CHAPTER FOUR

THE OMBUDSMAN AND ITS FEASIBILITY IN
A FEDERAL SET UP:

It is proposed in this chapter to examine the
workability of the Ombudsman in a federal set up. Ombudsman and federalism are both familiar concepts but it is relatively recently only that the Ombudsman is being tried in federal systems. This trial development is another challenge to the adaptability of the Ombudsman as well as that of federalism. In this context, it becomes relevant to study the nature of federalism and the experience of Ombudsman in federal countries in general and its adaptability under the Indian set up in particular.

4:1: BUT IS FEDERAL?

The adjective 'federal' is used with Constitutions and forms of government. So it denotes the nature of Constitutions and of governments. It has been found difficult to give this term an exact meaning. The concept of federalism is like the 'Due Process' clause of the U.S. Constitution and the 'Basic Structure' of the Indian Constitution. Even as 'Due Process' and 'Basic Structure' are not amenable to precise meaning and scope except in a concrete fact situation, similarly, federalism is dependent upon the peculiar circumstances of

2. Ibid. See also Geoffrey Sayer, Modern Federalism, 2(1969).
each country. No two federal Constitutions are, or could conceivably be, and no constitution may fulfil all the conceptual essential elements of any definition of federalism.

Federalism is a wet clay concept. It has been moulded from time to time. The nineteenth century definition does not hold valid in the twentieth century. E.A. Freeman in 1863 gave his version of the perfect form of Federal Government by pointing out:

Two requisites seem necessary to constitute a Federal Government in its most perfect form. On the one hand, each of the members of the union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively. Each member is perfectly independent within its own sphere, but there is another sphere in which its independence, or rather its separate existence vanishes.

Accordingly, a federal system implies the existence of Governments at two levels, the National and the Regional, each independent in its own sphere. This very view was expressed by the modern classic on the subject of federalism, Prof. F.C. Theare when he said:

By the federal principle I mean the method of dividing powers so that the general and regional governments are each within a sphere co-ordinate and independent.

5. V.I. Bharatiya, 'Central Inquiry and State Minister's Accountability', 13 JIL, 56 (1976).
The two words, co-ordinate and independent, signify the essentials of a federal polity. Co-ordinate means: one who is of equal rank, authority or importance with another. Independent needs no explanation. The Wheare test for a federal system is clear that the general and regional governments be 'equal in rank and independent'. The application of this test will not qualify any existing system as federal. According to Prof. Wheare himself, any definition of federal government which fails to include the United States would be thereby condemned as unreal. It seems that Prof. Wheare as pointed out by Prof. Reagan, overlooked Article VI, Sec. 2 of the United States Constitution which states that national laws are "the Supreme law of the land .... anything in the Constitution or laws of any State to the contrary notwithstanding." This clearly brings out the supremacy of the national government. It seems unlikely that there can be a nation in which there is no institutionalized final authority. Besides the United States, according to Prof. Wheare the best examples of the working of federal government were Switzerland, Canada and Australia, and on his own analysis of each of these governments, he found that something or the other did not conform to his basic thesis of federalism. The definition of Prof. Wheare could not even embrace the 19th century or the early 20th century Constitutions. Obviously, it was not meant to cover the

9. Wheare, supra note 7, p. 1.
11. Ibid.
12. Wheare, supra note 7, p. 23.
13. Ibid., pp. 16-21.
later developments which were a sure strain on the federal concept. This theory of federalism involving two co-ordinate levels of sovereignty within a single country has, in practice been more of a myth than a reality.

The myth became only too apparent with the developments that took place before and after the second world war. These developments resulted in a new concept of 'cooperative federalism'. The challenges of economic crises and of war could not be met without co-operation and interdependence. The new trend was explained by F.A. J. Corry as follows:

It has arisen because several separate governments share a divided responsibility for regulating a single economic and social structure. It is most unlikely that any constitution could be devised which would enable each to perform its specific functions adequately without impinging seriously on the others. So their activities are inevitably mingled and co-operative arrangements must be worked out. The two levels of government ... interpenetrate one another in many places and ways. Under the heat and pressure generated by social and economic change in the twentieth century, the distinct strata of the older federalism have begun to melt and flow into one another.


The two governments, the national and the regional, could no more function in watertight compartments.

Federalism could no more be considered "as a wall separating the national and state levels of government" or to keep them at arm's length with orders such like "you do this and he will do that." In 1955, H. H. Birch made it clear that the guiding principle of eighteenth and nineteenth century federalism was the independence of state and federal authorities whereas of the mid-twentieth century is the need for cooperation between them. The developing tendencies of cooperation in federal systems were cogently articulated by William S. Livingston in 1956 when he explained that the "essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces - economic, social, political, cultural - that have made the outward forms of federalism necessary."

He added that "federal governments and federal constitutions do not grow simply by accident. They arise in response to certain stimuli; a federal system is consciously adopted as a means of solving the problems represented by these stimuli." In 1961, H. J. C. Vile substituted the term 'interdependence' in place of 'independence' when he pointed out that the foremost characteristic of American federalism is the interdependence of federal and state governments, not their mutual independence. Nelson R. Rockefeller in 1962 introduced another expression.

17. Id., p. 4.
'Shared Sovereignty' when he said that the federal idea is above all an idea of a shared sovereignty at all times responsive to the needs and will of the people in whom sovereignty ultimately resides. Morton Grodzins was very illustrative in explaining that the "American federalism is not like a layer cake, with each level of government having its own autonomous sphere of decision making; rather, it is like a marble cake, in that decisions regarding a particular function are made at all levels of governments, and that all levels typically co-operate in implementing public policies." These views particularly pin-point the fact that the concept of federalism in the sense of two levels of sovereign Governments is no more an operational reality in the contemporary world. If, Reagan's book, 'The New Federalism', begins with the pronouncement:

'Federalism - old style - is dead. Yet federalism - new style is alive....'

and proceeds to add:

old style federalism described a non-relationship between the national and State Government. New style federalism refers to a multi-faceted positive relationship of shared action. The meaning of federalism today lies in a process of joint action, not in a matter of legal status. It lies not in what governments are, but in what they do. It is matter of action rather than structure. It is dynamic and changing, not static and constant.

23. Reagan, supra note 10, p.3.
24. Id., II, 153-159.
The old and the new federalism were a subject of special seminar at a recent world congress. It was acknowledged that even without formal constitutional alterations, the structure of federalism has perforce undergone change and development by reason of such irresistible pressures, so that it is appropriate to speak of a 'new federalism'. Professor G. de Gaulle rightly observed that an inadequate federal constitution should be adapted to what the country concerned requires rather than that the country should adapt or adjust itself to the lineaments of its federal constitution. Federalism, in short, is not like the iron curtain or the Berlin wall: it is not something that makes a high barrier between the actions of the national and State governments, nor something that has its essence in a competitive relationship.

Just as Montesquieu's separation of powers is not workable in modern systems of government, here's concept of federalism is out of date. Indeed, rigid or absolute concepts cannot stand the test of time. All concepts grow with the passage of time, for otherwise, the functioning of the government is rendered difficult, if not impossible.

The idea of co-operative federalism can be applied today in the larger context of the world. Just as no city, no county or State within a federal set-up can live unto itself and meet its own requirements, so can no nation, including the most progressive, be

28. Rockefeller, supra note 21, p.59.
self-sufficient or live on its own resources. Independence of nations in the comity of nations and the need of co-operation amongst them in different spheres is illustrative of the fact that free nations, subject themselves to the regulation of the world organisation like the U.N.O.

4:12: THE NATURE OF INDIAN FEDERATION

In 1858, the British Crown assumed sovereignty of India from the East India Company and the British Parliament enacted the first statute for the governance of India in the same year. But it was the Government of India Act, 1919 which for the first time introduced the diarchical form of government in the provinces. This system provided for classification of subjects as Central and Provincial. The central subjects were exclusively kept under the control of the Central Government. Provincial matters were further divided into 'transferred subjects' administered by the Governor and his Ministers responsible to the Legislative Council, and 'reserved subjects' administered by the Governor and his Executive Council. The Centre retained the power to legislate for the whole of India on any subject. This system of Provincial dyarchy proved a failure mainly because the ministerial responsibility in respect of transferred matters worked inefficiently and partly because the Governor assumed a dominating position in view of his control over financial matters. The

29. The Government of India Act, 1858,
31. Id., sec.45A(4).
32. Id., sec.65.
Statutory Commission as contemplated in the Act of 1919 was set up in 1927 to review the working of the system. This Simon Commission submitted its report in 1930. The Commission reported that dyarchy had outlived its usefulness and recommended extension of responsible government in the provinces. The genesis of the present federal system in India lies in this report which supported the concept of federalism. On the basis of the report, the British Government convened a 'Round Table Conference' whose deliberations resulted in a Government White Paper incorporating the outline of the reforms to be introduced. The White Paper was submitted to a Joint Select Committee of Parliament which was assisted by an Indian delegation and the Committee submitted its elaborate report in 1934.

