-à-vis such employment.\textsuperscript{113} The Supreme Court has held that the office of the Governor is not under the control, subordinate or subservient to the Government of India. This is an independent constitutional office.\textsuperscript{114} Similarly, the Supreme Court has also held that a High Court Judge is not a Government servant; there is no relationship of employee and employer subsisting between him and the Government.\textsuperscript{115} On the basis of this constitutional position, it can be argued that, in spite of the proposed restriction, there would be no bar on ex-Lokpals and Lokayuktas being appointed to those positions which cannot be described as under the control of the Government or the Government cannot issue instructions to the holder as to how he has to discharge his functions. The list of such positions can be impressive such as President of India, Vice-President of India, Governor and Comptroller and Auditor General of India. There will equally be no limitation on their being appointed as High Court and Supreme Court Judges. In fact, their experience as Lokpals and Lokayuktas will be useful in performing the duties of a Judge. Article 134(3)(a) can be amended to include:

\begin{quote}
has been for at least five years a Judge of a High Court or of two or more such courts in succession or Lokpal for the same duration,
\end{quote}

Similarly clause 'C' can be added in article 217(2) in order to make the State Lokayuktas qualify to be appointed as High Court Judges. In Sweden, when Ombudsmen leave

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\textsuperscript{113} Hariprakash v. Radhakul, (1979) SC 1109 at p.1113.  
\textsuperscript{114} Ibid.  
\textsuperscript{115} Union of India v. P.S. Seth, (1977) SC 2329.
\end{flushright}
office, they are quite often appointed Judges of the Supreme Court. There will also be no difficulty even in the presence of employment bar in the appointment of erstwhile Lokpals and lokayuktas on Commissions of Inquiry or other Commissions or on ambassadorial assignments.

In the context of this legal position, how far will it be justified to continue with the prohibition of employment under the Government of India or that of the State? The prohibition has been contemplated in public interest with a view to ensure that no allurement is held out to the Lokpal or lokayukta which would deflect him from his duty. The prospect and peril of the executive trying to influence overtly or covertly by holding out the possibility of employment under the Government after the expiry of their term of office may corrupt the Lokpal or the lokayukta. It is true that they will be men of proven merit and integrity and normally no allurement will deflect them from their duty but the possibility cannot be completely ruled out. The office of the Lokpal should be kept beyond reproach and above suspicion. Explaining the raison d'etre for imposing moratorium on future employment of Chairman and members of Public Service Commission, Dr. B.R. Ambedkar said in the Constituent Assembly:

(That is a very salutary provision, because any hope that might be held out for reappointment, or continuation in the same appointment, may act as a sort of temptation which may induce the member not to act with the same impartiality that he is expected to act in discharging his duties.)

116. IN. CM, 575 (August 22, 1949)
Member H.Y. Kamath also spoke in the same stride when he pointed out that if a Member of the Public Service Commission is under the impression that by serving and bowing to those in power, he could get an office of profit, then he would not be able to discharge his functions impartially or with integrity. It is evident from this that the constitutional makers were anxious to insulate them from Governmental temptations. Same will hold good for the Lokpal and Lokayukta.

In the background of this constitutional position, it can be summed up that the employment restriction be continued in our Lokpal legislations. This would be no hindrance in appointing them in only appropriate cases to positions which have been delineated above. It would no doubt still be a handle in the hand of the Government to use it as and when it wants. To specifically make an exclusion that they will not be eligible to be appointed as Judges, Governors etc., will not be a desirable step. It will be out of line with the constitutional scheme. If Judges and members of Public Service Commissions can be appointed to different offices, there would be no rationale to exclude Lokpals and Lokayuktas. Moreover, if they are put in such a separate class, deserving people will not be willing to accept the position except those who have retired or are nearing retirement. It would certainly be a waste of rich experience if a blanket ban is imposed on their future appointments.

The Bills do not provide for any age requirement. Prof. H.I. Jain's suggestion is that maximum age for

117. Id., 589.
118. Dr. Rajhukul Tilak who was member of Rajasthan Public Service Commission during 1953-59 was appointed Governor.
appointment should be fixed at 65. This he justifies on the ground that the office needs a good deal of active work and then no retired Supreme Court Judge would be qualified to be appointed as the Lokpal which will result in good public esteem as far as the highest court in the land is concerned. 

It is probable, looking forward psychology of Judges has prompted Prof. Jain to take this stand. However, can the mere exclusion of the possibility of being appointed as the Lokpal change the psychology of Judges? On the other hand, Prof. Jain's contention ignores the rich contribution and objective approach which retired Judges would bring to bear upon the problems to be handled by the Lokpal or the Lokayukta. On the basis of Prof. Jain's argument, one could even say that Judges of the Supreme Court should be directly appointed and not from the High Courts which would make the State Judiciary more independent and forward looking. In Scandinavian countries, no age bar has been provided. New Zealand legislation requires the Ombudsman to resign his office on attaining the age of 72 years and in case of Australia and the U.K., it is 65 years. No useful purpose will be served by putting an age bar. The public confidence in the independence of Judiciary would prove an asset if in deserving cases retired Judges of the Supreme Court and of High Courts are appointed Lokpal and Lokayuktas.

120. Jain, supra note 15, p.163.
121. Ombudsman Act. 1975, Sec.5.
122. Ombudsman Act. 1976, Sec.22(2).
The Administrative Reforms Commission was in favour of fixed term of five years with eligibility for reappointment for another term of five years. Provision to this effect was included in the Bill of 1963. The Joint Committee was not in favour of giving a second term to the Lokpal and recommended its deletion for two reasons, one that it will not ensure the impartiality of the Lokpal and secondly, it will involve the risk of a person being retained for a longer period even when more suitable and competent persons are available. Since, it was not a case of automatic second term, there could not be much of base for this. If a more suitable person is available, there is nothing to prevent the appointment of that person. The Government accepted the amendment of the Committee and justified it by explaining that the main purpose of this is to see that there is no suspicion in the people's mind that the incumbent to this high office is trying to do things to ensure his continuance for a second term. The Bills of 1971 and 1977 only provided that the Lokpal shall hold office 'for a term of five years'. It was not made clear whether they will be eligible for re-appointment or not? In the absence of any express bar, they could be re-appointed. The State enactments have uniformly followed the Bill of 1971 in this respect. So far, in the States no Lokayukta has been given a second term of appointment.

125. Joint Committee, supra note 13, VII.
128. Bill of 1977, cl.6(1).
129. Section 5(1) of Lokayukta Acts of Maharashtra, Bihar, Rajasthan and U.P.
No uniform pattern is discernible from other countries with regard to the tenure of Ombudsman. There is on the other hand a wide variety of approach, eg.

(1) In Denmark, Norway, Ombudsmen are appointed for the term of the Parliament. In Finland and Sweden, Ombudsmen are appointed for a term of four years and the term of the Parliament is also the same. The rationale behind this is that Ombudsmen is a representative of the Parliament. Each Parliament should have the right to appoint its own Ombudsman. One Parliament should not hand over an Ombudsman to another Parliament.

Up-Lokayukta L.N. Madhani acted as Lokayukta when A.K. Shimpli took office on Jan 2, 1973 as Lokayukta. He resigned in Jan, 1979. Thereafter retired Judge M.D. Kumar was appointed the Lokayukta. Malabar, LIA, Nia took over as the first Lokayukta on Aug, 1973, completed his five years term in Aug, 1971 then Justice S.P. Gupta took over as acting Lokayukta. Later, first Lokayukta Mr. S.S. Kohoni took over on May 27, 1973, retired on May 27, 1973 then Justice S.L.K. Singh took over from him.

131. The Ombudsman Act, 1954 (as amended by Act of June 9, 1971), Sec.10(1) provides, 'After every general election and when vacancy occurs the Folketing shall elect an Ombudsman......' according to The Constitution of the Kingdom of Denmark Act, 1953, Part I, Sec.32(1), Folketing is elected for a period of four years.

132. The Storting Ombudsman Act, 1962, Sec.1 provides: 'After each parliamentary election the Storting shall elect an Ombudsman......' Constitution of Norway, 1914, Sec.54: Storting is elected for a period of four years.

133. Parliament Act, 1928 (as amended on July 30, 1955), Chapter 1, Article 3; The Constitution Act, 1919 (amended on Jan 15, 1971), Art.49, (Initially in Finland, the term was one year, then raised to three years and in 1957 extended to four years).

