

DESIRABILITY OF THE INSTITUTION OF OMBUDSMAN IN A MODERN DEMOCRATIC SET UP

*Sarbjit Kaur**

Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. But history bears witness to the fact that more often, the impersonal bureaucratic system advertently or inadvertently tries to overwhelm the 'little man'. With the proliferation of administrative agencies affecting the life of a citizen in every conceivable aspect, the chances of administrative faults violating the rights of a person, property and liberty have tremendously increased. This has led to the never-ending search for an efficacious mechanism that can protect a person from administrative faults. The search has produced the idea of 'Ombudsman', which in terms of utility means a 'watchdog of the administration' or 'the protector of a little man'. This institution was first developed in Sweden in 1809 and soon became a cherished importable commodity the world over. It is a unique institution, which leads to an 'open government' by providing a democratic control mechanism over the powers of the State. Its main catch is its apparent effectiveness despite minimal coercive capabilities. It has its own role to play by bringing 'renaissance' and 'humanism' in the working of modern governments which have tended to develop an attitude to look to the paper rather than the person behind it.¹

I. MEANING, OBJECT AND MAIN CHARACTERISTICS OF THE OMBUDSMAN

Ombudsman is Scandinavian word. It is taken to mean officer or commissioner. In its special sense, it is taken to mean a commissioner who has the duty of investigating and reporting to Parliament on citizens' complaints against the government. An Ombudsman acquires no legal powers except power of inquiry. In particular, he is in no sense a Court of Appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances.²

In simple words, the Ombudsman is an Officer of Parliament whose main function is to investigate the complaints and allegations against the

* Lecturer, Law Centre-I, Faculty of Law, University of Delhi, Delhi-110007.

¹ I.P. Massey, ADMINISTRATIVE LAW (6th ed., 2005) at 458.

² Wade, ADMINISTRATIVE LAW (7th ed., 1994) at 81.

administration. The main object of the Ombudsman is to control the administration and thus give protection to the citizens against injustice brought about by faulty administration. The Ombudsman is closely concerned with the correct functioning of the administrative machine. His function is to locate 'mal-administration' or faults in the administration. He does not upset an administrative decision in the absence of an element of mal-administration even though he takes a different view of a decision on merits from what the administration has taken.³

In the words of Prof. S.K. Agarwala⁴ the term 'Ombudsman' refers only to institutions which have three basic and unique characteristics:

- (a) The Ombudsman is an independent and non-partisan officer of the legislature who supervises the administration;
- (b) He deals with specific complaints from the public against administrative injustice and mal-administration. The Ombudsman may proceed on his own information in the similar circumstances.
- (c) He has the power to investigate, criticise and report back to the legislature, but not to reverse administrative action.

No court fees are payable for filing a complaint with the Ombudsman; no lawyer need be engaged because the Ombudsman himself is the complainants' lawyer. A probe by him into administrative functioning does not involve much publicity; he works silently and discreetly and the administration gets a chance of rectifying its mistakes.

II. NEED AND IMPORTANCE OF THE OMBUDSMAN

In modern times, two tendencies have become manifest in all democratic countries. One, the administration enjoys a vast reservoir of powers to order and affect the daily lives of the people over a wide canvas. Two, a feeling has arisen in the public mind that vesting of such vast powers in the administration has generated possibilities and opportunities of abuse or misuse of power by administrative functionaries resulting in mal-administration and corruption. In the flush of power, the administration very often exhibits a tendency to disregard individual rights and interests in the name of public good. As Wheare⁵ observes "It is not eccentric to conclude that if there is more administration, there will be more mal-administration." The greater the power given to the executive, the greater the need to

³ Jain & Jain, *PRINCIPLES OF ADMINISTRATIVE LAW* (4th ed., Reprint 1993) at 918.

⁴ S.K. Agarwal, *THE PROPOSED INDIAN OMBUDSMAN* (1971) at XVI.

⁵ Wheare, *MALADMINISTRATION AND ITS REMEDIES* (1973) at 3.

safeguard the citizen against its arbitrary or unfair exercise. Therefore, an urgent problem of the day is to evolve an adequate and effective mechanism to contain these dangers by controlling the administration in exercising its powers, safeguarding individual rights, and creating procedures for redressal of individual grievances against the administration.

In the common-law world, the courts have traditionally exercised control over administrative action. However, judicial control of administrative action is not perfect. While exercising power of judicial review over administrative actions, the courts play only a peripheral role. The courts do not provide for a review in depth of the entire administrative field. By and large judicial review at present does not comprehend the merits of administrative decisions. The courts do not substitute their discretion for that of the official on whom the power is conferred by law.⁶

Besides, the efficacy of judicial review of administrative action is also diluted by several other significant restrictive factors, e.g. a number of aspects of administrative functioning fall outside the judicial purview; the legislature does not often lay down articulately the norms and guidelines for exercising the vast powers which are conferred on the administration; failure of the legislature to lay down procedures which the administration must follow while exercising its powers *etc.* The courts may compel the exercise of power by an administrative authority if it is mandatory for it to act, but not when the power is merely enabling or permissive, howsoever harmful its non-exercise may be to an individual. The courts have set before themselves the limited task of overseeing that the administration functions according to law. The courts can therefore quash administrative action on such grounds as *ultra vires*, *mala fides*, exercise of power for an improper purpose, or on irrelevant or extraneous considerations, or after failing to take into account relevant considerations or when there is a patent error of law. But even in the available limited area of judicial review, it is not always easy to get the relief sought and have the administrative action quashed.⁷ The burden of establishing the case lies on the person who alleges the abuse of power. To prove *mala fides*, improper purpose, *etc.*, is not an easy task specially in cases where the government claims privileges to withhold the documents.