The Government of India Act, 1935 embodied with modifications the proposals contained in the Report of the Joint Select Committee. It incorporated the federal principle in order to bring together and co-ordinate two different types of political systems and sets of authorities. The Act divided the powers between the Centre and the provinces. The federal executive authority was vested with the Governor-General to be exercised on the advice of the Council of Ministers with regard to subjects other than reserved subjects. This regards the

34. The Government of India Act, 1915-19, Sec.944.
35. Shukla, supra note 33.
37. Proposals for Indian Constitutional Reform, and 1263 (1933).
38. Lord Linlithgow was the Chairman of the Committee.
41. Id., Sec.11.
reserved subjects (defence, ecclesiastical affairs, external affairs and tribal areas), the Governor-General was to act in his discretion, with the help of no more than three councillors appointed by him. The executive authority of the provinces was given to the Governor to be exercised on behalf of the Crown and not as a subordinate of the Governor-General on the advice of the Ministers. The legislative powers were distributed under the Act between the Federal and Provincial legislatures by having a Federal List over which the federal legislature was given the exclusive power of legislation, a Provincial List over which the provincial legislature could exclusively legislate, and a Concurrent List over which both could legislate. In case of repugnancy, the federal law was to prevail and the residuary power was vested with the Governor-General who could empower the same either to the federal or the provincial legislature. Another important feature of the Act was the establishment of the Federal Court for determining the disputes between the units and the federation. The federal structure as contemplated under the Act did not come into existence as the Indian States refused to join the federation.

In 1947-49, the conditions were more favourable for a federal solution. These were because two major hurdles had been removed with the creation of Pakistan.

42. Ibid.
43. Ibid, Chapter 17, §§ 48-59.
44. Ibid, Sec.100(1).
45. Ibid, Sec.100(2).
46. Ibid, Sec.100(1). The idea of 'concurrent list' had been conceived at the Round Table Conference and was included in the Report of the Joint Committee, supra note 39, para 51, pp 30831.
47. Ibid, Sec.107(1).
48. Ibid, Sec.108(1).
49. Ibid, Sec.204(1).
and the liquidation of the Indian States which decided to merge into the Dominion of India. In framing the Indian Constitution, the constituent assembly could draw upon number of foreign models but it rightly decided to make the Government of India Act, 1935 as the base. In working out the details of the federal system, the effort of the framers was to see what would suit the genius of the nation best.

The scheme envisaged under the Constitution of India of 1950, no doubt gives an upper hand to the Union Government but it cannot be said that it did not provide at all for a federal set up. In the division of legislative powers, the parliament can legislate not only on matters enumerated in the Union and concurrent lists but it can also do so with regard to matters in State list in certain situations, viz., when the Council of States passes a resolution that it is expedient in the national interest that Parliament should make laws on a matter specified in the resolution or when two or more State legislatures pass resolutions requesting the Parliament to legislate or when there is a proclamation of emergency in operation or when there is President's rule in case of failure of constitutional machinery in a State. Parliamentary power of legislation is also vested in the Parliament. It cannot be said that State legislatures have not been assigned any exclusive area.

51. Constitution of India, ¶. 246(1).
52. id., ¶. 246(3).
53. id., ¶. 249.
54. id., ¶. 252.
55. id., ¶. 250.
56. id., ¶. 256 and 357.
57. id., ¶. 263.
58. id., ¶. 246(3).
Normally it is they alone who can legislate on matters in the State list. It is only in exceptional situations as explained above that the Parliament can also legislate. If there is a conflict between the Union and the State law, it is the Union law which will prevail unless the State law has been reserved for President's assent in which case the State law will prevail subject to the power of Parliament to repeal such a law either directly or by passing a law inconsistent with it.

Administrative relations between the Union and the States have been so formulated that generally the scheme of legislative relations has been adhered to. Normally, the executive authority is co-extensive with legislative authority. The application of this rule would have extended the authority of the Union to the States with regard to matters included in the concurrent list but the proviso to Article 72(1) expressly provides that the executive power of the Union shall not extend in any State to matters within the legislative competence of the State except to the extent that the Constitution, or a law made by Parliament provides otherwise. The Constitution makes it clear that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which may apply in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary.

59. Id., rt. 254(1).
60. Id., art. 254(2).
61. There was a similar provision in the Government of India Act, 1935, Sec.8(a) read with proviso(i).
for that purpose. Similarly, the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. These provisions are necessary since the laws enacted by the Parliament operate in the States and unless they, there will be nothing to check the States if they decide to block the functioning of the Union Government. The sanction behind the power of the Union to give directions is found in article 365 which provides that where any State has failed to comply with or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of the Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It has been pointed out by Mr. H.M. Seervai that this power is not absolute, it is subject to the conditions mentioned and, therefore, will be open to judicial review if it is used for a purpose other than the one contemplated in the Constitution.

Part XIII of the Constitution deals with emergency provisions. If a proclamation of emergency has been made under article 352 because of war, external aggression or armed rebellion, in that event, notwithstanding

63. ibid. art. 257(1).
anything in the constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. And as mentioned earlier, the Parliament shall have the power to legislate even on matters exclusively in the State list. The effect of these provisions is that during the period of emergency, India is required to function as a unitary State. The experience of other federal constitutions like those of the United States, Australia and Canada has been that in times of war or imminent threat of war, they function as unitary governments as the modern war requires that the total resources of the whole country should be mobilized under the central control. Even otherwise, it needs to be understood that emergency provisions are not provisions of normal times and this departure from the federal principle becomes essential in order to handle abnormal situations. However, if the proclamation is allowed to continue even after the need for it has ceased to exist as has been our past experience, it will amount to abuse of emergency powers.

Article 355 of the constitution imposes on the Union the duty to protect every State against external aggression and internal disturbance, and also the duty to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. This provision is based upon Art.4, Sec.4 of the U.S. Constitution, enjoins that each State must have a republican

66. Id., Art.50.
67. See supra note 64, p.1615.
68. Id., p.1616.
69. IX C.R.D. p.175
form of government and if a State were to adopt a non-republican form of government, it will be the constitutional obligation of the federal government of the United States to intervene and to restore a republican form of government to the State. It is imperative that the federal government will have to act on its own initiative since it is unlikely that the people who destroy the republican form of government will ask for its restoration. Sec. 4 of art. 4 of the U.S. Constitution further provides that the United States shall protect each State against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence. The Supreme Court of the United States has held in Debs case that domestic violence may affect the execution of powers entrusted to the United States by the Constitution and consequently it has the power and the duty to use "the entire strength of the Nation ... to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." In actual practice, the requirement of the request of the State has not been insisted upon. Sec. 119 of the Australian Constitution is also similar to the U.S. provision and it has been observed in this regard that the State's request is not necessary when the Commonwealth acts in respect of domestic violence for the execution of its powers or for the protection of commonwealth property.

69. 9 F.2d, p. 175.
70. 46 Am. Jur. 2d, Constitutional law of the United States, 451(1938).
72. Scerri, supra note 64, pp 1613-20.
or services. It is clear from these provisions that Art. 355 of the Indian Constitution is not different from the position existing in other federal constitutions. Art. 355 provides the means to carry out the duty cast upon the Union Government under Art. 355 that it would ensure that the government of each State is carried on in accordance with the Constitution. The power conferred under Art. 356 is that if the President on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution, he may by a Proclamation impose President's Rule in the State and declare to himself all or any of the functions of the Government of the State and declare that the powers of the legislature of the State shall be exercisable by or under the authority of the President. It cannot be denied that this provision is capable of being misused, has been abused in the past and will cause imbalance in the Central-State relations contemplated under the Constitution.

In the background of these provisions, the nature of the Indian polity has been described in different ways by different writers. The Constitution has been viewed as definitely unfederal or unitary, its federal structure a myth and not a reality, quasi-federal, a federation with a strong centralising tendency, basically federal.

73. ibid, note 6, Legislative, Executive and Judicial Powers in Australia, 739 (1962).
74. See ibid, supra note 64, p. 1621. It has been suggested by ibid, supra that if it is desired to prevent or minimize such abuse, constitutional amendments will have to be made.
77. See ibid, supra note 7, p. 23.
but of course with striking unitary features and federal in form but lacks much of the substance of a classical federation. On the other hand, it has been observed that the Indian Constitution is in essence and substance federal. One finds the same diversity in the views of the Judges. Chief Justice B.P. Sinha has described the Indian Constitution as "not true to any traditional pattern of federation" whereas Justices J.N. Shelat and A.N. Grover find all the essential elements of a federal structure in the Indian Constitution. Chief Justices K. Subba Rao and F.B. Gajendragadkar have pronounced the Indian Constitution 'federal' but Chief Justice K.H. Beg is convinced that it is dominated by strong unitary features. These diverse and almost diametrically opposed views have been possible as no definite yardstick is applied to determine the nature of the polity. K.H. Bailey can be quoted with advantage when he says:

"If there is such a thing as a strict, pure, or unqualified federal principle, then the hard fact is that there are no federations and no federal constitutions."
It would not be justified to say that the Indian Constitution is not federal, particularly keeping in view the fact that the old concept of federalism is no more applicable. Referring back to the debates that took place in the Constituent Assembly, one finds that there was unanimity amongst members as to federal character of the Indian polity. On the eve of the adoption of the Constitution, Dr. B.R. Ambedkar explained:

The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. This is what the Constitution does. The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a constitution can be called centralism. It may be that the constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other federal constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism.