134. The Riksdag Act, Chapter 3, Article 10.
There are number of systems where fixed terms of 5, 6, and 10 years have been provided. The idea behind fixed term is that the Ombudsman should not be made dependent upon the Parliament, should rather be independent of it. No doubt, he is an agent of the Parliament but he should not be made to go with the Parliament, otherwise it would give an impression that Ombudsman represents the Government of the day. Parliament reflects in fact if not in law, the views of the majority party. A fixed term would conceivably help in ensuring the impartiality and independence of Ombudsman.

Some systems put a limit of two to three terms. The object behind this being that the same person should not hold office for too long a period. If a person is allowed to continue for number of terms, the institution develops a pattern of its own and leaves little scope for innovations to be introduced.

In the United Kingdom, no set term has been provided but the Ombudsman continues up to the age of 65 years unless resigns or removed earlier. This means that if an Ombudsman is appointed at the age of 50, he can continue for 15 years. This would mean a long term and not linked up with the Parliament.

135. Riji, Ouma, United Republic of Tanzania (originally for two years).
137. Manitoba (Province of Canada), Hawaii, Nebraska (States of United States).
138. Australia.
139. New Brunswick (Province of Canada).
140. Manitoba.
141. Hawaii.
142. Parliamentary Ombudsman Act, 1967, Sec. 1(3),
135, 136, 137, 138, 139, 140, 141, 142.
So far four Parliamentary Oumilsonprs have been appointed. The first from 1966 to 1971, second from 1971 to 1976, third from 1976 to 1979 and the fourth took over on Jan. 3, 1979. In actual practice, this means that none of the incumbents had more than five years.

The experience has shown that in countries where fixed terms have been provided and there is no restriction on their being re-appointed, Commsenmen have been re-appointed for number of terms. The first Cmmsenmen of Sweden, Friherre Lars August Hannerheim held office from 1910 to 1923. Another well known Swedish Cmmsenmen, Alfred Saxlius had four terms from 1936 to 1972. The first Cmmsenmen of Denmark, Prof. Stepehn Finditzt continued from 1954-1971.

Similarly, the first Cmmsenmen of New Zealand, Sir Guy Bowles had long innings from 1963 to 1977. Prof. Donald S. Powat has advocated long appointments for the Cmmsenmen. He believes that with this, he would be much less subject to political influence from the members of Parliament in his handling of cases and would become better known and more influential and proficient as he would gain experience.

Prof. Stanley v. Anderson also confers to the view of Prof. Powat by suggesting that the Cmmsenmen should not be given a term less than that of the Parliament, re-appointment should be common and the first Cmmsenmen should serve at least two to three terms. In view of the experience of other countries, it would be desirable if a healthy convention of re-appointment of Lokpal and

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143. Sir Edmund Compton.
144. Sir Ian Barre.
145. Sir Ideal Hugh.
146. Mr. G. Clothier (He was 59 at the time of appointment).
Lokayuktas is developed or a longer term is provided. If they are made to go '4th the Parliament, it would mean with the Government, it would be a most retrograde step. It will fail in its object and purpose. It would be like appointing Judges for the term of Government. Each Government will have its own Lokpal and Lokayukta. If they are given a longer term, they will not be dependent upon the Government and will be able to function freely and frankly.

Another recommendation of the Administrative Reforms Commission was that the Lokpal will have the same status, salary and emoluments as that of the Chief Justice of India. The Bill of 1963 stipulated that these details will be laid down keeping in view those of the Chief Justice of India. The Bills of 1971 and 1977 prescribed the salary of the Lokpal equal to that of the Chief Justice and other conditions to be determined later keeping in view those of the Chief Justice. These could not be varied to his disadvantage after retirement. In Denmark, Finland, Guyana, Sweden, New Brunswick and Hawaii, Ombudsmen get the Judge's salary whereas in Fiji, Norway, United Kingdom, United Republic of Tanzania, Alberta, Nova Scotia, Quebec and Northern Ireland, the salary is left to be fixed by the parliament. In New Zealand, it is fixed by the Government and in Australia by the Remuneration.

151. Bill of 1971, Second Schedule; Bill of 1977, cl.6(3).
152. Bill of 1971, cl.5(6)(b); Bill of 1977, cl.6(5).
153. Bill of 1971, proviso to cl.5(6)(b); Bill of 1977, proviso to cl.6(5).
155. Ombudsman Act, 1975, Section 9(1).
Tribunal. It would be better if such provision is made whereby the Lokpal is equated in matters of conditions of service with that of the Chief Justice of India and the State Lokayuktas with Chief Justices of High Courts. This will avoid difficulties and will be easy to work out. At the same time, equating them with the Chief Justice will enhance their prestige which is essential for their successful functioning.

REMOVAL:

There is equally a large variety in the removal process of the Ombudsman. The Ombudsman can be removed by the executive head on specified grounds in United Republic of Tanzania whereas in Fiji and Guyana, he can do so only on the recommendation of a tribunal appointed for this purpose. In Australia, New Zealand and the provinces of Canada, Alberta, Manitoba, New Brunswick, Nova Scotia, the executive head can remove the Ombudsman on the resolution of Parliament. In Denmark and the U.K., the Ombudsman is directly removable by the Parliament whereas in Sweden on the request of the Committee which examines the annual reports of the Ombudsman. The Ombudsmen of Norway, Quebec, Hawaii and Nebraska are removable by two-thirds vote of the Parliament.

156. Ombudsman Act, 1976, Section 24(1).
158. Id., p.9.
159. Ombudsman Act, 1976, Sec. 29(1).
160. Ombudsman Act, 1975, Sec.6.
161. Weeks, supra note 154, p.10.
162. The Ombudsman Act, 1954, Sec.1(4).
163. Parliamentary Commissioner Act, 1967, Sec.1(3).
164. The Nikades Act, Chapter 3, Article 10.
165. Weeks, supra note 154, pp.10-11.
Parliament cannot remove the Ombudsman of Finland during his term of office. The only sanction the parliament can apply to the Ombudsman is that of refraining from re-selecting him at the end of his term. The common grounds for the removal of the Ombudsman are, inability to discharge functions or misbehaviour or misconduct. New Zealand and the province of Alberta provide for the added ground of bankruptcy. As yet there is no reported case where the Ombudsman may have been removed but recently the Ombudsman of the province of Ontario resigned because of his differences with the legislature’s Select Committee and threatened to go to the opposition party leaders to get the committee disbanded.

To entrust the executive with the power of removal of the Ombudsman will not be a sound policy. It would cut at the very base of the Ombudsman. To remove him on the basis of the recommendations of a tribunal does provide him a chance to explain his conduct. Empowering the parliament with the power of removal is relatively a better alternative. The opposition parties in the parliament will provide a good check and will prevent the removal of an Ombudsman who does not find favour with the Government of the day. The qualified majority for removal will further discourage the use of the removal power for frivolous or partisan political reasons.

The recommendation in this context of the Administrative Reforms Commission of India was that

167. Leeks, supra note 154, pp. 9-11.
168. Ibid.
the Lokpal should not be removable from office except in the manner prescribed in the Constitution for the removal of a Judge of the Supreme Court.171 This recommendation in the modified form was incorporated in the Bill of 1968 which provided that the Lokpal or the Lokayukta may be removed by the President on the ground of misbehaviour or incapacity after an inquiry as contemplated under Art.311 by a person appointed by the President who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court and after an address by each House of Parliament supported by a majority of the total membership of that House and a majority of not less than two-thirds of the members of that House present and voting.172 In a dissenting note by member B.H. Maharaaja Pratap Kesari Deo to the report of the Joint Committee on the Bill of 1963, it was suggested that since the Judges Inquiry Act, 1963 is now on the Statute Book, a similar procedure should be laid down for the removal of the Lokpal and the Lokayukta.173 On the other hand, the recommendation of the Joint Committee was that the inquiry contemplated should be conducted only by a sitting or retired Judge of the Supreme Court.174 No reason was assigned for the exclusion of the Chief Justice of a High Court. The Bill of 1971 introduced the recommendation made by the Committee,175 but it did not bring it in consonance

172. Bill of 1968, cl.6(1).
173. The Lokpal and Lokayukta Bill had been introduced in the Lok Sabha on May 9, 1968. Judges (Inquiry) Act received the assent of the President on Dec.5, 1968.
174. Joint Committee Report, supra note 13, p.XX.
175. Id., p.VIII.
176. Bill of 1971, Prov. to cl.6(1).
with the Judges (Inquiry) Act, 1969. The Bill of 1977 did the needful by providing that the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of the Lokpal shall be as provided in the Judges (Inquiry) Act, 1969 in relation to the removal of a Judge and, accordingly, the provisions of that Act shall, subject to necessary modifications, apply in relation to the removal of the Lokpal as they apply in relation to the removal of a Judge.\footnote{177} The State legislations have been formulated on the basis of the Bill of 1968.\footnote{178} This is understandable because these state legislations are prior to the Bill of 1977.