Moreover, the administration is not obligated to give reasons for its decisions unless it is obviously required under the statute or the nature of the case is such which warrants the application of natural justice. Although

⁶ *Supra* n. 3 at 912-13.

⁷ *Ibid.*

is recent years judicial trend is developing to insist on giving reasons.⁸ Yet it is not possible in every kind of administrative functions. The result of the present situation in actual practice is that out of a large number of cases which are filed in the court against the administration, it is only in a very few cases that the courts are able to give relief and a large number of public grievance against the administration thus go unnoticed.⁹ The judicial control of administration is helpful to the extent it is available, but the point to note is that judicial review does not go far enough and does not cover many facets of the working of the administration. Further, judicial proceedings are dilatory, formal, time-consuming, costly and lawyers have to be engaged to prosecute individual grievances and this makes it beyond the resources of common men to seek judicial redress of the grievances against the administration.

Besides the judicial control, the system of in-built control in the administration to set right its lapses and faults, is not satisfactory and adequate. There is generally an official bias towards maintaining and supporting original decisions of the lower echelons of administration and higher or superior authority hardly looks into the complaints of the citizens seriously. This leaves the grievances unattended and unremedied.

Then there is legislature whose traditional function in a democracy is to oversee the administration. But nowadays instead of the legislature controlling the executive, in practice, it is the executive which largely controls the legislature. The legislature is always faced with paucity of time and pressure at work. It is a busy body and is usually engaged in discussing policy matters and proposals for legislation and taxation. A number of Bills always remain pending before the legislature for enactment. The legislative procedures are such that there is not much room for ventilating individual grievances on the floor of the House. The legislature has no mechanism at its disposal to probe into administrative faults and lapses in individual cases. Raising of a matter in the legislature soon acquires political overtones, receives a lot of publicity, and may even become a matter of confidence in the government, and consequently, redressal of individual grievances through the legislature becomes a far cry.¹⁰

⁸ See *Government Branch Press v. D.B. Belliappa*, AIR 1979 SC 429; *Waryam Das v. Madhya Pradesh*, AIR 1972 SC 2086; *Uttar Pradesh v. Lalai Singh*, AIR 1977 SC 202; *Raja Mallaiiah v. Anil Kishore*, AIR 1980 SC 1502.

⁹ *Supra* n. 3 at 915.

¹⁰ *Id.* at 916.

From the above discussion, it becomes clear that the traditional organs in a democracy do not provide an adequate and effective control mechanism over the administration. It has, therefore, been felt that some independent institution outside administrative hierarchy, should be established to detect and check administrative lapses and faults and to ventilate the grievances of people so that the rights of the individuals are not unduly transgressed and appropriate relief is provided to them. In these circumstances, the quest for an effective control-mechanism over the administration led to the establishment of the institution of Ombudsman. The institution has been adopted in a number of countries with the basic idea to control effectively the activities of, and prevent abuses by, public officials after it came to be realised that the existing procedures and mechanism for the purpose were hardly adequate and efficacious.

The Ombudsman is in a very strong position to redress individual grievances arising out of bad administration. A major difficulty in the present dispensation for getting relief against the administration through the courts is the difficulty of obtaining sufficient evidence of the impropriety committed by it. The important point of the Ombudsman is that he has access to departmental files. On a complaint being made to him against the administration, the Ombudsman satisfies himself by looking into the relevant papers whether there was any fault or lapse on the part of administration. The complainant is not required to lead any evidence, or to prove his case, before the Ombudsman. It is for the Ombudsman to find out whether the complaint is justified or unjustified.¹¹

The Ombudsman has a 'frontier' with the law; in some aspects an 'overlap'; but his criteria for judging mal-administration or injustice are not co-extensive with those of law courts. The Ombudsman can thus deal with many facets of administrative action with which the courts may not concern themselves, e.g. the Ombudsman can give relief to the individual for delay in administrative action, or when the complainant has not received any answer to his communication from a department, or when he complains of departmental bias in making a decision and so on.¹² The proceedings of the Ombudsman are not formalised or routinised and do not take long to be completed. The essence of the Ombudsman's technique is to receive the complaint informally, to enter the government department, to speak to the officials and read the files and to find out exactly who did what and why.

¹¹ *Id.* at 917.

¹² *Id.* at 918.

No formal procedure is involved at any stage. Therefore, the action taken by him is fast and inexpensive.

The role of the Ombudsman is not only curative but also preventive. He not only gives relief to the aggrieved party in certain situations, but also induces more care in the administration while taking decisions, and, thus, many potential grievances are eliminated and rights of the people are protected and preserved from infringement. The Ombudsman also helps in gradually improving administrative procedures by making recommendations for modifying these procedures.¹³ The Ombudsman thus can help in developing by his observations and suggestions a body of principles of administrative due process. His functioning leads to setting and maintaining standards of good administration for government departments which he does from case to case. Wade¹⁴ has rightly observed that the consciousness of the Ombudsman's vigilance has a healthy effect on the whole administration making it more sensitive to public opinion and to the demands of fairness.