89. Shri N.V. Gadgil declared: 'Now in this constitution the nature of the State is federal. I doubt whether there is a single individual either here or outside or a party here or outside which has stood or even stands for a completely unitary State'.


On examination of the scheme of the Constitution, it can be said that it has introduced co-operative federalism. Mr. Granville Austin has said that the constituent Assembly had embraced co-operative federalism from the start itself. It is clear from the scheme of the Indian Constitution that it is not the States alone who have been made dependent upon the Centre, even the Centre is also dependent upon the States in several respects. First of all, the Parliament is dependent upon the States, because one of its Houses, the Council of States, is elected by the Legislative Assemblies of the States. In a situation when the ruling party in the House of People does not have majority in the Council of States, it assumes important voice in the passage of legislation and Constitutional amendments. This has been the experience during the Janata rule from 1977-79. Secondly, a Bill to amend the constitution requires to be passed by each House of Parliament separately by an absolute majority in that House and by not less than two-thirds of those present and voting. This means that the State legislatures have an important say in the process of amendment of the Constitution since the Council of States is indirectly elected by the state legislatures. Further, the important matters mentioned in the proviso to Art. 363 cannot be amended unless the amendments passed by Parliament are ratified by not less than half of the State Legislatures.

91. Searval, supra note 64, pp. 1629-30. Number of situations have been listed in which the Centre is dependent upon the states.
93. Certain clauses of the 45th Constitutional Amendment Bill were not carried through because the Council of States did not approve them.
Thirdly, after the 44th Amendment, Art. 352 gives the Council of States an important role in the declaration of Emergency since it is required to be approved by each House separately by majorities required for an amendment of the Constitution. Fourthly, the executive power of the Union is vested in the President of India who is not directly elected by the people but is elected by an electoral college consisting of (a) the elected members of the Legislative Assemblies of the States and (b) the elected members of both Houses of Parliament. It is evident from this that the Legislative Assemblies have a substantial say in the election of the President of India. Besides this dependence, there are a number of provisions which provide for co-operation between the federal and State authorities by breaking down the rigid separation which is implied in the classical definition of federalism. Without being exhaustive, one can mention first of all the extensive list of items included in the Concurrent list. Here both the legislative bodies can legislate but the most recent legislation will have priority, whether it be federal or State legislation. Secondly, under certain situations, the Parliament can even legislate on matters which are exclusively reserved for the States. Thirdly, the constitutional obligation between the States and the Union in their administrative

95. Id., Art. 54.
96. Most recent legislation means, (i) if there is a State law existing and the Parliament enacts thereafter on the same matter, it is the Parliamentary law which will prevail to the extent it is repugnant to the State law; or (ii) if there is a Parliamentary law in operation and thereafter the State Legislature enacts a law which had been reserved for the assent of the President, it is the State law which will prevail but it will be open to the Parliament to modify or repeal the State Law.
98. Id., Arts. 249, 250 and 252.
relations demands a lot of co-operation between the two sets of government. Fourthly, the provisions pertaining to financial relations are primarily based upon the co-operation of the federal and state governments. Finally, there is a duty cast upon the union to ensure that the government of every state is carried on in accordance with the provisions of the constitution. The successful governance of a country of the magnitude of India is possible only when the governments at two different levels function with the spirit of co-ordination and co-operation and, at the same time, remain in their own assigned areas in order to avoid any kind of strained relations. This has become more essential in view of the fact that often there is one party in power at the centre and some other party or parties in the states. The fact cannot be ignored that for almost 25 years, the Congress Governments dominated both at the Centre and in the States as a result of which problems of Federal Government did not come to the fore. In the changed context now, as and when there would be any effort on the part of the Centre to 'take over' some area of States, there would be not only resentment but also a countervailing demand for more autonomy.

It needs to be underlined that the observance of the discipline of the Constitution is very essential for smooth functioning of the cooperative federal system that we have adopted.

99. Id., Arts. 256-257.
100. Id., Arts. 268-270.
The institution of Ombudsman remained confined to Scandinavian countries till 1962 when it was incorporated by New Zealand. As a result, other systems viewed the institution with hesitation and doubt as to whether it could be transported to countries with a large population and having a federal set-up. For those who were seriously considering the adoption of Ombudsman the main apprehension was, could it be able to look after the entire federal administration or not?  

Frits Forstein Marx, Professor of Comparative Administrative Science and Public law expressed his apprehension that in a country of continental width like the United States, an Ombudsman would have to support a sizeable machine to cope with the business flowing to him as a result of federal operations alone. He added that with fifty States and, if fashion spreads, perhaps ten times as many of the larger local governments in the market for an Ombudsman, we are bound soon to greet a new professional association, holding annual meetings like the others. It is submitted that the size and the population of the country does not run counter to the institution of Ombudsman. It is wrong to assume that one country can have only one Ombudsman. There can be more than one Ombudsman depending upon the likely number of complaints. Sweden started with one Ombudsman and today it has four.

105. Frits Forstein Marx, 'The Importation of Foreign Institutions' in Fowat, id., p. 259.
New Zealand started with one and now has amended the law to have several Ombudsmen. Both these examples are from non-federal systems.

In a federal system it is easier to manage, for the big country is already divided into smaller units. Professor Donald C. Rowat recommends the federal system as more suitable to the Ombudsman. It is because the great advantage of a federal system is that an experiment with a new idea or institutional form can be tried on a small scale in one of the states or provinces first. If it is successful there, it will spread to the others and can safely be adopted by the Central Government. He has given a very sound suggestion that as the needs at the provincial and central level are different, therefore, the provincial and federal offices should not be mere carbon copies of one another. On the other hand, Professor Albert S. Bel feels that there is a special difficulty in accommodating the Ombudsman in a federal arrangement as it could heighten the conflict between the Ombudsman and the rule of law. He points out that either level of government in a federal system must, in its legislative and official actions, stay within the range of concern assigned to it by the constitution, and this is bound to give rise to frictions and frustrations as there will be challenges relating to constitutional vires and ultra vires. Prof. Rout has argued that since Ombudsman will have only advisory powers, even if a federal Ombudsman received a complaint having to do with

107. The Ombudsman Act, 1975 (New Zealand), Sec. 3(1).
a decision made by a State Ombudsman and proceeded to
deal with it anyway, no harm will be done. We would
make only a recommendation. Moreover, even without
the Ombudsman, disputes of this kind in federal systems
are a common feature which are resolved through the
Judicial process. The very concept of federalism has
undergone a change as a result of which absolute autonomy
of each unit is no more a reality. In this changed
context, there is not likely to be much friction of
the Ombudsman vis-a-vis the federal system. Each Ombudsman
will function within the area assigned to him and in
assigning the area, caution will have to be exercised so
that the general federal scheme of that system is kept in view.

Some other difficulties have also been visualized.
It has been pointed out that there can be a possibility
of conflict of opinion among the various Ombudsmen which
can result in confusion and detract from the value and
effectiveness of the institution. This objection runs
counter to the scheme of the Ombudsman. Ombudsman
investigations are not to result in judgments. Each
complaint will be examined in its own background and
whatever the Ombudsman will consider appropriate, he
will recommend. On this logic, even the system of State
High Courts should not be workable since different High
Courts can reach different conclusions and thereby
create confusion. It is no doubt true that in any system,
with the passage of time, Ombudsmen will create their own

111. Proceedings of a seminar on Judicial and other Remedies
    against the abuse of administrative authority organised
    by the U.N., 16 (June 12-25, 1969).
Jurisprudence. Another point that has been raised is that the institution will turn into a vast bureaucracy. It has been aptly pointed out that the existence of multiple ombudsmen at different levels in a federal system will automatically prevent this. Even otherwise, one of the features of an Ombudsman office is that it functions with small professional staff. It is also argued that with ombudsmen at both levels of government, complaints will often be sent to the wrong ombudsman. In a federal system, it is possible that the Ombudsmen at both levels may receive a number of complaints that should have gone to the other level. It is also possible that in some cases, the complaint may be sent even to both. The solution for this is that the ombudsmen will have to create a liaison amongst themselves. The ombudsman will have to ensure that the wrong complaint is transferred to the proper ombudsman and inform the citizen accordingly.