It would be relevant here to refer to the provisions of the Judges (Inquiry) Act, 1969. A motion for the removal of a Judge is required to be given to the speaker signed by at least one hundred members of the Lok Sabha or to the Chairman by at least fifty members of the Rajya Sabha. Thereafter, the Speaker or the Chairman as the case may be, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, either admit the motion or refuse the same. If the motion is admitted, the Speaker or the Chairman will constitute a committee comprising of a Judge of the Supreme Court, a Chief Justice of a High Court and a distinguished Jurist for the purpose of making an investigation into the grounds on which the removal is sought.\footnote{179} The Committee has been given the power to regulate its own procedure in making the investigation and is required to give a reasonable

\footnote{177} Bill of 1977, cl.7(2). 
\footnote{179} The Judges (Inquiry) Act, 1963, Sec.3.
opportunity to the Judge of cross-examining witnesses, adducing evidence and of being heard in his defence. In case of physical incapacity, the matter is required to be referred to the Medical Board which shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the Committee stating therein whether the incapacity is such as to render the Judge unfit to continue in office. At the conclusion of the investigation, the Committee will submit its report to the Speaker or the Chairman. If it contains the finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, no further steps are required to be taken and the motion pending in the House shall not be proceeded with. If the report be otherwise, then the motion together with the report would be taken up by the House in which it was pending. If the motion is adopted by each of the Houses of the Parliament with the requisite majority, then, the misbehaviour or incapacity shall be deemed to have been proved and address shall be presented to the President for the removal of the Judge.

This process indicates clearly that the Lokpal's removal will not be guided and controlled by the executive. It involves a number of checks and balances which are not only desirable but necessary also. With this procedure even a hostile Government with its majority in the Parliament will not be able to get rid of a Lokpal without a reasonable cause. This process would compare favourably with

190. Id., Sec.4(1).
191. Id., Sec.3(5) and (6).
192. Id., Sec.4(2) and (3).
193. Id., Sec.6.
194. See, Andersen, supra note 29, pp. 45-47 (It has been advocated that procedure should be such so that the Ombudsman should not be removable without a reasonable cause).
with any other Ombudsman system and will help the Lokpal to function free from any kind of fear or pressure of the executive. It would be better if the State legislations are modified to bring them in conformity with this process.

**His Jurisdiction and Functions:**

To begin with, the rationale underlying the institution of Ombudsman was to supervise the observance of laws and statutes as they may be applied by the courts and by public officials and employees. However, in Sweden and elsewhere, the area of the activity of Ombudsman has since been enlarged. In Sweden, an Ombudsman for Military Affairs was provided in the year 1915. Today besides the other Scandinavian countries, Denmark, Finland and Norway, Federal Republic of Germany and Israel have separate military Ombudsmen. In Sweden and Finland courts are included within the jurisdiction of the Ombudsman. Local Government matters are looked after by Ombudsmen.

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186. In 1915, the Riksdag found it necessary to separate the function of supervising the military authorities from the general supervisory functions of the Ombudsman and created a separate office for the control of the armed forces - the militiaman. In 1963, the two offices were amalgamated.
187. The Ombudsman Act, 1954, Sec.1(1).
188. Since 1933, the Ombudsman has turned over complaints from military to the Ombudsman. See, weeks, supra note 154, p.40.
189. The first Ombudsman created in 1952 was for military affairs. Today, there are two Ombudsmen, one for civil and the other for military affairs.
190. The Parliamentary Commissioner for the Armed Forces Law was enacted on June 30, 1957.
Besides all these areas, public officials continue to be the centre of activity of Ombudsmen in different countries. The main functions of the Ombudsmen in different countries are to supervise the observance of laws and statutes and investigation of arbitrary or unreasonable decisions, or decisions with improper motives or influenced by irrelevant considerations which result in maladministration causing injustice and giving rise to grievances of the people. This shows that the Ombudsmen is not linked with, or limited to any particular area. It would depend upon in which areas the Ombudsmen is needed in a particular country. There is nothing like the exclusive role of the Ombudsmen. Normally, it may be argued that there should be no Ombudsmen's supervision over the judiciary and yet Sweden and Finland have continued with it from the beginning.

194. The Ombudsmen Act, 1954, Sec.1(1).
195. Salto, supra note 166, at p.9.
196. Weeks, supra note 154, at p.36.
198. The Ombudsmen Act, 1975, Sec.13 read with Sch.1, Part III.
200. The Local Government Act, 1974, Part III.
201. Weeks, supra note 154, at p.36.
202. Id., p.37.
203. Ibid.
204. Id., pp.13-20.
already consumer ombudsmen, corporations ombudsmen, colleges and universities ombudsmen are functioning.

The jurisdictional and functional aspects of the Lokpal and Lokayuktas have passed through different stages. The recommendation of the Administrative Reforms Commission was that the Lokpal should inquire into a complaint of maladministration involving not only an act of injustice but also an allegation of favouritism to any person or of the accrual of personal benefit or gain to the administrative authority responsible for the act, namely, a minister or a Secretary to Government at the Centre or in the States. The Lokpal should also be authorised to investigate suo moto if he so considers necessary. The Bills of 1968 and 1971 provided that the Lokpal may investigate the actions of a minister or Secretary where a complaint involving a grievance or an allegation is made where the Lokayukta will do so in case of other public servants. Grievance was explained to mean a claim by a person that he sustained injustice in consequence of maladministration. The scope of maladministration was to be that the complained action is

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206. Major American Corporations have 'ombudsmen. See, Richard C. Schneider, 'Troubleshooters For The People', 15 at p.16 (Jan., 1971); Justices W.S. Despande and H.L. Manekshaw made a strong plea for introducing the institution of Ombudsmen in Industry in India as watchdogs over cost-price relationships and quality control to protect the vital consumer interests, The Times of India, W. Delhi, 11(Feb.,1,1979).
207. There are 130 colleges and universities Ombudsmen in the United States, 4 in Canada and 1 in Israel. See, Survey, supra note 99, at p.93.
209. Bill of 1968, cl.7A; Bill of 1971, cl.7A.
unreasonable, unjust, oppressive or improperly discriminatory or where there has been negligence or undue delay in taking such action or the administrative procedure or practice governing such action involves undue delay. Allegation was defined to mean that the public servant has abused his position to obtain any gain or favour to himself or to any other person or to cause undue harm or hardship to any other person or was actuated in the discharge of his functions by personal interest or improper or corrupt motives or is guilty of corruption, lack of integrity or improper conduct in his capacity as such public servant. Both, Grievance and allegation were so widelyworded that the Lokpal and the Lokayukta would not have been handicapped in exposing the misdeeds of the public servants. Two changes were suggested by the Joint Committee on the Bill of 1963. In the definition of allegation, words 'improper conduct' should be deleted as they make the definition unmanageably wide and are capable of including matters of a minor nature. The second point was that the words, 'undue hardship' should be added in the definition of grievance to make it more clear. These changes were incorporated in the Bill of 1971.

The Bill of 1977 cut short the jurisdiction of the Lokpal to 'misconduct' by public men. The definition of public man in the Bill included members of the Union Council of Ministers including the i.e., i.e., Chief

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210. Bill of 1963, cl.2(d) and (g); Bill of 1971, cl.2(d) and (g).
211. Bill of 1963, cl.2(b); Bill of 1971, cl.2(b).
213. Id., p. vii.
214. Bill of 1971, cl.2(b), (d) and (g).
Ministers of State, members of Council of Ministers for a union territory, members of the legislative assembly for any union territory, members of the Executive Council of the Delhi administration and Mayors of municipal corporations in any union territory. The Bill specified that a public man commits misconduct if he is actuated in the discharge of his functions by motives of personal interest or other improper or corrupt motives, or if he abuses or attempts to abuse his position to cause harm or undue hardship to any other person, or if he directly or indirectly allows his position to be taken advantage of by any of his relatives or associates and by reason thereof such relative or associate secures any undue gain or favour to himself or to another person or causes harm or undue hardship to another person or if he fails to act in any case otherwise than in accordance with the norms of integrity and conduct which ought to be followed by the class of public men to which he belongs or if any act or omission by him constitutes corruption. It was further provided that abetment of misconduct or its concealment, attempted or actual, by another public man would render the latter guilty of misconduct. It would have been no longer possible to protect an erring colleague without the personal risk involved. It is clear that the Bill was confined to allegations of misconduct unlike the two earlier Bills. Mr. A.G. Noorani described the Bill as 'much the sharper' than the 'anaemic' Bill of 1971. The Bill gave priority to the eradication of corruption from our public life. This

216. *id.*, cl.2(g).
217. *id.*, cl.3(1).
218. *id.*, cl.3(2).
fact was acknowledged by the Government in its statement of Objects and Reasons for the Bill in clear terms:

(1) it is proposed to alter the scheme of the Lokpal as incorporated in the 1971 Bill in material respects for making the institution of Lokpal an effective instrument to combat the problem posed by corruption at higher political levels.