III. ORIGIN AND DEVELOPMENT OF THE OMBUDSMAN

The institution of Ombudsman first came into operation in the Scandinavian countries. Sweden was the first country to adopt this institution as early as in 1809; Finland adopted it in 1919; Denmark in 1953; and Norway in 1963. Amongst the common law countries, with a parliamentary form of government, New Zealand was the first country to opt for the Ombudsman system in 1962; next was England which established the system in 1966. In Australia, it has been established at the Centre as well as the States in 1976.

SWEDEN

In Sweden, the office of Ombudsman was established in 1809. Ombudsman is appointed by the *Riksdag*, the Swedish Parliament, for a four-year-term at a time. A person is selected for this high office mainly for reasons of the high integrity, character and good established reputation. His main duty is to act as an authorised agency of *Riksdag* for maintaining a constant vigil over, and scrutiny for the discharge of administrative and judicial functions by the government and other authorities. He cannot quash or review the administrative decision but can make investigation and recommendations to Parliament, not only against public officials but also against Ministers on complaints made by aggrieved citizens. The function of the Ombudsman is not only to supervise the administration of the laws

¹³ *Ibid.*

¹⁴ *Supra* n. 2 at 75.

as a representative of the Parliament and to report to the Parliament but also to institute proceeding (in the manner a public prosecutor does) against those officials who have acted contrary to law or with partiality or negligence¹⁵. He also audits administrative procedure and problems becoming apparent in the course of investigation of complaints of the individuals.

DENMARK

Under the Danish law passed in 1954 the provision was made for the *Folketingets* Commissioner with the looks of an Ombudsman in Sweden. After every general election the *Folketingets*, the Danish Parliament appoints a person with legal qualifications and known for good reputation from among persons who are non-members as the *Folketingets* Commissioner. He holds office at the *pleasure* of the *Folketing*, and occupies his office so long as he enjoys the confidence of that body. The functions of the office of *Folketingets* Commissioner include¹⁶ :

- (i) supervision of the civil and military government, and administration;
- (ii) keeping a watch over unlawful, arbitrary or unreasonable decisions of the public authorities and abuse, or misuse of powers vested in them; and
- (iii) gathering information relating to acts of negligence and mistakes of the civil servants and all other persons including Ministers, but not judges in performance of their official duties.

NEW ZEALAND

In New Zealand, the Ombudsman has been established in 1962 by the Parliamentary Commissioner (Ombudsman) Act, 1962. The Act of 1962 has been replaced by the Ombudsman Act, 1975. By the Act of 1975, the jurisdiction of the Ombudsman has been extended and the provision has been made for the appointment of more than one Ombudsman. The provision has been made for designating one of them as the Chief Ombudsman for allocation of works among them and also for co-ordination among them. In New Zealand, the Ombudsman is appointed by the Governor-General on the recommendation of the House of Representatives. He holds the office for a term of 5 years. He can be reappointed. He can be removed from his office by the Governor-General upon the address from the House of Representatives on the ground of disability, misconduct, neglect of duty, *etc.*

¹⁵ U.P.D. Kesari, ADMINISTRATIVE LAW (15th ed., 2005) at 258.

¹⁶ M.C.Jain Kagzi, THE INDIAN ADMINISTRATIVE LAW (6th ed., 2002) at 204.

ENGLAND

In England great interest regarding the establishment of the office of Ombudsman was aroused by the Scandinavian Ombudsman. The "Justice" a British wing of the International Commission of Jurists recommended that it be set up in England. Thus the office of Parliamentary Commissioner was created by the Parliamentary Commissioners Act, 1967. The Parliamentary Commissioner is a permanent appointee with the security of service of a High Court Judge. He is appointed by the Crown on the advice of the Prime Minister. His salary is charged on the Consolidated Fund and he holds office during good behaviour, subject to retiring age of sixty-five. He can only be removed on addresses from both Houses of Parliament. He has power to appoint his own staff subject to the Treasury's approval. Astonishingly, there is no professional lawyer in his staff.

The jurisdiction of the Commissioner extends to the department given in the Second Schedule of the Act. The Third Schedule lays down the departments which are excluded from his jurisdiction. Prominently external relations, crime investigation, judicial proceedings, prerogative of mercy, governmental, contractual and commercial transactions, award of honours, granting of royal charters, national health service, local government, police and personnel matters in armed forces and the civil services are excluded from his jurisdiction.

The jurisdiction of investigation extends to the cases of "injustice in consequence of mal-administration".¹⁷ However, the terms 'injustice' and 'mal-administration' have been deliberately left undefined to make the boundaries of jurisdiction flexible. Nevertheless, 'injustice' includes cases of hardship and a sense of grievance, besides legally redressible damage. Maladministration covers a multitude of administrative faults of commission and omission, corruption, bias, unfair discrimination, harshness, misleading a member of the public as to his rights, failing to notify him properly of his rights or to explain the reasons for a decision, general highhandedness, using power for a wrong purpose, failing to consider relevant material, taking irrelevant material into account, losing or failing to reply to correspondence, delaying unreasonably before making a tax refund or presenting a tax demand or dealing with an application for a grant or licence and so on.¹⁸ The Commissioner is prohibited from investigating an action in respect of which the person has a remedy in a court or tribunal by way of appeal, reference

¹⁷ Section 4, 5(i) and Schedule II of the Parliamentary Commissioners Act, 1967.