Those federal systems which find that one ombudsman is not sufficient at the federal level or even at the State level, can opt for a collegial ombudsmanic body at each level. Different ombudsmen can be assigned different areas or has been done in Sweden. Thus there does not seem to be any insurmountable difficulty for the ombudsman in a federal system.

It is interesting to note that in Australia, Canada and United States, the ombudsman has first been created at the state level. In Australia, they have Ombudsmen both

112. locat. supra note 110, p.73.
113. For a comparative chart of the size of staff of different ombudsmen offices, see, Kent, H. Rees, Ombudsmen around the world: comparative chart, 16-17 (1973).
114. locat. supra note 110, p.73.
at the Central and State levels. By 1974, five of the six States had introduced Ombudsmen. Thereafter, the first Commonwealth Ombudsman was appointed in 1977 followed by an Ombudsman in the remaining State of Tasmania in 1979. Canada as yet does not have the federal Ombudsman though it has been well tried in the provinces. At the federal level, they have the Federal Commissioner of Official Languages who investigates complaints that the status of an official language (French and English) was not recognized in federal government and Parliament. They also have the Federal Correctional Investigator who investigates, upon receipt of complaints received from inmates in federal penitentiaries, in respect of grievances that come with the responsibilities of the Solicitor General. On the basis of the experience of ombudsmen in the provinces, Joseph Clark has advocated a federal Ombudsman. The idea of a federal ombudsman in the United States has so far received only a lukewarm response. No doubt the efforts for the federal ombudsman were initiated in 1967 yet there is no existing institution.

116. Sec. 19 establishes the office of the Commissioner of official languages. This commissioner performs functions in the nature of ombudsmen. This was explained by Prof. Ian A. Hunter of the University of Western Ontario in a personal talk at indoor (U.I.T.) on 29-5-1980.

117. Inger Hansen, a lawyer, was appointed by the Solicitor General on June 5, 1973 to serve as a Commissioner under the Inquiries Act with the title of correctional investigator.

118. Frank, supra note 106, p.15.


120. Stephen I. Noble, 'Terror for the administrative compensation of victims of toxic substance pollution: A model Act,' Harvard Journal on Legislation, 683 at p.756 (1977). The author has explained that over the years, congress has approached the concept with some hesitancy.

which could be embraced by the classical ombudsman definition. The arguments which have been advanced against the federal ombudsman emphasize the dangers of adding yet another level to the bureaucratic hierarchy which, it is contended, would serve to confuse existing policy makers and render government even more cumbersome and less efficient. This argument cuts at the very basic philosophy of the Ombudsman. The Ombudsman is meant to improve and inspire confidence in the administration by being an impartial defence against unjustified attacks to which the individual civil servant cannot himself respond. The ombudsman should be regarded neither as a simple 'watchdog' of the public nor as the apologist of the administration, but as the independent upholder of the highest standards of efficient and fair administration. The apprehension of 'another level of the bureaucratic hierarchy' is not substantiated by the experience of the ombudsman institution in other countries. It is nobody's case that for the whole of the United States, the federal ombudsman alone would be enough. But with the federal and State ombudsmen, each one would operate in his own area. Prof. William B. Gyn


124. Paul R. Verkuil, supra note 122, p.847. See also, T. Low, The End of Liberalism, 303-05 (1969). The author views the ombudsman as redundant and favours the fostering of a truly independent and integrated senior civil service.

does rightly observe that it is difficult to comprehend as to how the ombudsman can affect American federalism adversely, for the jurisdiction of the federal and State Ombudsman would be limited to the federal and State bureaucracies respectively. In fact, like Prof. Rowat, he believes that federalism facilitates the introduction of the ombudsman into a large country by breaking the country and public administration into separate independent parts. The States of Hawaii and Alaska have already given the lead. There seems to be no reason as to why the Ombudsman should not be adopted both at the Central and State levels. The ombudsman is as much adaptable in federal systems as it is in unitary systems. The Procuracy in the USSR has been operative at different levels of the government for such a long time. Those who oppose the introduction of the ombudsman in federal systems perhaps overlook or underestimate the flexibility both of the ombudsman and of federalism. It is hoped that the Australian experience in particular will soon prove (if it has not done so already) to the federal world that the ombudsman can function without causing any adverse impact on central-state relations.

The Ombudsman today is being debated not only at the national but also at the international level. The European Parliamentary Conference on Human Rights, held in Vienna in October, 1971, approved a resolution that it was necessary to 'consider favourably the establishment of an organ authorized to receive and examine individual complaints with the right of access to the files of government departments, functioning on the lines of the ombudsman as known in the Scandinavian countries.'

Thereafter, in January, 1972, the Parliamentary Assembly of the Council of Europe passed a resolution which concluded with the statement that it "invites national parliaments to give effect to the proposals of the conference..." On January 24, 1972, a motion recommended a committee of Ministers to study and report on the question of instituting the office of Ombudsman/Commissioner of Human Rights at the European level. The recommendation was adopted by the Assembly in October, 1972 which invited the Council of Ministers to set up an ad hoc Committee, composed of highly qualified experts, to consider the proposals. The Legal Affairs Committee was instructed to organize a meeting of persons discharging the functions of ombudsmen or parliamentary commissioners in member States of the Council of Europe, together with other qualified persons, to exchange information and experience and advise on the desirability of extending the system at the European level. The Legal Affairs Committee which met in April, 1974, prepared a report which was debated in January, 1975 by the Parliamentary Assembly. The Assembly could not decide in favour of an ombudsman at the European level, it only recommended to the committee of Ministers that the governments of those member States which have not done so, to consider the possibility of appointing at national, regional and at local level persons discharging functions similar to those of existing ombudsmen and Parliamentary Commissioners. The institution of ombudsman has also been discussed and debated at various International Conferences of Ombudsmen:

129. idem, p.25.
129. idem.
International Commission of Jurists, the United Nations and the World Peace through Law Centre. Already, an International Ombudsman Institute has been set up in Canada.

In the background of these efforts that have been made at the national and international levels, the view that an Ombudsman in a federal set up cannot be mobile stands refuted. It is submitted that federations present a very workable background to the Ombudsman.

414: **Feasibility of Ombudsman under the Indian federal set-up**

Whether there should be an Ombudsman on an all-India basis or should there be separate ombudsmen for the Centre and States is a question which needs careful consideration. The Study team of the Administrative Reforms Commission examined this issue and highlighted two-fold difficulties in having an all-India ombudsman; one, that of the huge number of complaints from all over the country and two, an authority imposed upon the State by the Union Parliament will interfere with the executive powers vested in the State under Article 162. It suggested that if an ombudsman has to be set up in the States, it should be done by each State legislature. Overlooking these aspects, the Administrative Reforms Commission recommended that there should be one authority dealing with complaints against the administrative acts of Ministers or Secretaries to Government at the Centre and in the States. There should be another authority in each State and at the Centre for dealing with complaints against the administrative acts of other officials. In the draft Bill which was appended

131. Frank, supra note 106, p. 27.
132. Id., p. 29.
133. Id., p. 29.
With the report of the Commission, provisions were made only for the Lokpal to deal with complaints against Ministers and Secretaries but no provision was made for other authorities. When the Government did not come forward with the Bill for over a year after the report of the Commission, Mr. P.R. Deo, a Member of Parliament introduced a private member's Bill incorporating verbatim the provisions of the draft Bill as proposed by the Commission. The Bill was voted for eliciting the opinion of the States. Number of States objected to the Parliament passing a law to appoint an ombudsman having jurisdiction over Ministers and Secretaries in the States on the ground that it was beyond Parliament's legislative competence and encroached on the State's powers in as much as it would subject the State ministerial advice to Central authority. Prof. Donald C. Rovat as a foreign observer found it difficult to see how the Commission's scheme could be effected in a federal system without a constitutional revision, how the super-ombudsman could be made answerable to both the federal and State legislatures and how he and the sub-ombudsman would be able to sort out their respective functions in a hierarchical system of administration for which Ministers at the top are held responsible. Prof. P.R. Jain attacked the Commission's federal Lokpal scheme on constitutional and practical grounds. He pointed out that the Lokpal, who will be the appointee of the Central government but will be probing into the actions of the ministers and Secretaries of the States would be ignoring the federal aspect of the constitution in a very obvious manner. He cautioned that

137. ibid. pp. 36-34.
139. Rovat, supra note 104, p. KII.
since the political complexion can be different at the centre and in the States, a central appointee will not command confidence of the political parties in each State. He further added that though the Lokayukta who is to function in the State will have no central functions to discharge and is to submit his report to the State legislature, he is to be appointed by the President on the advice of the Prime Minister, which would not be reasonable and acceptable to the political parties in each State.\(^{140}\)

The Government in its Bills of 1963 and 1971 limited the jurisdiction of the Lokpal to the Central authorities alone\(^{141}\) and left it open for the States to enact their own legislations. This avoided a head-on-collusion between the Centre and the States. But the Lokpal Bill of 1977 revived the controversy by including the State Chief Ministers within the purview of a Lokpal appointed by the Centre.\(^{142}\) The primary function of the Lokpal as contemplated in the Bill of 1977 was to make inquiries into specific allegations of misconduct against public men.\(^{143}\) The question that arises is, can the Parliament enact a law whereby a central body may be authorized to hold inquiries into the conduct of State Chief Ministers or not? This has not been specifically provided either in any of the articles of the Constitution or in the legislative lists therein. But this does not mean that no legislation can be enacted to this effect.