The Joint Committee on the Bill felt that the definition of misconduct was 'too wide' and was, therefore, amenable to different interpretations. It accordingly recommended that it should be restricted to cover cases in which the public man is actuated in the discharge of his functions by corrupt motives or he abuses or attempts to abuse or knowingly allows to be abused, his position for securing for himself or for any of his relatives or associates directly or indirectly any valuable thing or pecuniary advantage, or any act or omission by him constitutes corruption. This restricted scope of misconduct was criticised. Member Ram Jethmalani in his dissenting note pointed out that the exclusion from the definition of the portion providing,

if he fails to act in any case otherwise than in accordance with the norms of integrity and conduct which ought to be followed by the class of public men to which he belongs

was wholly wrong. It is said that this is not 'too wide' and the committee has not assigned any reasons for dubbing

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221. Joint Committee Report, supra note 39, p. VIII.
222. Id., X:IV.
Section 45 of the Army Act, 1950 makes it an offence for any officer to behave, 'in a manner unbecoming of his position and the character expected of him.'

Section 35 of the Advocates Act, 1961 renders an advocate liable to disciplinary proceedings if he has been guilty of 'professional or other misconduct.' These expressions are not defined by the Acts because they are not susceptible of precise definition. The norms of conduct expected of an army officer or an advocate are ill known.

So is also the position of a public man. There are certain terms like, 'reasonable' or 'public interest' which are better understood than described. The same will hold good in case of norms of conduct expected of a public man.

Another exclusion which has been made by the Committee pertains to the conduct actuated by 'personal interest or other improper' motive and is confined to 'corrupt motives.' This means that gross impropriety will be completely exempt from the Lokpal's jurisdiction. Mr. A.G. Noorani has rightly put it that it is illustrative of the difference of approach between the framers of the Bill and that of the Joint Committee. If the definition is intended to be enumerative, then it should cover all possible situations. If the effort of the Committee was to exclude 'vagueness' and to introduce 'definitiveness' in the definition of misconduct, it is submitted that the Committee failed in its purpose. Expressions like 'actuated', 'attempt to abuse' and 'any act or omission' are not capable of being given any definitive meaning.

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224. Ibid.
The definition originally given in the Bill was better for it would have widely covered the various grounds of misconduct.

The scope of 'public man' as given in the Bill has also been a subject of controversy and needs examination:

**Inclusion of MPs:**

The inclusion of Members of Parliament has generated sharp controversy. The then Congress Government was not in favour of including MPs within the jurisdiction of Lokpal as is evident from the Bill of 1968 and 1971. In one of the dissenting notes to the Report of the Joint Committee on the Bill of 1963, it was emphasised that when Ministers were being brought under the Act, there does not appear any valid reason why the actions of MPs should be excluded from the jurisdiction of the Lokpal. On the other hand, any attempt to include them was opposed in another dissenting note, as they were not invested with any power and there was already the forum of the Committee on privileges, where their actions could be arraigned and if found guilty, they could be dealt with by the House. When the MPs were included in the Bill of 1977, the Janata Government explained its stand by pointing out that an MP is not a man in the street. He enjoys political prestige and his conduct is very much the concern of the public. It was made clear that Lokpal's control will not come in the way of a Member expressing his views freely in the House for that will not be within the ambit of the

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225. Joint Committee Report, supra note 13, para 72.
Dissenting note of member Sham Sunder Narain Tankha.

226. id., IV. Dissenting note of member C.C. Desai.

Lokpal.\textsuperscript{229} In the Lok Sabha, views were expressed for and against the inclusion of MPs.\textsuperscript{229} The Joint Committee in its report did not recommend the exclusion of MPs. 15 members of the Committee in their note of dissent pointed out that in no other democratic country are legislators subjected to such Ombudsmianic law.\textsuperscript{230} The correct position is that in some countries, Ombudsmen do exercise control on them. In Denmark, the Members of the Folketing are not exempted from control with regard to those activities which are carried out outside the legislature. There has been a case in which a member was criticised for his behaviour as a member of the Government's Agricultural Law Board.\textsuperscript{231} In India also, it was contemplated that the role of the member inside the Parliament will not be subject to the scrutiny of the Lokpal. It were only the activities outside Parliament which were being subjected to his jurisdiction. In New Zealand, the Chief Ombudsman has reported to the Prime Minister, on the basis of his investigation, about the irregularities committed in the granting of certain import licences to a company controlled by a Member of Parliament, who was also a member of the governing body.\textsuperscript{232} In the United Kingdom, the actions of the elected members of local authorities are subject to the jurisdiction of the Local Commissioner (local Ombudsman) and in appropriate cases, they are criticised also.\textsuperscript{233} Moreover, if in other systems, the necessity for their inclusion has not been felt, that cannot be

\textsuperscript{229} The Tribune, Chandigarh, August 4, 1977.
\textsuperscript{229} L.Sel., cols. 295-384 (August 1, 1977).
\textsuperscript{230} Joint Committee Report, supra note 38, p. XXXI.
\textsuperscript{232} (1979) 5 C.L.R. pp. 219-19.
\textsuperscript{233} Frank Stacey, The Ombudsman compared, 237 (1978).
pleaded as a ground for their exclusion in India as well. It has been ably put by Sir Guy Powles, the first Chief Ombudsman of New Zealand that the system of Ombudsman is established to fill a public need. If there is a public need for it, it would not be necessary to look for precedents in other countries.

The main argument that has been advanced inside and outside the Parliament for the exclusion of MPs is that they do not exercise any executive powers. It is no doubt true. But it is also true that members misuse their good offices to obtain permits, licences and easier access to Ministers and officials for industrialists and businessmen. While participating in the debate on the Bill of 1977, member V.B. Tathwa asked:

Has it not been said that the members of Parliament and legislatures have started charging fees for putting starred questions?

...... Has it not been said that they have been charging fees for recommendations and for arranging meetings with the Minister?

He emphasised that it cannot be said that there is no abuse by members of legislatures and reminded the House of the proverb that there cannot be any smoke unless there is a fire. Membership of Parliament is a great honour and carries with it a special duty to maintain the

236. Joint Committee Report, supra note 33, p. 111, 1111.
238. ibid.
239. ibid.
highest standards of probity. My institutional effort to maintain this should be welcomed, rather than opposed. Otherwise it gives the impression that members merely wish to look after their own interests overlooking the wider public interest involved.

One more point of substance which has been raised against the inclusion of EFs is that they should be subject to the supervision of the Parliament only and they are already answerable to the Parliamentary privileges Committee. In view of the similarity in the functioning of Parliamentary Committees in the U.K. and India, it would be relevant to mention what has been recorded by the Salmon Commission on Standards of Conduct in Public Life:

> with the most genuine respect to the Committee of Privileges and the Select Committee on Members' Interests, we do not consider that they provide an investigative machinery comparable to that of a police investigation. We have had frequent occasion to comment on the complexity of most investigations into serious corruption, and the special expertise that is necessary for this type of inquiry.

These Parliamentary Committees function under certain limitations. They are constituted on party basis and they have no machinery to carry out investigations. Experience has shown that even on demand, matters relating to the conduct of a member of the House are not referred to a Parliamentary Committee. In the Import Licences Case.

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240. Joint Committee Report, supra note 29, p. xvi.
there was the serious charge of forgery against Member Tulsishyam Ram. In the Lok Sabha, it was pointed out that C.B.I., being a Government agency, it would not be able to probe into a case in which Ministers and PPs were involved and request was made for a parliamentary Committee. It was added that since the conduct of the Members of the House was involved, the House alone should inquire into the matter and not an outside agency. The request was turned down and the matter was referred to the CBI. On the basis of the report of the CBI, the Speaker of the House ruled that the conduct of the Member of the House can be discussed even when the matter is *sub-judice*. If the actions of a M.P. can be a subject of CBI inquiry, certainly they can be subjected to Lokpal investigation as well. It is argued that if an agency outside the Parliament would investigate, it would be violative of parliamentary privileges. The relevant portion of Article 105 reads as follows:

No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

The import of this provision is that a Member of Parliament shall not be liable for his doings inside the House. The Bill of 1977 had only purport to deal with activities outside the Parliament. The Import Licences Case is a

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243. LLV L.S., CC 162-170 (Sept. 9, 1974)
244. LLV L.S.H., CC 229-229 (Dec. 2, 1974).
245. Lok Sabha, Joint Committee on the Lokpal Bill, 1977, Evidence, 6 (Feb., 1974).
clear example of it. It is alleged in the House that a certain member has forged signatures. The Lokpal inquires into the matter and reports to the Parliament, on the basis of which Parliament would take action. If this Lokpal inquiry is violative of the privileges of a member, so would be a CBI inquiry. The Lokpal inquiry will be rather on a sound footing. We will be acting as an agent and delegate of the Parliament. The whole submission of Mr. S.V. Oupte, the then attorney-general of India before the Joint Committee was that the Lokpal Bill, 1977 does not directly or indirectly infringe in any manner, the field covered or prescribed by Article 105.246 A standing Lokpal will rather prove helpful. If any undue criticism is made against any member, the latter would be in a position to say: 'If you have anything valid to allege, why do you not take recourse to the Lokpal?' Therefore, it would actually help and improve the stature of the Members of Parliament.