¹⁸ S.A. de Smith, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (3rd ed.) at 618.

or review, unless he is of the opinion that such remedy would not be adequate.

The Commissioner, cannot entertain a complaint directly from a citizen, it must come through a member of the House of Commons. However, in actual practice the Parliamentary Commissioner has been receiving complaints directly from the members of the public too and he has been giving them a certain amount of study.¹⁹ The Commissioner's jurisdiction is confined to faults in the administration as distinguished from question of policy and he has no power to implement his finding. His only function is to report to Parliament and it is for Parliament to decide what action should be taken on his report.

It is interesting to note that even if the Commissioner finds maladministration causing injustice, he cannot order the department to halt or delay or speed up action, to change a decision, to pay money, or to do anything else. He can submit his report after investigation. But this does not mean that complainants do not get their injustices remedied. In the first place, the Commissioner will expect the department to find a remedy for the complaint. Where the department expresses inability to find the remedy, he will ask them to think again, or if he thinks that the proposed remedy is inadequate, he will say so. Secondly, the Commissioner's report of his investigation goes to the principal officer of the department – the senior civil servant. It is his responsibility to see that his department is properly run. He will be concerned about the existence of mal-administration in his department and should ordinarily welcome an opportunity to put things right. Thirdly, the Commissioner reports to Parliament which will hold the Minister responsible for what he does and what his department does.²⁰ All these measures put pressure on the departments to accept the recommendations of the Ombudsman.

AUSTRALIA

In Australia, two tier Ombudsman system has been adopted. There is Ombudsman system at the Centre and each State has separate Ombudsman. The Commonwealth Ombudsman system has been established in Australia by Ombudsman Act, 1976 which has been amended several times. The Ombudsman system in Australia consists of a Commonwealth Ombudsman, three Deputy Commonwealth Ombudsmen and a Defence Force Ombudsman. The Ombudsman holds office for seven years. He is eligible

¹⁹ *Supra* n.15 at 261.

²⁰ Foulkes, INTRODUCTION TO ADMINISTRATIVE LAW (4th ed.) at 291.

for being reappointed. He retires at the age of 65 years. He is appointed by the Governor-General. He can be removed from his office on an address by the two Houses of Parliament requesting his removal on the ground of physical or mental incapacity or misbehaviour. He has been empowered to investigate complaints against the actions of several major government departments. He can investigate on complaint made by a person or *suo motu* with a matter of administration taken by the department. Taking of action includes failure or refusal to take action. It is to be noted that he can investigate into an action taken by a delegate of a Minister but cannot investigate into an action taken by a Minister. The provision has been made for resolving the doubt about the power or jurisdiction of the Ombudsman by the court. The Ombudsman and the department concerned can refer it to the Federal Court for determination²¹.

THE UNITED STATES OF AMERICA

In the United States of America the reception of the idea of an Ombudsman has encountered strong constitutional and other practical difficulties. Because of the established constitutional position originally founded on the doctrine of separation of powers, the idea of accountability of the administration to Congress is opposed to the known constitutional jurisprudence of the country. Since, 1963 in every session of the Congress a Bill has been introduced to establish an institution akin to the Ombudsman, but it never did become an Act. However, the congressional investigations and grievance cells established in various departments like the police review Boards, discharge the work of the Ombudsman.²²

IV. LOKPAL: THE PROPOSED OMBUDSMAN IN INDIA

In India the desirability of the establishment of the Ombudsman-type institutions has repeatedly been stressed²³, although the Central and State Governments have not been very receptive of the idea of their adoption.

²¹ Paras Diwan, ADMINISTRATIVE LAW (3rd ed., 2004) at 274-75.

²² Gellhorn, WHEN AMERICAN COMPLAIN (1966).

²³ M.P. Jain, LOKPAL – OMBUDSMAN IN INDIA (1969); Jagannadham and Makhija, CITIZEN, ADMINISTRATIVE AND LOKPAL (1969); S.K. Agarwala, THE PROPOSED INDIAN OMBUDSMAN (1971); S.P. Sathe, *Lokpal and Lokayukta: The Indian Ombudsman*, 38 JOURNAL OF UNIVERSITY OF BOMBAY (1969) at 265; Donald C. Rawat, *The Proposed Ombudsman System for India*, 5 JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES (1971) at 284; R.L. Narsimhan, *The Indian Ombudsman Proposal – A Critique*, LAW AND COMMONWEALTH (1971) at 27.