\(^{141}\) The Lokpal and Lokayuktas Bill, 1968, cl.7; The Lokpal and Lokayuktas Bill, 1971, cl.7.

\(^{142}\) Lokpal Bill, 1977, cl.2(g)(iii).

\(^{143}\) Id., cl.10. Emergency: a war on corruption, Appendix 7, 156-162 (1975).
except by an amendment of the Constitution. On perusal of the legislative lists, one will find the following relevant entries:

Entry 94 of List I:

Inquiries, surveys and statistics for the purpose of any of the matters in this list.

Entry 45 of List III:

Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

In the Government of India Act, 1935, entry 43 of List I and entry 39 of List II read: "Inquiries... for the purpose of any of the matters in this list," and entry 35 of List III read, "Inquiries... for the purpose of any of the matters in this part (i.e., Part II) of this list."

In the Draft Constitution, entries 56, 64, and 36 of Lists I, II and III respectively read as follows:

"Inquiries... for the purpose of any of the matters in this list." Ultimately this scheme was not carried through. Dr. Ambedkar moved an amendment "that entry 64 be deleted. That is taken in the Concurrent List."

There were no reasons assigned and without a debate the motion was adopted. Dr. Ambedkar moved "that for entry 36, List III the following entry be substituted: '36. Inquiries and Statistics for the purposes of any of the matters specified in List II or List III'." Again without any debate, the amendment was adopted. This means that the Parliament can enact a law for holding of inquiries with regard to even those matters which are included in List II over which ordinarily it is the State legislature alone which is competent to

144. 9 C.A.P., p.925 (Sept. 2, 1949).
145. id., p.953 (Sept. 3, 1949).
Legislature. It has been argued by Mr. Seervai that in interpreting a provision of the Constitution, that interpretation should be given which would lead to smooth and harmonious working of the Union and State Governments.\textsuperscript{146} In view of the fact that under the Constitution the executive power of a State extends to those matters with respect to which the legislature of the State has power to make laws,\textsuperscript{147} the giving of power to the Parliament which would mean to make an inroad in an area which is assigned to the States.\textsuperscript{148} Besides the above mentioned entries, entry 97 of List I read with Art. 243 of the Constitution vests the Parliament with residuary legislative power whereby it can even legislate with regard to those matters which may not have been specifically covered in either List II or III. The question of holding of inquiries into allegations of misconduct against Chief Ministers, individual Ministers or the entire Council of Ministers is of utmost constitutional importance. This matter of inquiries against the State Ministers and Ministers has been a subject of scrutiny of the Supreme Court under the Commissions of Inquiry Act, 1952. The Lokpal inquiries will have a close bearing with the inquiries under the Act of 1952. It will be relevant here to mention the experience gained under this Act.

**COMMISSIONS OF INQUIRY ACT, 1952:**

Section 3 of the Act provides that the appropriate government may appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance. It does not specify the category of

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\textsuperscript{146} Seervai, supra note 64, p. 1934.
\textsuperscript{147} Constitution of India, 1950, Art. 162.
\textsuperscript{148} See, Seervai, supra note 64, pp. 1933-34.
persons against whom the inquiry can be ordered. The result of this is that the inquiry can be ordered against any person or class of persons provided it pertains to any definite matter of public importance. There is a large catena of inquiries which have been ordered against ministers and ex-ministers. Since the commencement of the Constitution, but there are not very many examples of the Central Inquiry Commissions being instituted against State Ministers and Chief Ministers. The Das Commission of 1963 was the first one to have been appointed by the Centre to inquire into the charges levelled against late S. Partap Singh Virran, the then Chief Minister of Punjab. The Commission had been instituted after persistent demand. In fact, the then Prime Minister was very reluctant to do so. But the fact remains that the Commission was established against the ruling Chief Minister and one who belonged to the same party as that ruling at the Centre. The constitutional validity of this Commission was not questioned. The Chagani Commission of 1975 against the ex-ministers of Punjab also did not focus the issue of whether the centre could appoint Commissions in the State or not? Then came the appointment of the Jarkaria Commission in 1976 to inquire into the allegations made against S. Ramnath, the ex-Chief Minister of Tamil Nadu and some of his cabinet colleagues. Around the close of 1972, memoranda had been submitted to the President levelling different

151. The reluctance is clear from the note written by Prime Minister Jawahar Lal Nehru to the President on Sardar Partap Singh Virran, reproduced in M. Vallyya, Emergency: a war on corruption, Appendix 7, 156-162(1975).
152. On 4-11-1972 by L. Ramchandran, and on 6-11-1972 by L. Vallyan Sundaram.
allegations against the Chief Minister. The Government sought his comments. He wrote to the Prime Minister that in the federal set up, the constituent States were not subordinate to the Central Government, each State being autonomous within certain defined limits, and a State cabinet was collectively responsible to the Legislative Assembly of the State, since the pattern of parliamentary system of Government in the States was the same as that in the Centre. It was contended by him that there was no provision in the Indian Constitution which made the State Cabinet "accountable" to the Union Government. Therefore, he pleaded that it would be subversive of the entire scheme of the constitution and the system of responsible Government if a State Cabinet was sought to be subject to the Commission of Inquiry constituted by the Union Government. He was of the view that such an action would amount to an interference with the powers falling under the State list in the Seventh Schedule to the Constitution. The Central Government in a public statement rejected the contentions of the Chief Minister and claimed competency to probe into any matter of public importance pertaining to the Central or State Government. An Inquiry Commission was appointed by the Central Government during the tenure of the contending Chief Minister.

On 31st January, 1976, President's rule was imposed under Art.356 in the State of Tamil Nadu. The President's rule was imposed on the report of the Governor who had also recommended that a Commission of Inquiry be ordered to inquire into the allegations made against the C.P.I. (M) Government. On 3.2.1976, the Central Government notified

the appointment of a Commission of Inquiry. This notification was challenged under article 226 of the Constitution mainly on the ground that it is destructive of the federal structure contemplated under the Constitution. The division bench judgment was delivered by the then Chief Justice K.S. Kailasam. The Court observed that the words, 'federation', 'autonomy', and 'federating states' have varying meanings and what a particular word means would depend upon the context. To apply the meaning of the word 'federation' or 'autonomy', used in the context of the American Constitution, to our Constitution would be totally misleading. After referring to the history of the Indian Government, from the Government of India Act, 1919 to the present Constitution, the Court observed:

"The feature of the Indian Constitution is the establishment of a Government for governing the entire country. In doing so, the Constitution prescribes the powers of the Central Government and the powers of the state government and the relations between the two. In a sense, if the word 'federation' can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and the governance of the country. The powers of the Centre and the States are demarcated under the Constitution. It is futile to suggest that the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such state ever existed or acceded to the Union."

159 Id., p. 194.
159 Id., p. 195.
In this background of the nature of the Indian federation, the court analysed the provisions of the Constitution and lists and held:

"That the power of the Parliament extends to legislate in all matters not covered by List II and List III cannot be questioned...." 159

and added that -

"there could be no difficulty in concluding that the State as such has no inherent power or autonomous power which cannot be encroached upon by the Centre. The powers of the Centre and the States will have to be looked for in the Lists and other Articles in the Constitution. 160

In this whole context and in the context of Articles 3 and 356, the Court laid down:

"These undeniable facts can give no room for the contentions of the learned counsel for the petitioner that the Central Government is not empowered to order an inquiry against State Ministers, subordinating the state ministers to the control of the Union Government." 161

The notification was also held intra vires the Commissions Inquiry Act, 1952 and the petition was dismissed in limine. 162

So an important constitutional issue was decided without even admitting the petition.