The Joint Committee on the Bill of 1977 made number of recommendations in order to protect the special position of Mls. Since Mls do not exercise executive powers, a different definition of misconduct was approved for them. A legislator will be considered to have committed misconduct if:

- he abuses, or attempts to abuse or knowingly allows to be abused, his position as such legislator for securing for himself directly or indirectly any valuable thing or pecuniary advantage.

246. Id., 11.
247. Joint Committee Report, supra note 33, p. IX.
The flaw in this is that it allows the legislators to abuse their position for securing for their relatives or associates any valuable thing or pecuniary advantage. Even in the absence of executive powers, the legislators occupy a position in society and by virtue of that, they manage to get many things done. This means that if something is being offered to the legislator for the help rendered by him, he could safely require it to be given to his wife or son instead of taking it himself. This needs to be avoided. In fact, it would indirectly encourage what was intended to be discouraged. Having suggested a less consequential definition of misconduct, the committee prescribed an indirect process for lodging complaints against the legislators. The complaint was first required to be sent to the presiding officer of the House to which the member concerned belonged and if he was satisfied particularly that it did not relate to article 105, he may refer it to the Lokpal. Rather than prescribing this indirect approach to the Lokpal, the better course will be to prohibit the Lokpal under the law from investigating those complaints which may relate to the area covered by article 105. It would be wrong to prescribe two different routes to reach the Lokpal. The difficulty will be that when the complaint is filed with the presiding officer and he recommends it to the Lokpal for investigation, the Lokpal may find that he should not go into it since it relates to the prohibited area. There cannot be any guarantee that the presiding officers

248. id., Rx. XX, XXX, XXXX.
249. id., p. X.
will be able to check all those complaints which cannot be investigated by the Lokpal. Similarly, the presiding officer may also be instrumental in putting an axe on a complaint which was otherwise within the jurisdiction of the Lokpal. In view of this, there should be direct approach to the Lokpal and let the Lokpal sort out those complaints which fall within his jurisdiction.

The Committee further suggested that the enquiry in respect of a complaint against a legislator should not be given any publicity till the stage of communication or announcement of the findings and it should be conducted only in camera as any premature publicity will damage his public image. Why this special treatment to legislators? Will this very reasoning not hold good in case of Ministers and other public men? Why such a mandatory curtain in case of one and discretionary in case of others? In addition to the above special provision, it was also recommended that any contravention of it should be treated as a criminal offence and should be punishable with imprisonment for a maximum period of six months or fine or with both. Public image is not more important in the case of legislators than in the case of Ministers. It would be desirable that this special treatment be made equally applicable to all. This is necessary because otherwise pre-publicity of the complaint can cause irreparable loss to public image which the concerned person may not be able to regain even if the findings of the Lokpal are ultimately in his favour. The overall impression that one gets from

250. Ibid.
251. Id., p. 7.
the proposal of the Committee in regard to legislators is that the committee was apprehensive of the opposition to the inclusion of MPs from MPs themselves and in order to tone down the opposition, special provisions for them were proposed and recommended. This is not a sound approach. It can prove counter-productive. Ultimately, it would become a permanent part of our Lokpalic Organisation.

INCLUSION OF PRIME MINISTER:

The Administrative Reforms Commission was silent in regard to the inclusion or exclusion of the Prime Minister. The Bill of 1963 included the members of the Council of Ministers. The Joint Committee on the Bill of 1963 specifically excluded the F.M., in order to make it clear that the F.M. is not included within the scope of the Bill. The exclusion was defended in the Lok Sabha on the ground that when the Lokpal looks into a complaint against a Minister, he is obliged to resign, he demits the office but nothing else happens whereas when a Prime Minister demits his office, the entire Government goes. To bring the fall of the Government is the sole monopoly of the Lower House. If it was a question of only the F.M., the position probably would have been different. The members were reminded that this fundamental right of the Lower House should always be retained by it, to be secured by nobody else. It is submitted that after the investigation of the Lokpal, the Report will come to the House whose members would discuss it and if a no-confidence motion is carried, the Prime Minister

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252. Bill of 1969, cl.2(h).
253. Joint Committee Report, supra note 18, p.VII.
and his Council of Ministers will have to resign. There is no question of the House being deprived of its right. If the F.M. has been found to be guilty of misconduct, the House would be justified in demanding the resignation of the Council of Ministers headed by the F.M. While repelling the stand of the Government, it was forcefully argued in the Lok Sabha that the F.M. should not be equated with the English monarch in the popular slogan: 'King can do no wrong.' It was emphasised that the conduct of the F.M. should be under constant vigil and it should come under the scrutiny of the Lokpal. Why should another privileged class be created which is contrary to the very scheme of the Constitution? In the Bill of 1971, the F.M. was explicitly excluded.

The Bill of 1977 included the entire Council of Ministers. The inclusion of the F.M. was accepted by the Government. Clause 19 dealt with the complaints against the F.M. This inclusion of the F.M. had a mixed reaction in the Janata Party and had opposition from the Congress members. There was a positive reaction to it from the public as it was evident from some of the editorials in some of the dailies which appeared after the introduction of the Bill.

Under the Bill of 1977, the F.M. himself was authorised to receive the report of the complaint.

256. Bill of 1971, cl. 2(b).
257. Bill of 1977, cl. 2(g)(i).
258. Supra note 220, at p. 865.
261. Ibid., The Tribune, Chandigarh (July 30, 1977).
investigated against him by the Lokpal and he was required to place the same before other members of the Council of Ministers. The Joint Committee felt that as the Prime Minister himself was proposed to be the 'competent authority' in his own case, it would not be in conformity with the principles of Jurisprudence and natural justice. It would look odd and may even be embarrassing to him to act as a Judge in his own case. The Committee, therefore, suggested that the Speaker may be made the competent authority in the case of the Prime Minister. It is obvious that the Speaker as the competent authority will examine the report of the Lokpal and propose some action to be taken on the basis of that report. This means that such action of the competent authority will be liable to criticism in the Parliament which will undermine the constitutional position of the Speaker. It would also be awkward and embarrassing for the speaker whose role in relation to the House is more of a Judicial character and who has to function without getting involved in political and non-political controversies. Mr. H.V. Kamath in his note of dissent to the Report of the Committee suggested that the President acting in his individual judgment should be made the competent authority. On the other hand, Mr. S.V. Gupte in his evidence before the Committee had stated that to make President to be the competent authority

263. Joint Committee Report, supra note 39, p. VII.
264. Id.
265. Id., p. XXXV.
266. Id., p. XXVII.
267. Id. (emphasis added).
would not only be unconstitutional but would also be derogatory to the position of the Head of the State.

Under the Constitution, the President acts on the aid and advice of the Council of Ministers. A constitutional amendment would be required to enable him to act in his individual judgment, which in turn itself would not be very much in consonance with the general constitutional position of the President. In connection with the competent authority, the suggestion made by member Bhupesh Gupta in his dissenting note deserves serious consideration. He is of the view that a Joint Committee of the two Houses of Parliament should be entrusted with this duty. This will also solve the problem as to who will speak on behalf of the Lokpal in the Parliament. There should be a Standing Lokpal Committee of the Parliament which should receive the reports from the Lokpal about the misconduct of public men. In case of Ministers, the Committee should forward the report along with its own views to the Lok Sabha for appropriate action and bringing the matter before the House. In case of the M.L.A. and M.P.s, the Committee itself can bring the matter before the Lok Sabha which should decide what action should be taken. In fact, before the matter is taken up in the House, the Committee should hear the Lokpal on points of doubt in his report. The Committee should also hear the concerned public man. The added advantage of the Committee will be that it would ensure that some M.P.s are well acquainted with what their Lokpal is doing and see that there is no

268. Supra note 245, at p. 3.
270. Joint Committee Report, supra note 33, p. XI.
interference on the part of the Government. The Committee will also make sure that there is no undue delay in the presentation of the report before the House. It is essential in the light of the experience gained in the States. The constitution of such a committee will not be something new. It has performed useful role both in and outside Scandinavia. A provision should be made in the Lokpal legislation itself for the constitution of such a committee.