The proposals have been frequently made in this respect at various levels. The Administrative Reforms Commission was appointed on January 5, 1966 by the President of India to consider the problems of citizens' grievances. The Commission surveyed the existing remedial methods for redressal of the citizens' grievances and allegations in connection with administrative corruption, mal-administration, delinquencies, lapses, failures, improprieties, and lack of desired standards of administrative probity, propriety and efficiency. The Commission²⁴ noted the widely prevalent corruption in the administration and administrative inefficiency and unresponsiveness to the public. It treated the problem at two levels: (i) lapses and improprieties committed by the Ministers and their immediate subordinates, that is, Secretaries to the government and his aides; and (ii) the delinquencies committed by the lower administrative authorities and public servants. It classed the Ministers and the Secretaries together as they were functionally inter-dependent and confidants of one another. A Minister would bear the political responsibility; and his Departmental Secretary would carry the administrative responsibilities. Accordingly, the Commission recommended the appointment of two Ombudsmen, namely, *Lokpal* and *Lokayukta*, the *Lokpal* was recommended to be appointed by the President on the advice of the Prime Minister. The latter was intended to select a person for the appointment in consultation with the Chief Justice of India and the leader of Opposition in the Lok Sabha. The *Lokpal* would be easily accessible and demonstrably independent of the official pulls and pressures, and would be impartial. He would have jurisdiction and power to investigate the complaints against the Ministers and the Secretaries. The subject matter of a complaint could be an act done by, or with the approval of a Minister or a Secretary falling within the purview of the Union. An act would include failure to do an act. A complaint could raise the issue of matters of mal-administration, corrupt practice, favouritism, nepotism, personal benefits, abuse of political influence and official discretion, except certain specified categories of matters, e.g., action in respect of contracts, services, etc. Unless a complainant was a person who did not suffer any injustice at all, or else the complaint was vexatious or otherwise not worth investigation, the *Lokpal* would inquire into it. He would communicate the substance of the complaint to the concerned Minister, or the Secretary, as might be the case; and would invite comments on it. He would ask for rectification of the faulty administrative action in the case. If no rectification was made, he could suggest appropriate remedial action. In the event of non-response, non-

²⁴ See Administrative Reforms Commission, INTERIM REPORT ON PROBLEM OF REDRESS OF CITIZENS' GRIEVANCES (1966).

cooperation and indifference to his advice he could report the matter to State Chief Minister. He could also mention it in a report submitted to the Parliament, or the appropriate State Legislature. The proceedings were intended to be conducted *in camera*. They would be informal, orderly and simple. The *Lokpal* would have power to call witnesses, inspect official records, papers and documents. He would communicate the findings to the complainant.

The *Lokayukta* would bear the looks of the *Lokpal*. He would work independently and effectively; and his office and investigation wings would function autonomously. He would investigate the complaints in respect of the official acts of the administrative authorities in general, and afford redress of individual grievances arising in the course of day-to-day administration. Besides the *Lokayukta* for the Union; each State could have a *Lokayukta*.

The recommendations of the Commission were widely commented upon. The proposal for the Ombudsman was largely welcomed and tentatively accepted by both, the Government of India and certain State Governments. A Draft Bill was appended to the Interim Report of the Administrative Reforms Commission. In 1968, a Bill²⁵ called the *Lokpal* and *Lokayukta* Bill was introduced in the Lok Sabha, under which the *Lokpal* and *Lokayukta* would jointly make one single two-tier system. The *Lokpal* was intended to have a five years term with a provision for a second term. He would not be a member of any House of Parliament, and would hold no other office of profit or trust; and would be totally ineligible for any post-retirement employment or appointment. He would draw salary and allowances equal to the Chief Justice of India. He would be irremovable, except on the ground of misconduct in the manner of a judge of the Supreme Court. The complaint against Ministers and Secretaries could be entertained at any time within five years of the alleged cause. He would have jurisdiction over matters falling within the purview of the Union agencies. He would communicate with the Minister or the other competent authority in the course of his work. The government would be required to make a reply intimating him of the action taken in any matter within three months. The *Lokpal* would be given free access to the official record for relevant evidence in connection with investigation in a Minister's conduct, except the proceedings of the Cabinet and the Cabinet Sub-Committees.

The *Lokayukta* would also be appointed by the government in consultation with the *Lokpal*; and would be afforded the service conditions available to a judge of the Supreme Court. In other respect he would imitate

²⁵ Bill No. 51 of 1968.

the position of the *Lokpal*. He would look into complaints against the public servants. He would hear complaints in respect of administrative failures and involuntary injustice likely to be caused by official misdemeanour or culpable practice. He would also entertain and investigate into allegations of graft and sharp practices of the errant public servants. He would be able to communicate with the competent authority with a copy to the concerned public servant. But before the Bill could be passed, the Lok Sabha was dissolved and therefore the Bill was lapsed. In 1971, another Bill²⁶ was introduced in the Lok Sabha. It provided for the appointment, by the President, of one *Lokpal* and one or more *Lokayuktas*. The *Lokpal* was to be appointed after consultation with the Chief Justice of India and the leader of opposition in the Lok Sabha. If there was no such leader, a person elected by the members of opposition in the Lok Sabha for this purpose was to be consulted.