Another situation and one of complex nature, arose in the Karnataka case 163 during the Janata regime, demands had been made through memorials for an inquiry

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159. ibid.
160. ibid.
161. ibid.
162. ibid, p.198.
into the conduct of the Karnataka Congress Chief Minister, Devraj Urs, and some of his cabinet colleagues. After a meeting of the Union Cabinet, the union Home Minister wrote to Urs on 26-4-1977 asking for his comments on the various charges. Urs did not approve of the move, rather criticised it on the ground that the centre could not probe matters relating to State Ministers. On 15.5.1977, the Prime Minister told a news conference that the Centre had a constitutional right to institute a probe into charges of corruption against a State Minister. Urs preempted the Central Government's move by appointing a Commission himself on 18-5-1977, to inquire into the various allegations made against him and his colleagues. Urs explained that he wanted the vitiated atmosphere to be cleared once for all and having taken the stand that the Central Government had no constitutional or legal right to probe into matters within the exclusive jurisdiction of States, he would have been accused of trying to hide his guilt if he had not taken the present course. The Central Government was surprised by this move of Urs. In reply to the communication from the Union Government, Urs had described the charges as baseless but within five days of sending the reply his government appointed the Iqbal Hussain Commission. On 23-5-1977, the Central Government appointed Justice A.N. Grover, a retired Judge of the Supreme Court to inquire into allegations against Urs and his cabinet colleagues, excluding those

165. Indian Express, New Delhi, 17.5.1977.
166. Shri Iqbal Hussain, a retired judge of the Karnataka High Court was appointed as one man Commission.
matters which were covered by the notification of the Government of Karnataka. It has been suggested that under the circumstances, the better course for the Union Government would have been to seek the advisory opinion of the Supreme Court. The Karnataka Government filed a suit in the Supreme Court under article 131 of the Constitution. The main issues which are relevant to the discussion in hand were:

(i) Whether the appointment of the Central Commission was violative of the federal principles embodied in the constitution or not?

(ii) Whether the Centre could appoint a Commission to go into the same matter in respect of which the State had already appointed the Commission or not?

(iii) Whether the appointment of a Commission by the Central Government to go into the conduct of a Chief Minister and other ministers was ultra vires the Commissions of Inquiry Act or not?

These issues were dealt at length by a Seven-Judge bench. The Commissions of Inquiry Act was held to be constitutionally valid by the bench with the exception of Justice P.S. Kallaam. He did not think it necessary to express his opinion on this issue since he otherwise held the impugned notification ultra vires Section 3 of the Commissions of Inquiry Act. In Karnataka's case, he had upheld the constitutional validity of Sec. 3 of the Act. Chief Justice H. Beg explained that the term 'inquiries' as used in Entry 94 of List I and Entry 45 of List III, is wide enough to

169. The Gazette of India, Ext., part II-Sec.3 - Sub-Sec.(II) dated 23-5-1977.
172. Id., p.179.
173. Supra note 156.
embrace every kind of inquiry* and added that the language used - "any of the matters specified" - is broad enough to cover anything reasonably related to any of the enumerated items even if done by holders of ministerial office in the States. He assumed that even if these entries do not include inquiries against ministers in states, article 243 read with entry 97 of list I would empower the Parliament to legislate to hold inquiries against state ministers on matters of public importance. A contrary view, according to him, would have the wholly unacceptable consequence of placing the ministers in the State Governments practically above the law which could have never been contemplated by the constitution-makers and would violate the express provisions of Article 14 of the Constitution. Justice Chandrachud (as he then was) observed that it is hardly ever possible, except in utopian conditions, that the State Government will appoint a Commission to inquire into acts of corruption, favouritism and nepotism on the part of its own Chief Minister. It has been observed by Prof. Upanendra Baxi that the court is more anxious than the Parliament to give liberal power of instituting enquiries to the Union Government. He argues that the appointment of a Commission against himself by a Chief Minister is not inconceivable though it may be unlikely and substantiates this by pointing out that in this very case the Chief Minister appointed a Commission which might even have found that he had committed some 'lapses', unless we are to presume that no State Commission can find a Chief Minister guilty, even of 'lapses'. On the other hand, he points out that

174. supra note 171, pp. 105-06.
175. ibid.
176. ibid., p.133.
177. ibid., supra note 115, 146.
such enquiries by the Centre are not likely to be appointed unless the government in the relevant State is run by opposition parties. He emphasises the fact that the power of instituting enquiries is primarily a weapon in the otherwise already rich armoury of Indian politics. In this particular case, the Chief Minister had instituted a Commission with the sole purpose of avoiding the Central Commission and not that he otherwise wanted it. Prof. Baxi is not justified when he quotes this as an example but he is right in pointing out that the central commission will be appointed only when the centre wishes to embarrass the State Government. It cannot possibly be denied that in the changed political set-up where the Centre is governed by one political party and the States by others, the weapon of enquiries can possibly be misused. There is need for a machinery which could inquire into such matters without the intervention of the Government. This will avoid the political overtones involved in it.

It was argued that the central inquiry will have the consequence of interference with the State Government which is not warranted by the Constitution. Justice Chandrachud (as he then was), with whom Justice Bhagwati concurred, made it clear that a Commission appointed under the Act is purely a fact-finding body which has no power to pronounce a binding or definitive judgment, so it cannot be said that the inquiry constitutes an interference with the executive functions of the State Government or that it confers on the Central Government the power to control the functions of the State executive. It is no doubt true that these commissions are fact-finding.

178. Id., p. 147 (emphasis added).
179. Supra note 171, p. 137.
bodies but it also cannot be denied that the moment the Commission is set up and starts holding public hearings, not only is it embarrassing and awkward for the persons being inquired into, they also stand condemned in the public mind even before the Commission gives its findings. To say that interference results only from a definitive judgment is to overlook the practical realities of the situation. Untawia, Shinghal and Jaswant Singh, JJ were also of the definitive view that Section 3 of the Act is not constitutionally invalid on any account. The obvious intention behind the Act in the words of Chief Justice K.H. Beag is 'to enable the machinery of democratic Government to function more efficiently and effectively.' So the Act was held to be valid with the constitutional scheme of the federal structure.

As regards the second issue, whether two Commissions can go on simultaneously or not, the Act provides that if a Commission has been appointed by the Central Government, no State Government shall, except with the approval of the Central Government, appoint another Commission to inquire into the same matter so long as the Commission appointed by the Central Government is functioning. Similarly, if a commission has been appointed by a State Government, the Central Government shall not appoint another Commission to inquire into the same matter so long as the Commission appointed by the State Government is functioning, unless the Central Government is of the opinion that the scope of the inquiry should be extended to two or more States. In short, the law is that two

130. Id., p.157.
131. Id., p.92.
132. The Commissions of Inquiry Act, 1952, Sec.3(1)(a) and (b).
Commissions cannot and should not be appointed to inquire into the 'same matter'. The validity of the Second Commission, that is the Grover Commission was upheld on the ground that the two notifications were substantially different in nature and object and the two Commissions have not been asked to traverse the same area, meaning thereby that they were not to deal with the same matter. On the other hand, Kailasam J., while dissenting observed that the Court had not been called upon to go into the two notifications and determine which item in the notification of the Central government is not covered by the State Government notification. Chief Justice N.P. Beg having taken the position that the two notifications were substantially different, still thought it better to advise the State Government to withdraw its own notification. This kind of confusion at the Summit Court is not understandable.

The third issue was the validity of the appointment of the Central Commission against the Chief Minister and Ministers of a State vis-a-vis Section 3 of the Act. The requirement of Section 3 is that the 'appropriate Government' can constitute a Commission to inquire into a 'definite matter of public importance'. The majority held that there is no justification for reading down this provision so as to limit the power of the Central Government to appointing Commissions of Inquiry for going into the conduct of persons in relation to matters concerning the affairs of the Union Government only. Justice Kailasam appended a strong note of dissent when he held:

133. supra note 171, p. 38.
134. Id., pp. 33, 133.
135. Id., p. 177.
136. Id., p. 33.
137. See, Baxi, supra note 170, pp. 141-46.
138. Supra note 171, p. 134 (emphasis added).
Taking into account the history of the development of the Indian Constitution and its scheme, the impugned notification impinges on the right of the State to function in its limited sphere. Further, the impugned notification is beyond the powers conferred on the Union Government under s.3 of the Commissions of Inquiry Act, 1952 .... It is necessary that Commission of Inquiry should be appointed in order to maintain and safeguard the purity of the Union and State administration. But such Commission of inquiry should be strictly in accordance with the Constitution and should not affect the Centre-State relationship.