EXCLUSION OF CIVIL SERVANTS

The Bill of 1977 excluded the civil servants from the Lokpal's jurisdiction whereas the two earlier Bills had included them. In the statement of objects and Reasons, the Government merely expressed its desire to make the institution of Lokpal an 'effective instrument to combat the problem posed by corruption at higher political levels' but did not spell out any reason for excluding the civil servants. The Joint Committee avoided the issue by pointing out that to suggest an amendment to include the

271. The annual Reports of the Lok-sukta of Bihar for 1976-77, 1977-78, 1973-79 have yet not been submitted to the legislature. Letter from Mr. Yogamand Jha, Deputy Secretary to Lokayuktta Bihar, dated June 16, 1930.
272. Alfred Bexellus, 'The Swedish Institution of the Justitiialombudsmen in Record of the proceedings of subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, S.Res.190, 77 at p.79 (March 7, 1965); Lundvik, supra note 44 at p.19; Frank Stacey, The Ombudsman Compared, 26 (1978); Rowat, supra 43 at p.98.
274. Here only the short point-wy civil servants were included under the Bill of 1977 has been dealt. If in future proposals, the civil servants are included within the Lokpal's jurisdiction, constitutional implications of that have been dealt in chapter VI of this book.
275. Bill of 1977, cl.10 read with 2(g).
276. Bill of 1969, cl.7; Bill of 1971, cl.7.
277. Supra note 220, p.465.
civil servants would go beyond the scope of the Bill. 279
The main argument for inclusion of civil servants advanced before the Joint Committee 279 as also in the Parliament 290 was that the Minister is enabled to commit an act of corruption only with the aid of the bureaucracy, that they are inseparable, therefore, the inclusion of one and the exclusion of the other does not provide a workable formula. A provision in the Bill of 1977 which has been overlooked while advancing this argument provides:

The Lokpal shall not inquire into any act, or conduct, of any person other than a public man except in so far as he considers it necessary so to do for the purposes of his inquiry into any allegation of misconduct against a public man. 231

From this, it is clear that ordinarily, the civil servant will be outside the Lokpal's screening but he is not barred if it is necessary in view of the investigation that he is making into the conduct of a public man. The fact still remains that maladministration was kept outside the purview of the Lokpal. Mr. G. Noorani approved of this scheme on the ground that otherwise the Lokpal would have been swamped with complaints. 232 This establishes the fact that there is a need for a separate Lokpal for looking after maladministration. In future proposals, it would be desirable to make a provision for separate Lokpals to...

279. Joint Committee Report, supra note 33, p. 331.
279. id., dissenting notes of Supriyo Gupta, p. 117.
230. id., dissenting notes of Supriyo Gupta, p. 117.
231. Bill of 1977, cl. 11(2).
deal with different areas. Already the collegiate system of Ombudsmen is an accepted part of the Ombudsmen set-up. In multi-ombudsmen approach, one Ombudsman is appointed as the Chief Ombudsman in order to look after the administration with one or more Ombudsmen to look after different regions of complaints. In more important cases, they can sit together which would create greater assurance of Justice and fairplay.

The issue of Chief Ministers has been separately dealt with in the chapter relating to the functioning of the Ombudsman in a federal set up.

Matters not Subject to the Jurisdiction of the Lokpal:

The Bills of 1968 and 1971 incorporated certain riders with the general jurisdiction proposed for the Lokpal and the Lokayukta. Matters pertaining to foreign affairs, Extradition Act, 1962, investigation of crimes, contractual obligations, conditions of service of public servants, grant of honours and awards were declared to be outside the purview of their jurisdiction. Besides this, they could not ordinarily look into those matters in which the complainant had any other remedy by way of proceedings before any tribunal or court of law but if they were satisfied that such persons could not, or cannot, for sufficient cause have recourse to such a remedy, they could investigate that. The Bill of 1977

233. The Riksdag Act (Sweden), Chapter 8, Art. 10; The Ombudsman Act, 1975 (New Zealand), Sec. 3.
235. Supra note 233.
236. Joint Committee Report, supra note 33, p. XXXI.
238. Ibid. The implications of this provision have been dealt with in the chapter titled, 'Ombudsman and the Judiciary.'
was somewhat different in this regard. The first exception
provided was that if the Lokpal had any bias with regard to
any matter or person, he was prohibited from inquiring into
it. The exception is justified on the principles of
natural justice. Then the Lokpal was stopped from inquiring
into any matter which may have been referred for inquiry
under the Commissions of Inquiry Act, 1952, on his
recommendation or with his prior concurrence. This was
a salutary provision because it would avoid duplication
of investigations. Finally, the Lokpal was barred from
inquiring into those matters which were more than five years
old but the Lokpal was given the discretion to waive it if he
deemed it necessary for a sufficient cause. Bills of 1968
and 1971 had also provided the same limit of five years
but no discretion had been vested with the Lokpal to waive
it. It would be appropriate if this cut-off period
is reduced to one year and discretion should be vested
in the Lokpal to investigate complaints beyond one year
for a sufficient cause. This will also be in line with
the position prevailing in New Zealand and
the United Kingdom.

3:5: PROCEDE TO INVESTIGATE COMPLAINTS:

All the three Bills have followed almost a uniform
scheme. Under the Bills of 1963 and 1971, complaints
regarding grievances could only be lodged by the aggrieved

289. Bill of 1977, cl. 11(1).
290. Id., cl. 11(3).
291. Id., cl. 11(4).
292. Bill of 1968, cl. 3(4)(b); Bill of 1971, cl. 3(5)(b).
293. Thaven, supra note 40 at p. 274.
294. The Ombudsman Act, 1975 (New Zealand), sec. 17(2).
295. Parliamentary Commissioner Act, 1967, sec. 6(3).
persons whereas in the case of allegations, any person other than a public servant could do so. The Bill of 1977 purported to deal with misconduct against public men, other than a public servant, any person could make a complaint. The complaints were required to be made in the prescribed form, setting forth the particulars of the misconduct alleged and accompanied by an affidavit in support of the details given. The exception made in regard to public servants was necessary, for otherwise if a public servant was to make a complaint against his Minister, it would lead to an anomalous situation. Letters written to the Lokpal from the Jail or other place of custody or an asylum were required to be communicated by the concerned authority without delay and without opening them. If the Lokpal was satisfied, he could treat them as complaints made in accordance with provisions of law.

In order to check the inflow of frivolous complaints, the Bill of 1977 provided that the complainant will be required to deposit a sum of one thousand rupees subject to the Lokpal's power to make exemptions in cases with sufficient cause. There was a provision in New Zealand prior to the Act of 1975 providing for a fee of one pound. In the Act of 1975, this was not repeated. In no other country, is there a requirement of fee to approach the Ombudsman. The Joint Committee on the Bill was of the view

296. Bill of 1969, cl.9(1); Bill of 1971, cl.9(1).
298. Id., cl.12(2).
299. Id., cl.12(5).
300. Id., cl.12(4).
301. Id., cl.12(3).
302. The Parliamentary Commissioner (Ombudsman) Act, 1962, Sec.13(3).
that a more deterrent punishment should be incorporated, therefore, it provided that a person who wilfully or maliciously makes any complaint which he knows or has reason to believe to be false shall be punished with imprisonment for a term which may extend to one year and shall also be liable to fine which may extend to three thousand rupees. Such a provision will have the desired effect of eliminating baseless complaints but it would also make the people fearful of even coming forward with complaints which they believe to be genuinely true. Other systems have not made a provision of this kind. Keeping in view the possibility in India of misuse of Lokpalic investigations, it may be appropriate to have a provision to this effect. But it would be equally necessary to use the provision sparingly in clear cases of wilful or malicious complaints, otherwise no one would like to come forward with complaints. Infact, the task of the complainants under the different Bills was already difficult as they were required to support the details on an affidavit. Such a requirement is not provided even in New Zealand or in the United Kingdom. In sum total, the approach to the Lokpal should not be such which may deter people from coming forward with valid complaints.