The function of the *Lokpal* was to investigate any action which was taken by, or with the approval of a Minister (other than the Prime Minister) or a Secretary, or any other public servant belonging to that class which had been notified by the Central Government in consultation with the *Lokpal* for that purpose. Such an investigation could be undertaken if a person made a complaint involving 'grievance' or 'allegation'. A 'grievance' was defined as "a claim by a person that he had sustained injustice or undue hardship in consequence of mal-administration". The term 'allegation' was defined to include not only "corruption or lack of integrity" but also "abuse of public office to secure gain or to cause harm or hardship to another".²⁷ The time-limit for making a complaint involving an 'allegation' was five years from the date on which the action complained against was alleged to take place. In the case of 'grievance', the time was twelve months from the date on which the complainant came to know of the action complained against, but this period could be relaxed if the *Lokpal/Lokayukta* was satisfied that the complainant had sufficient cause for not making the complaint within the period of twelve months. It is to be noted that the primary idea of the Ombudsman in the Scandinavian and the common law countries (New Zealand, England and Australia) where the institution has been introduced is to oversee mal-administration, e.g. negligence, delay, inefficiency, bias, abuse of power (which may not amount to corruption), and to make the administration more humane and accountable. However, the 1971 Central Bill assigned to the Ombudsman the twin tasks of checking corruption (allegation) involving Ministers (other than the Prime Minister) and

²⁶ Bill No. 3 of 1971.

²⁷ Lok Sabha Secretariat, *LOKPAL* (1965) at 35.

government servants, and mal-administration by these functionaries. In view of prevailing situation in India, this would have been an extremely heavy burden on the functionary. It would have meant in practice that he would neglect one or the other function. Therefore, Jain and Jain²⁸ has advised that there should be two separate institutions for two functions – redressal of grievances and fighting corruption.

The *Lokpal/Lokayukta* could follow such procedure for conducting an investigation as he considered appropriate in the circumstances of the case. The identity of the complainant or that of the public servant concerned was not to be disclosed to the public at any stage of investigation. He could refuse to investigate any complaint if in his opinion it was frivolous or vexatious or was not made in good faith, or there was no sufficient grounds for investigating, or the complaint should avail of other remedies open to him. The reasons for not entertaining a complaint were to be communicated to the complainant.

The 1971 Bill lapsed on account of the dissolution of the Lok Sabha in February, 1977. The third *Lokpal* Bill in the series was introduced by the new government in 1977. The 1977 Bill²⁹ completely threw overboard the western idea of Ombudsman. The jurisdiction of the Central *Lokpal* was confined only to “public men” which term included Central Ministers (including Prime Minister), members of Parliament, members of legislative assemblies for the Union Territories and a few other categories of elected functionaries.³⁰ The government servants as such were beyond the purview of the *Lokpal*. However, the *Lokpal* could inquire into the conduct of any other person only to the extent necessary to inquire into any allegation of misconduct against a public man. Secondly, the proposed *Lokpal* was not to be concerned with the cases of mal-administration but only with the cases involving corruption. The task of the *Lokpal* was to be to inquire into allegations of misconduct against a public man. A public man would commit

²⁸ *Supra* n. 3 at 943.

²⁹ Bill No. 88 of 1977; GAZETTE OF INDIA, Extraordinary, Part II, section 2 dated July 28, 1977.

³⁰ The Bill as originally introduced in Parliament had included a State Chief Minister within the purview of the *Lokpal*. However, the Joint Committee of the Parliament recommended the deletion of this provision as the Chief Minister was primarily answerable to his Legislative Assembly. An amendment moved by the government on May 10, 1979 resorted the original position. See S.L. Verma, *Lokpal, Bureaucracy and the Common Man*, 24 INDIAN JOURNAL OF PUBLIC ADMINISTRATION, (1978) at 1030-58, 1245-58; Rajeev Dhawan, *A Comment on the Lokpal Bill*, 19 JOURNAL OF INDIAN LAW INSTITUTE (1977) at 257.

misconduct if he was actuated by corrupt motives in the discharge of his functions, or abused his position to cause harm to any body or used his position to secure any valuable or pecuniary advantage for himself or his relatives or associates or committed an act constituting corruption. In sum, the purpose of the *Lokpal* Bill, 1977 was to control political corruption.

Other provisions of the 1977 Bill were on the same lines as those of the 1971 Bill except with the following major differences. First, the *Lokpal* was to be appointed by the President after consultation with the Chief Justice of India, the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha. The last two functionaries could consult the leaders of the various parties and groups in their respective Houses before expressing their views on the appointment of the *Lokpal*. Secondly, the Bill provided for the appointment of special *Lokpal* or *Lakpals* by the President if he considered it necessary on a report from the *Lokpal* that it was necessary to do so for expeditious disposal of complaints under the Act. Thirdly, the 'competent authority' for the Prime Minister was the Speaker; for a Minister, the Prime Minister; and for members of the Parliament, the Chairman of the Rajya Sabha or the Speaker of the Lok Sabha as the case may be. Fourthly, no matter in respect of which a complaint could be made under the Act was to be referred for inquiry under the Commissions of Inquiry Act, 1952, except on the recommendation, or, with the concurrence of the *Lokpal*; and the *Lokpal* was not to inquire into any matter which had been referred for inquiry under the Commission of Inquiry Act, 1952 on his recommendation, or, with his prior concurrence. Fifthly, power was given to the *Lokpal* to try summarily certain offences, that is, the offence of giving false evidence before him and offences contained in sections 175, 178, 179 and 180 of the Indian Penal Code committed in his view or presence. A person convicted by the *Lokpal* could appeal to the High Court.