Justice Kailasam's view was that under Sec.1, the Central Government cannot order an inquiry into the abuse of powers by the State Chief Minister in office. The distinction between ministers-in-office and ministers out-of-office cannot be overlooked. If the Central Government were to exercise this power against State ministers-in-office, it will disturb the Centre-State relationship balance and will also lead to practical problems. It has been argued by Kailasam J., that inquiry into the misconduct in exercising governmental functions by the Chief Minister of a State cannot be discerned from any of the entries in List II or III. He points out that Entry 45 is in the Concurrent List and if a law can be enacted by the Parliament empowering the union government to conduct an inquiry into the misuse of the governmental functions by a Minister of State, it cannot be denied that the State Government will

189. id., p.179.
190. id., p.175 (emphasis added).
have the power to legislate empowering the State to inquire into the misuse of governmental powers by a union minister relating to matters in List II and III. Mr. U.D. Seervai has also supported this consequential interpretation. On the basis of this, it will be justifiable to say that under Sec. 3 of the Act, the 'appropriate government' can constitute an inquiry and hence a State government can also order an inquiry against the members of the Central Council of Ministers relating to matters in List II and III. This interpretation cannot be dismissed in view of the majority opinion in the Karnataka case. But it will certainly lead to serious consequences and will not be conducive to the harmonious functioning of the Centre and States. It could not be out of place to mention the complex situation that arose recently in the context of tabling three interim reports of the Gurdev Singh Commission in the Punjab Vidhan Sabha. The Akali Government in Punjab had instituted this Commission to look into the emergency excesses committed during the Chief Ministership of Gian Singh. By the time the reports were submitted, there was change in Government not only in Punjab but at the Centre also. Gian Singh was appointed the Home Minister in the Central Ministry. Under the Commissions of Inquiry Act, the report is required to be laid before the Legislative Assembly of the State within a period of six months from the submission of the report by the Commission. Since Gian Singh had been indicted in a number of

191. ibid. p. 170.
193. Indian Express, Chandigarh, 1 (July 26, 1980).
194. The three reports were submitted on February 29, March 7 and March 31, 1930 respectively.
195. The Tribune, Chandigarh, 14 (July 26, 1930).
complaints, the presentation of the reports resulted in a demand for resignation from the members of the opposition in the Parliament. The reply of the Government given in the Rajya Sabha was that it (the report) has no relevance as far as we are concerned, that it was for the Punjab Assembly to decide that future action it proposed to take on the report; As far as the Punjab Government was concerned, it had to even explain to the Centre that the report could not be withheld because of the mandatory statutory requirements. The question of any action could not have been thought of in view of the fact that both the Governments were of the same party. If on the other hand, there would have been a different party in power in Punjab, possibly the situation would have been different. It would have initiated some action which would have caused embarrassment to the Centre. It is evident from this that if the State Governments were to order Commissions against Central Ministers, not only that the whole exercise will be futile since the Centre will just ignore the reports, it will cause difficulties in the functioning of the Governments at the two levels. In this respect, it will be better if the two Governments are left to themselves to set their affairs right rather than one interfering in the other. The above mentioned circumstances are a strong indication that 'inquiries' in Entry 45 List III should not be given a wide meaning so as to confer on the Union and the State Governments power to legislate to embark on an inquiry regarding the misuse of Government powers by the other.

196. *Indian Express*, Chandigarh, 1 (July 26, 1980).
The fundamental point that the Supreme Court completely overlooked in upholding the constitutional right of the Centre to order inquiries against State Chief Ministers and Ministers was that after the completion of the inquiry when the report is submitted, who is competent to take action on it? If the Commission finds the Chief Minister or/and his colleagues have indulged in corrupt practices, can the Central government constitutionally direct the Chief Minister to step down or exclude the indicted Ministers? If the Chief Minister refuses to carry out the direction and manages to get the vote of confidence from the Legislative Assembly, in that case, it will not be valid to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. It has been justifiably argued by Mr. H.M. Seervai that if the union government purported to give directions about the exercise of executive power in any field reserved for the state executive, which power does not collide with, or prejudice the exercise of, the Union’s executive power, such a direction would be invalid, and the imposition of the President’s Rule under Art. 365 would be void for non-compliance with the condition precedent laid down by Art. 365. Justice Chandrachud, as he then was, did touch upon the issue when he pointed out that on receipt of the Commission’s report, the Central government may or may not take any action, depending upon the nature of the findings recorded by the Commission. If it decides to take any action, the validity thereof may have to be tested in the light of the constitutional provisions. This was clearly avoiding the

198. Seervai, supra note 64, p. 1624.
199. supra note 171, p. 133.
issue and arguing in two opposed directions since what purpose is served by inquiry and findings if the follow up action remains doubtful. The issue of follow up action could not conceivably be taken to be beyond the issues before the Court since by necessary implication this issue was involved and the court could legitimately be expected to go into this aspect rather than sweeping it under the carpet. A peculiar situation arose in this very Karnataka case. After the Supreme Court upheld the establishment of the Grover Commission, it worked for two years, indicted Devraj Urs in its final report on five charges of favouritism, misuse and abuse of power. After studying the report for two months, the Union Government merely passed it on to the State Government for 'follow-up-action' explaining that under the present law the Centre cannot do anything beyond forwarding the report to the State Government for action. It was strange that the report was sent to the very person who was indicted for action. Urs ignored it by saying, it is 'only a report and not a Judgement'. In the ultimate analysis the whole exercise proved meaningless and the onus of it lies squarely on the apex court which gave a judgment ignoring the fact that a choice between pragmatic and functional approach and a purely literal approach was inevitable which, perhaps it shirked to make. This interpretation defeats the object of the legislation, suppresses the mischief and does not advance the remedy.

Another deadlock can be visualized. If two Commissions, simultaneously operating inquiring virtually

202. Ibid.
into the same matter or similar or allied matters reach
two different conclusions, one indicting and the other
exonerating completely, which report should be acted upon?
If the Central Commission exonerates and the State Commission
indicts, the State will argue that the report of the
Central Commission should prevail. If it is the other
way round, the State will say that the Central Commission
was biased and was appointed to inflict political
humiliation. In either case the situation will not be
happy and deserves to be avoided under all circumstances.
In this case, the task of the Grover Commission was made
easier by the High Court's directive to wind up
the State Commission.

The fundamental issue that the Supreme Court
settled in this case is that the parliament is constitutionally
titled to legislate in regard to inquiries against State
Chief Ministers and Ministers and the Union Government
acting under the Commissions of Inquiry Act can constitute
commissions against State Chief Ministers and Ministers.
The majority decision accommodates the assertion of power
by the Union over the claims of the State by an 'expansive
interpretation of the law, guided by the value of purity
in public life'. It has the clear implications of
disturbing the balance of Centre-State relations. In fact,
within a few months of this decision, a 2,500 word
memorandum was submitted by the West Bengal Government
to the Union, the central theme of which was that the
'pressures of Centre over the States' should be lessened
rather than being increased. In particular, it demanded
the abolition of the power to declare President's rule

203. S. Sahney, 'Cynicism Towards Commissions',
Statesman, New Delhi, May 19, 1979.
204. Baxi, supra note 170, p.150.
and of dissolving duly elected assemblies. In this context, if the Centre were to order inquiries against State Chief Ministers and Ministers, the States will resent that, will not co-operate with the Commission and will ultimately ignore with contempt the report. Such central commissions need to be avoided.

The Lokpal and the Chief Ministers:

The Bill of 1977 initially included the Chief Ministers within the investigatory jurisdiction of the Lokpal but the Joint Committee of Parliament advocated their exclusion. It argued that since the Chief Ministers were primarily answerable to their respective legislatures and not to Parliament and as per opinion of the Attorney-General of India - the State legislatures were competent to legislate on the subject matter comprised in entry 45 in List III, the central government should not ordinarily step into the area which falls within the domain of the States. The Committee was further of the opinion that when an example is set by the Centre (as the Bill included the P.M.), it would automatically be followed by the States under the pressure of public opinion. If there are any cases which are not taken care of by the State, the Central Government would be within its competence to invoke the Commissions of Inquiry Act, 1952 to deal with them. Inspite of the built-in majority of the official bloc in the Joint Committee, the Government then it brought the Bill before the Lok Sabha, decided once again to include the Chief Ministers within the purview of the Central Lokpal. The reasons given were: some of

205. For the text of the document on Centre-State Relations adopted by the West Bengal Cabinet on Dec. 1, 1977, see 23 Indian Journal of Public Administration, 1117-26 (1977).
207. XVII L.S.L., 335 (May 17, 1979).
the members of the Joint Committee in their notes of dissent had urged that the Chief Ministers should not have been excluded; the code of conduct of 1964 under which the complaints against the Chief Ministers are inquired into by the Prime Minister had inspired confidence in the public; and the Centre has the constitutional right as per the judgment of the Supreme Court in the Karnataka case. It would be useful to refer to the notes of dissent. Messers Somnath Chatterjee and Shanksashekhar Sanyal in their note say:

"...... since the Joint Committee has expressed their hope that an example set up by the Centre would be followed by the States, we do not wish to take our difference with the recommendation for excluding the Chief Ministers from the purview of the Bill to the point of dissent."209

And the only other note on this issue of Chief Ministers is that of Mr. Narendra P Nathwani. He said:

"In order to preserve the autonomy of States in this area, however, it could have been provided that, in case, a corresponding State law provided for an inquiry against a Chief Minister, the Lokpal under the Central Act should not enquire into such matter."210

It is clear from both of these notes that if at all they could be labelled as a dissent, they were to say the least, far from being emphatic or convincing. In fact, the first note is admittedly not a dissent and the second one gives option to the States to include the Chief Ministers within the purview of Lokayuktas created by State legislations if they do not wish the Chief Ministers to be investigated.