PRELIMINARY SCRUTINY OF COMPLAINTS:

After receiving the complaint, the Lokpal has to check up as to whether the complaint is in accordance with the specified requirements or not. He has to ensure that the complaint has been filed within the time stipulated, is within his jurisdiction, is made in good faith, is not frivolous or vexatious and that there are

303. Joint Committee Report, supra note 38, p. XI.
sufficient grounds for inquiring into it. It is left to the Lokpal to adapt such procedure as he may consider appropriate to carry out this preliminary scrutiny. The Bill of 1977 provided that at this stage, the Lokpal may, if he deems it necessary, call for the comments of the public men concerned. This is an important stage when the Lokpal has to accept certain complaints for fuller investigation and reject others. This is akin to the preliminary hearing before the High Court or the Supreme Court. The Lokpal will have to be very careful in this important task of preliminary scrutiny. The Bill requires that if the Lokpal dismisses a complaint at this initial stage, he must record his reasons for doing so and communicate the same to the complainant and to the competent authority concerned. Though this practice is not uniformly followed in the High Courts and the Supreme Court, yet, it is very essential in the case of Lokpal since it will ensure deeper consideration of the matter. This will be in accordance with the principles of natural justice and would further inspire confidence in the institution of Lokpal.

PROCEDURE IN RESPECT OF INQUIRIES:

After the preliminary scrutiny, if the Lokpal decides to proceed with the inquiry, it was left to him to follow such procedure which he considered appropriate in the circumstances of the case. However, certain provisions were specifically provided in the Bill of 1977:

- The Lokpal was forthwith required to forward a copy of the complaint to the competent authority concerned.

305. Id., cl.13(2).
306. Id., cl.13(1).
307. Id., cl.14(3).
308. Id., cl.14(1)(a).
provision to this effect is not provided in other
ombudsmanic legislations except that of New Zealand. This
does not appear to be of any purpose. The
competent authority has nothing to do at this stage
of the inquiry. The better course will be that if
the Lokpal is asked by the competent authority with
regard to any specific complaint, he may supply
the information. 

(ii) The Lokpal was authorised to make such orders as
to the safe custody of documents relevant to the
inquiry as he deemed fit. The Lokpal also had
the authority of search and seizure in this
regard he could depute any subordinate officer of
his or any officer of the investigating agency of
the Central Government or a State Government with the concurrence of that Government to search and
seize the documents. This authority is necessary
for the collection of evidence but doubts have been
expressed with regard to seeking help from
Governmental investigating agencies. In
Scandinavian countries, the Ombudsmen have their own
staff and they can engage and dismiss them. So
is the position in New Zealand. The staff of the
Ombudsmen is not deemed to be employed in the
service of Her Majesty. In the United Kingdom

309. The Ombudsmen Act, 1975, Sec.13(1).
311. Id., cl.16(1).
312. Id., cl.18(1).
314. The Ombudsmen Act, 1954 (Denmark), Sec.15;
The Ombudsmen Act, 1962 (Norway), Sec.14;
Parliament’s Instructions of May 24, 1957 (Sweden),
Sections 26-27; Parliamentary Regulations of
Jan 10, 1930 (Finland), Sec.13.
315. The Ombudsmen Act, 1975, Sec. 11.
and France, the staff is not entirely independent of the civil service. The Parliamentary Commissioner takes legal advice from the Treasury Solicitor. The Mediator makes extensive use of the specialized government inspectorates for his investigations. The Joint Committee on the Bill of 1977 had recommended that the Lokpal should have the power to appoint its own staff and should be given the exclusive administrative control over them. Without the assistance of its own, independent investigatory staff, the Lokpal will not be able to function. If the Central Bureau of Investigation officials are to search and seize certain documents from the Home Ministry, they themselves being under the Home Ministry, would not be able to perform their duties in an independent manner. The experience in the States has also been that the Governmental agencies have not co-operated with the Lokayukta; the important gain of having the Lokpal and Lokayuktas with their own staff will be that they will be able to carry out independent investigations without delay which will produce greater public confidence.

(iii) The Lokpal was required at such time as he considered appropriate to forward a copy of the complaint to the public man concerned and afford him an opportunity to represent his case. This

316. Stacey, supra note 272, p. 169.
318. Refer to Chapter relating to 'Functioning of Lokayuktas and Up-Lokayuktas in States' of this work.
meets the primary requirement of natural justice. The time for forwarding the copy of the complaint and the nature of opportunity to be afforded were left to the discretion of the Lokpal. In the United Kingdom, if the Parliamentary Commissioner decides to conduct an investigation, he is required to afford to the concerned authority or person an opportunity to comment on any allegations contained in the complaint whereas in Australia and New Zealand before making any adverse report against any person or authority the Ombudsman shall afford him an opportunity. This means that opportunity is to be provided only in case an adverse report is being made. It is most essential that no one should be condemned unheard and this is as true of an Ombudsman investigation as of any other.

(iv) The Lokpal was required to conduct his inquiries in camera, unless for reasons to be recorded in writing, he determined otherwise. This is in accordance with the position in other Ombudsman systems. The advantage of acting in private is that the Lokpal can operate informally without the usually attendant publicity of commissions of inquiry, can take a quick look at Government documents without putting anyone on the defensive and then report equally confidentially. If the Lokpal were

320. The Parliamentary Commissioner Act, 1967, Sec. 7(1).
321. The Ombudsman Act, 1976, Sec. 3(5).
322. The Ombudsman Act, 1975; proviso to Sec. 13(3).
324. The Ombudsman Act, 1954 (Denmark), Sec. 7(4); The Ombudsman Act, 1973 (New Zealand), Sec. 13(2); The Parliamentary Commissioner Act, 1967, Sec. 7(2); Ombudsman Act, 1976 (Australia), Sec. 3(2).
325. See Sheppard, supra note 29, 521; Love, supra note 254, p. 51.
to hold public investigations following the minute details observed in courts, that would defeat the very object of the institution. It would hardly be able to complete its investigations. In exceptional cases, the Lokpal can hold public investigations. This flexibility will prove beneficial. Wherever public interest would demand, he will hold public investigations.

**COLLECTION OF EVIDENCE**

The Bill of 1977 stipulated that the Lokpal shall have all the powers of a civil court in respect of certain matters, namely, summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or office, issuing commissions for the examination of witnesses or documents and such other matters as may be prescribed later. Similar powers are enjoyed by the Ombudsman in New Zealand and the Parliamentary Commissioner in the United Kingdom. Moreover, the proceedings before the Lokpal are deemed to be judicial proceedings within the meaning of Section 193 of the Indian Penal Code. Hence, any person who intentionally gives false evidence or fabricates false evidence shall be liable to be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

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327. The Ombudsman Act, 1975, Sec.19(2).
328. The Parliamentary Commissioner Act, 1967, Sec.3(2).
330. Indian Penal Code, Sec.193.
In the process of collection of evidence, the Lokpal could require any public servant or any other person to furnish information or produce any document. This process could not be hampered by the obligation under any law to maintain secrecy or restriction regarding the disclosure of information. The Government or any public servant shall not be entitled to such privilege in respect of the production of documents, or giving of evidence as is allowed under any law in any legal proceeding. These provisions are similar to those in England regarding the Parliamentary Commissioner. There were certain exceptions provided to the general rule as mentioned above. The Bill provided that no person is to furnish any such information or answer any such question or produce so much of any document -

(i) as might prejudice the security or defence or international relations of India or the investigation or detection of a crime; or

(ii) as might involve the disclosure of proceedings of the cabinet or of any committee of such cabinet.

The problem is to achieve balance. On the one hand, the Lokpal must be permitted access to the widest possible range of information. On the other, he must be constrained so that excessive zeal on his part may not prejudice the interests of the State. In the two above mentioned areas, it is the practice in most jurisdictions to deny to the

332. Id., cl.15(3)(a).
333. Id., cl.15(3)(b).
334. The Parliamentary Commissioner Act, 1967, Sec.3(3).
336. Love, supra note 287, 49.
ombudsman any right of access to the documents or information concerned. So the Indian Lokpal will not be different in this regard.

It was further provided in the Bill of 1977 that a certificate issued by a Secretary to the Government certifying that any information, answer or portion of a document, is of the nature referred to in the two exceptions mentioned above, shall be binding and conclusive. This provision was not in conformity with the recommendation of the Administrative Reforms Commissions. Based upon the position in England, the Commission had recommended that the certificate should be issued by the Secretary of the Cabinet with the approval of the Prime Minister. As the Lokpal will be concerned with the actions of the Ministers, the Secretary may be influenced or prevailed upon by the Minister and this may defeat the very purpose of the institution of Lokpal. Since, it was proposed to include the Prime Minister also within the scope of jurisdiction of the Lokpal, the approval of the Prime Minister was not a sound proposition. In this regard, it would be advisable to adopt the New Zealand model where the Attorney-General has been given the power to issue the certificate.