Maladministration which is the primary concern of the Ombudsman in other countries was thus proposed to be kept out of the purview of the Indian Ombudsman under the 1977 Central Bill. This was not proper as there is a great need for an institution, independent of the executive, to supplement the system of judicial control over administrative action in view of the limitation of judicial review so as to reduce the sense of grievance presently nursed by the people against the administration.³¹

The 1977 Bill was referred to the Joint Select Committee of the Houses of Parliament which presented its report to the Houses in July, 1978. But this Bill lapsed again with the dissolution of the Lok Sabha. So far, all

³¹ *Supra* n. 3 at 944.

attempts to establish the Ombudsman system at Central level were proved futile. In the meantime various State Governments set up the office of *Lokayukta*.³²

The Rajiv Gandhi Government introduced another Bill³³ in the Lok Sabha on August 26, 1985. If this Bill should have been passed it should have provided for a *Lokpal* appointed by the President from amongst a small class of elderly persons. The choice should have fallen on a person who was, or had been, or was qualified to be a judge of the Supreme Court. The *Lokpal* thus would be sitting Supreme Court or High Court Judge, a High Court Chief Justice, a retired judge of either court, a lawyer of ten years standing known to be the man who would matter, or an eminent jurist considered as suited to the appointed authorities. The persons eligible for appointment would really be limited in number, therefore, the choice in the matter of appointment of *Lokpal* would not be very wide.³⁴

The choice would fall on a person who would be more suited than meritorious. The only safeguard against selection of a person for his acceptability to be men in the government was that the President would consult the Chief Justice of India before making the selection. He would appoint the *Lokpal* by warrant under his hand and seal. The appointment would be for five years; and the *Lokpal* would cease to hold office on completion of 65 years of age. He could be removed by the President on the ground of proved misbehaviour or incapacity after an antecedent inquiry made in the charges or allegations levelled against him by the Chief Justice of India, or by a Supreme Court Judge nominated by the Chief Justice. The *Lokpal* could resign his office. On ceasing to hold the office, he would be ineligible for any further appointment/employment. The *Lokpal* would inquire into any matter involved in, or arising from, or connected with any allegation made in a complaint against any public functionary who could be a Union Minister – a Minister of State, Deputy Minister or Parliamentary Secretary. The expression ‘public functionary’ would not include the Prime Minister. Unlike the earlier Bill of 1977 a complaint could not be made against any Secretary or other high official of the Union Government or head of any public corporation. A complaint would allege that a public functionary while holding any of the offices (Ministerial) committed any offense

³² Orissa (1970); Maharashtra (1971); Bihar (1973); Rajasthan (1973); Uttar Pradesh (1975); Madhya Pradesh (1981); Andhra Pradesh (1983); Himachal Pradesh (1983); Karnataka (1985); Assam (1986); Gujarat (1986).

³³ Bill No. 166-B of 1985.

³⁴ *Supra* n.16 at 213.

punishable under Chapter IX of the Indian Penal Code, or under the Prevention of Corruption Act, 1947. No complaint could be made after the expiry of five years from the date of commission of the offence mentioned therein. Never could a complaint be frivolous or vexatious. When received, the *Lokpal* would inquire into the complaint, provided there were sufficient grounds for inquiry into it. The *Lokpal* would send a copy of the complaint to the competent authority; and at such time as he would consider it appropriate, send the copy to the concerned public functionary. The *Lokpal* could have at his disposal services of an investigating agency of the Central Government. The *Lokpal* would conduct the inquiry *in camera*. He would afford the public functionary an opportunity to represent his case.

The Bill was referred to a Joint Committee of both the Houses of Parliament. In the committee several members criticised the Bill on the ground that the scope of the Bill was very restrictive. It did not provide for the redressal of grievances of citizens but only provided of a pre-trial enquiry into the cases of corruption.³⁵ The definitional category of "public functionaries" excluded Prime Minister, the members of Parliament, heads of public corporations, the State Chief Ministers and other high functionaries, e.g., Secretaries of Ministers of the Government of India or heads of various governmental agencies such as Central Bureau of Investigation, Chairman of Railway Board *etc.* Another restrictive feature of the Bill was that it left out complaints of misconduct, grievances due to complaints of mal-administration, abuse of office/power, *etc.* The government felt that it would be desirable to re-examine the entire issues relating to the establishment of the *Lokpal*, his powers and jurisdiction. The government, therefore, withdrew the Bill with a view to bringing forward a more comprehensive legislation on the subject. However, this was not done during the tenure of the eighth Lok Sabha. The members of the opposition parties who were members of the select committee strongly protested against the withdrawal of the Bill because in their opinion the Bill with suitable modifications could be adopted. The dissenting members stated in their note that the *Lokpal's* jurisdiction should not be restricted to examination only of those complaints which involved corruption but should also cover complaints about abuse of power, gross misconduct, mal-administration causing harassment to citizens *etc.*³⁶ The opposition members also insisted that the Prime Minister should be brought within the purview of the *Lokpal*.

³⁵ *Report of the Joint Committee on the Lokpal Bill, 1985*, GAZETTE OF INDIA, Extraordinary, Part II, section 2 at 7.