209. Id., pp.334-35.
209. Supra note 206, p. XXVI.
210. Id., p. XL.
by the Central Lokpal. Normally, no Chief Minister would like to be exposed to the Central agency. They would prefer to be included in the State legislations. With this, the inclusion of the Chief Ministers within the Central legislation will become redundant and ineffective. These notes virtually provide no support to the Government for their decision to include the Chief Ministers.

As to the second reason, if the arrangement under the code of conduct of 1964 whereby the Prime Minister inquires into complaints against the Chief Minister has inspired confidence, there is the necessity at all to include the Chief Ministers within the jurisdiction of the Lokpal? Infact, the argument of the Government goes against itself. It would have been well advised to retain the 1964 arrangement without making any further inroads. One is struck by the fact that the Government which had found itself in a helpless position in the matter of implementation of the Gover Commission Report should have so soon decided in its decision to include the Chief Ministers within the Lokpal's purview. Mr. Y. C. Noorani who supports the inclusion of the Chief Ministers within the jurisdiction of the Central Lokpal in view of the Karnataka decision, conveniently overlooks the practical difficulties and the prevailing position in the country. Speaking in the Lok Sabha on the Bill, Mr. V. Mulchand alleged that the inclusion is purely politically motivated to blackmail the Chief Ministers of other political parties and place them under the threat of pressure from the Centre. There was a time when one party ruled at

Now the position is not the same. In the light of this, Messrs O.V. Nagesan and K.K. Covindan Fair appealed to the Government in the Lok Sabha not to press for the inclusion of Chief Ministers because it may lead to people accusing the Government of political malice.

Mr. G.C. Noorani's plea for the inclusion of Chief Ministers within the Central legislation is based upon the pressure to which this institution in the states has been 'notoriously' subjected to. This being so, where is the guarantee that the central body will be in a different position? Moreover, if this institution cannot function in the states in regard to Chief Ministers because of pressures, same will be true in case of Ministers who fall within his purview. That needs to be ensured is that ways and means should be provided so that the institution is able to function freely, without fear or favour at all levels. Its position, powers and functions should be so fortified by express legal provisions as to make it as independent as the Comptroller and Auditor-General of India or the Election Commission of India. In fact, the co-operation of the Government will be needed both at the Central and State levels if this institution is to function at all and is to be used for instilling purity in public life.

In order to meet the point of view taken by the Joint Committee for non-inclusion of Chief Ministers, the then Minister for Home Affairs proposed that in case of complaints against a Chief Minister, the 'competent authority' will be the Chief Minister of the State, or.

213. Id., cc. 316-17, 326-27.
214. Noorani, supra note 211.
If by reason of a proclamation under Article 356 of the Constitution, being in force in the state, there is no Chief Minister, the Governor of the state shall be the competent authority. It was further proposed that the Lokpal shall forward a copy of any special report or any portion of the annual report relating to a complaint against the Chief Minister to the Governor of such state and the Governor shall cause the same to be laid before the state legislature. It was justified that in this way, while the Central Lokpal gets jurisdiction to inquire into complaints of misconduct against Chief Ministers, the State Governments and the State Legislatures will be satisfied with the accountability of the Chief Ministers in respect of such inquiries. It is not understandable as to why the Chief Ministers should be included within the Central Lokpal if ultimately the report is to go to the Chief Minister himself for action. In fact, the Chief Minister will get the alibi to say that the Lokpal inquiry was politically motivated, so the report merely deserves to be ignored. More than this, there is a patent contradiction in the stand taken by the Government. In the case of the Chief Minister, it is the Chief Minister himself who is to receive the report. But in case of the Finance Minister, it will be the Lok Sabha which will be competent to receive the report. The Joint Committee thought that it would be contrary to the principles of Jurisprudence and natural justice that the Prime Minister should act as the 'Judge of his own cause.' This is no

215. supra note 207.
216. id., c. 336.
217. supra note 206, p. 117.
218. supra note 207, c. 336.
doubt the correct position. But why the Government had to adopt a double course is not clear. If it was precisely for the reason that under the Indian Constitutional Scheme, the Parliament cannot take action against the Chief Minister, it is submitted that the Chief Ministers should not be included within the Central Lokpal. It is a settled proposition that it would not be advisable for a federal Ombudsman to investigate, criticise and virtually pass a judgement on the conduct of persons/bodies whose principal accountability is not to the Parliament but to their own respective State legislatures. It will, in addition, strike at the very root of cooperative federalism. It will give rise to fragile federal structure which in its turn will encourage dissiparous tendencies which will be so dangerous to the future of Indian federal polity. The cooperative federalism envisaged in the constitution should not be eroded by including the state Chief Ministers within the Central Lokpal.

If the Chief Ministers are included within the jurisdiction of State Lokayuktas, it would cause no practical problems. In the first place, the Lokayukta investment will not be dependent upon the initiation of the Chief Minister, any person, including a member of the opposition can lodge a complaint with the Lokayukta to initiate his investigation. This is not so in case of Commissions which can be appointed only by the Government and it would normally be reluctant to do so in its own case. This position of the Lokayukta is fortified by the fact that the recently the opposition in the K.C. legislature levelled charges of 'rampant inefficiency' against the Government, the Chief Minister then put in a complaint with the

State Lokayukta. The opposition did not move any further. It is wrong to presume that the Lokayukta will be catering only to one-way traffic. At the same time, he would operate as an effective instrument in the service of the State Governor to vindicate its position, rightful causes and actions.

Otherwise also, a federal Ombudsman like the one proposed in the Bill of 1977 will not be able to effectively function. The basic idea behind the institution of Ombudsman is that it is easily accessible to the people in contrast to the complex and costly procedure involved in the system of courts with the inbuilt mechanism of delay and backlog. If people from different parts of the country have to cover long distances in order to establish contact with him, that will be a big deterrent for many to come forward even with genuine complaints.

Article 226-A had been added in the Constitution by way of 42nd Amendment in 1976 whereby it was provided that the High Court shall not consider the constitutional validity of any central law in any proceedings in that Article. The consequence was that the people were required to go to the Supreme Court from remoter parts of the country which was a practical hindrance in their way in challenging the constitutional validity of central laws. The framers of the Constitution had provided dual jurisdiction to the High Courts and the Supreme Court keeping in view the vastness of the country. The impracticability of Article 226-A was soon realised and it was omitted by the 43rd Constitutional Amendment Act, 1977. This impracticability should not be lost sight of in other legislations. If the federal Lokpal is to be given jurisdiction over State Chief Ministers, in that case,

he will have to have different establishments at the State level, which will present managerial and practical problems. Another problem will be that of a flood of complaints which it will be virtually impossible for the federal Lokpal to cope with. It is easier to meet the situation in a federal set up rather than the unitary one by having Ombudsmen at the central and state levels.

The Scheme of 1977 will pose more problems than it will solve. The inclusion of Chief Ministers and the exclusion of other Ministers is not based upon sound rationales, particularly when they all work as a team under the title, 'Council of Ministers.' It is inconsistent with the fundamental doctrine of the cabinet form of government to treat the Chief Minister as a distinct and separate entity from the Council of Ministers. The Chief Minister is essentially a member of the Council of Ministers although he is its head. The State Lokayukta should have within his jurisdiction both the Chief Minister and the Ministers. In case of the Chief Minister, the competent authority should be a standing committee of the State Assembly to whose chairman the Lokayukta should submit his report. The Committee will review the report and bring it before the legislature within the specified period with specific proposals and the legislature will decide upon the course of action. It should be provided in the legislation that if after the State Lokayukta's investigation, the Chief Minister is indicted, he should forthwith seek a vote of confidence in the Assembly and if the report reveals any criminal case made out, the Assembly should also decide as to whether criminal prosecution is to be initiated or not. In case of other Ministers, the report should be submitted to the Chief Minister who in turn should be obliged to bring

it before the legislature with his comments so that the legislature can take an appropriate action on it. The Committee will help in its follow-up action at the Chief Minister’s level so that the report is not allowed to be delayed as has been the experience of some of the State Lokayuktas.\textsuperscript{222}

In view of the 1977 proposal, once the Prime Minister is included within the purview of the federal Lokpal (as and when a fresh Bill is introduced in the Parliament), it is hoped that State legislatures would amend their legislations to include the Chief Ministers within the Lokayukta’s purview and new State legislations would otherwise include them. The scheme suggested above will be in conformity with the basic structure of the Constitution relating to its cabinet system, and Centre and State relations. Any disturbance in the delicate balance of the federal scheme of the Constitution will give rise to demands for more State autonomy. The system of Lokpal and Lokayuktas should be one which should help in resolving problems rather than creating them. No other federal system has thought of including State authorities within the purview of a federal Ombudsman. India should be no exception.