A proviso had been added in the Bill of 1977 whereby it was provided that the Lokpal may require any information or answer or portion of a document in respect of which a certificate is issued pertaining to the security, or defence or international relations or the investigation or detection...

337. Ibid.
341. Ombudsman Act, 1975, Sec.20(1).
of crime to be disclosed to him in private for scrutiny and if on such scrutiny, the Lokpal is satisfied that such certificate ought not to have been issued, he shall declare the certificate to be of no effect.\textsuperscript{342} This was a salutary provision which was likely to meet the objectives of the institution of Lokpal without jeopardising the vital interests of the State. However, scrutiny was not permitted with regard to the proceedings of the Cabinet and Cabinet Committees. This was kept out keeping in view the constitutional oath of secrecy that the Ministers are administered\textsuperscript{343} as also the conventional secrecy that surrounds the cabinet proceedings.\textsuperscript{344} It is possible that in certain situations, the Lokpal may be deprived of some vital information but, on a balance of considerations, it is probably unavoidable.

\textbf{SECRECY OF INQUIRY:}

The Bill of 1977 required that any information obtained by the Lokpal or on his behalf and any evidence recorded or collected in connection with Lokpal's inquiry shall be treated as confidential and, notwithstanding anything contained in the Indian Evidence Act, 1872, no court shall be entitled to compel the Lokpal to give evidence relating to such information or to produce the evidence so recorded or collected.\textsuperscript{345} This rule, however, was not to apply for purposes of the Lokpal Act or for purposes of any action or proceedings to be taken on any report of the Lokpal or for an offence of giving or fabricating false evidence or for such other purposes

\textsuperscript{342} Bill of 1977 cl.15(4)(b).
\textsuperscript{343} Constitution of India, 1950, Art.75(4).
\textsuperscript{345} Bill of 1977, cl.20(1).
as may be prescribed later on.* The exception makes it clear that when the matter is taken up in the parliament and the parliament desires to know the details in regard to a particular case, it will be the duty of the Lokpal to supply the details of the same. The purpose behind this 'confidentiality' was that the Lokpal should not be unnecessarily involved in court proceedings since that will adversely effect the functioning of the institution of Lokpal. The parliamentary commissioner in England and his officers cannot be called upon to give evidence in any proceeding of matters coming to his or their knowledge in the course of an investigation. Provision to the same effect for the observance of secrecy have been provided in New Zealand and Australia also. This secrecy protects, as it should, all those who come forward to give evidence before the ombudsman. They will not be exposed to unwarranted litigation.

Foresaid provisions with regard to the procedure show that informality, flexibility and privacy constitute the three essential aspects of a lokpalic inquiry.

3.6: **FINAL IN THE REPORTS:**

On the completion of the inquiry, the Lokpal was given the following options under the Act of 1977:

(a) If the allegation made in the complaint has not been substantiated either wholly or partly, he shall close the case under information to the complainant, the public minister and the competent authority concerned.

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346. Id., cl. 20(7).
347. The Parliamentary Commissioner Act, 1967, Sec.11(2).
348. The Ombudsman Act, 1975, Sec.21(2) read with 19(6).
349. The Ombudsman Act, 1976, Sec.35.
(b) If, on the other hand, the allegation made in the complaint has been substantiated either wholly or partly, he shall by report in writing communicate his findings and recommendations to the competent authority. The competent authority will examine the report and communicate to the Lokpal within three months of the receipt of the report, the action taken or proposed to be taken on the basis of the report.

(c) If the Lokpal is satisfied with the action taken or proposed to be taken on the basis of his report, he shall close the case under information to the complainant, the public man and the competent authority concerned. However, if he is not satisfied, he may make a special report to the President and inform the complainant of the same.

(d) The Lokpal shall present annually to the President a consolidated report about the functioning of his office. The President, in turn, is required to cause a copy of the special report or the annual report, as the case may be, together with an explanatory memorandum to be laid before each House of Parliament.

It is a common feature that the Ombudsmen in other systems function by reporting their findings to the relevant authorities. In this way they possess influence rather than power. They cannot alter decisions which fall within their investigatory jurisdiction. But they cause those who have this power to do so. It has been rightly observed that one of the institution's most interesting puzzles is its apparent effectiveness despite minimal coercive capabilities. 351 The experience of other

systems has been that, quite often, the mere publication of the Ombudsman's report is instrumental in effecting change. No one wishes to be included in the Ombudsman's who's who which lists those who commit faults.

In sum, the Lokpal will constitute a fact-ascertaining authority, with the object of furnishing the facts so ascertained to the competent authority for taking appropriate action. The Lokpal has not been empowered to take action but the importance of his investigations cannot be minimised since his investigations are bound to have a restraining impact upon the administration and the public man. For the success of the Lokpal, it would be necessary that the competent authority should co-operate in carrying out the recommendations made in the report. Otherwise, the Lokpal will lose its credibility.

3:7: THE POWER TO TRY CERTAIN OFFICERS SUMMARILY:

The Bill of 1977 introduced still another change. The Lokpal was empowered to summarily try himself any person who in a proceeding before him had knowingly or wilfully given false evidence or had fabricated false evidence. In doing so, the Lokpal was to give the offender a reasonable opportunity of showing cause why he should not be punished, to try the offender summarily in accordance with the procedure prescribed for summary trials under the Code of Criminal Procedure Code, 1973 and sentence him, if he is found guilty, to imprisonment for a term which may extend to three months or to fine which may extend to five hundred rupees or to both.

353. Ibid.
354. Bill of 1977, cl.22(1).
Besides this, if any person refuses to produce documents,\textsuperscript{355} refuses to bind himself by an oath,\textsuperscript{356} refuses to answer any question,\textsuperscript{357} or refuses to sign a statement,\textsuperscript{359} the Lokpal may cause the offender to be detained in custody and may at any time on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished, sentence the offender to simple imprisonment for a term which may extend to one month or to fine which may extend to five hundred rupees or to both.\textsuperscript{359} The purpose behind these provisions was to ensure that the Lokpal was not handicapped by lack of evidence in the proceedings conducted by him. The Lokpal should not be made dependent upon the courts for the proper functioning of his office. These powers are necessary though they are not enjoyed by Ombudsmen in other countries.

In order to prevent any misuse of this power, in every case tried summarily, the Lokpal was required to record the facts constituting the offence, with the statement (if any) made by the offender as well as the finding and the sentence.\textsuperscript{360} Any person who was convicted on a summary trial by the Lokpal was given the right to appeal to the High Court which may alter or reverse the finding or reduce or reverse the sentence appealed against.\textsuperscript{361}

\begin{itemize}
\item \textsuperscript{355} \textit{Indian Penal Code, Sec.175.}
\item \textsuperscript{356} \textit{Ibid., Sec.179.}
\item \textsuperscript{357} \textit{Ibid., Sec.179.}
\item \textsuperscript{358} \textit{Ibid., Sec.130.}
\item \textsuperscript{359} \textit{Bill of 1977, cl.22(2).}
\item \textsuperscript{360} \textit{Ibid., cl.22(3).}
\item \textsuperscript{361} \textit{Ibid., cl.22(4).}
\end{itemize}
The lacuna left in the Bill was that the Lokpal was not given the power to try cases of contempt. It was provided that if any person intentionally offered any insult or caused any interruption or by words spoken or written or by any other act brought the Lokpal into disrepute, he shall be punished with simple imprisonment for a term which may extend to six months or with fine or with both. It was further provided that complaints in this regard can be made by the Public Prosecutor under Sec. 199(2) of the Code of Criminal Procedure, 1973 only with the previous sanction of the Lokpal. The Joint Committee on the Bill was informed that the Lokpal cannot be empowered to punish for its own contempt in view of the fact that the Lokpal cannot be termed as a court and that its proceedings cannot be called Judicial proceedings. Clause 15 of the Bill laid down that the Lokpal shall have all the powers of a civil court in respect of certain matters. Clause 22 of the Bill gave power to the Lokpal to try certain offences summarily. In view of these provisions, it is submitted that the Lokpal should have the authority to try himself those persons who are guilty of contempt of the Lokpal. This is necessary in order to make him effective. It is just possible that in the course of discharging his functions he might be subjected to most uncharitable attacks in the press and elsewhere.

In view of the above analysis of the Bills, it is hoped that future proposals will be more comprehensive and will provide for some of the lacunas that have been noticed. A well-thought-out legislation will provide a sound base for the success of the institution.

362. Id. cl. 21(1)(2).
363. Id. cl. 21(3).
364. Joint Committee Report, supra note 33, p. xx.