³⁶ Minute of Dissent, *id.* at 9; the dissenting members included P. Upendra, K.P. Unnikrishnan, L.K. Advani, S. Jaipal Reddy, V. Arunachalam.

The 1989 Bill³⁷ introduced by the National Front Government almost reproduced the 1985 Bill with minor modifications. The most significant provision of this Bill was the inclusion of the Prime Minister within its purview. The scope of the Bill was, however, restricted only to complaints against public functionaries which included persons "who hold or has held the office of the Prime Minister, Deputy Prime Minister, Minister, Minister of State or Deputy Minister of the Union."³⁸ The *Lokpal* would have no power to inquire into complaints of corruption against the senior government officers. The *Lokpal's* jurisdiction was limited to combat only the problem of corruption at the higher political level abandoning the original exalted objective mooted in the Report of the Administrative Reforms Commission³⁹ for providing an effective and impartial machinery to redress administrative wrongs and excesses and eradicate corruption at all levels. Corruption in government offices is often the result of collusion between the Ministers and officers. It would be desirable that in cases in which officers appear to be guilty of collusion with the public functionary against whom the *Lokpal* has started an inquiry, the *Lokpal* should be empowered to treat the concerned officers also as public functionaries rather than entrusting the case to the vigilance commission.⁴⁰

For the first time the 1989 Bill provided that the *Lokpal* would consist of a Chairman and two members to be appointed by the President in consultation with the Chief Justice of India. The first Bill of 1967 provided for consultation with the leader of opposition in the appointment of *Lokpal*. The provision was not included in 1989 Bill. It is submitted that since the legislation seeks to maintain political cleanliness, it would have been better to provide for consultation with the leader of opposition during the process of appointment. The purpose would be better served if the *Lokpal* were appointed by the consensus between the ruling party and the opposition.

Only persons who were or had been judges of the Supreme Court were eligible to be appointed as Chairman and members of the *Lokpal*. The tenure of the members of the *Lokpal* would be five years. Members were made ineligible to hold any office of profit under the Government of India after ceasing to be members of the *Lokpal*. Members of the *Lokpal* could not be removed except by the procedure of removal as prescribed in the Act, which was similar to that provided by the Constitution for the removal of judges of the High Courts and the Supreme Court. It is submitted that eligibility

³⁷ Bill No. 98 of 1989, GAZETTE OF INDIA, Extraordinary, Part II, section 2.

³⁸ Clause 2(g), The Lokpal Bill, 1989.

³⁹ *Supra* n. 24.

⁴⁰ Balbir Singh, *The Lokpal Bill, 1989*, 12 DELHI LAW REVIEW (1990) 95 at 98.

qualifications for membership of the *Lokpal* has been too narrowly defined. As pointed out by S.P. Sathe,⁴¹ there is no reason to believe that judges are always and no one other than a judge could be suitable for being the *Lokpal*. The Bill excludes jurists, administrators or retired High Court Judges from being eligible for appointment as *Lokpal*.

The jurisdiction of the *Lokpal* had been very narrowly defined as his jurisdiction was confined merely to charges that might conceivably be covered under the Prevention of Corruption Act, 1988 and not those which were covered under the Indian Penal Code. The *Lokpal* could also not inquire into any matter which had been referred for inquiry under Commission of Inquiry Act, 1952 on his recommendation or with his prior concurrence. The *Lokpal* was to deal only with cases of corruption by such people. It is quite clear that the Ombudsman aspect totally side-tracked in the Bill. The *Lokpal* was going to merely conduct pre-trial inquiry against persons holding ministerial posts who were alleged to be guilty under the Prevention of Corruption Act, 1988. A pre-trial inquiry conducted by the *Lokpal* would merely enable the government to put forward cases before a competent court under the Prevention of Corruption Act and since standards of evidence in a criminal case would bound to be much more demanding, it might happen quite often that the person held to be *prima facie* culpable by the *Lokpal* could be acquitted by the trial court under the Prevention of Corruption Act.

A complaint could be made by any person other than a public servant. There was no reason why a public servant was prevented from making a complaint. A complainant was required to deposit one thousand rupees with the complaint. The deposit could be forfeited if the complaint was dismissed on the ground of having been frivolous or vexatious or not having been made in good faith. The deposit could also be utilised for compensating the public functionary complained against. In any other case, the deposit could be refunded. If the provision of deposit was intended to deter irresponsible or frivolous or vexatious complaints, that intention might not be achieved because one thousand rupees is not a big sum as one could easily spend that much amount in order to cause harassment to a political adversary.⁴² Moreover in order to discourage the mischief mongers the Bill empowered the *Lokpal* to punish for the offence of willfully and maliciously making a false complaint. The *Lokpal* had been given power to try certain offences such as giving false evidence *etc.* Whenever he rejects the complaint, he has to record reasons and communicate the same to the complainant and the competent authority. This is an essential requirement in the interest of justice

⁴¹ S.P. Sathe, ADMINISTRATIVE LAW (5th ed., Reprint 1996) at 496.

⁴² *Id.* at 498.

seen to be done. The *Lokpal* could award compensation or give reward to the complainant if the complaint had been substantiated either wholly or partly.

The *Lokpal* would have power to require any public servant or any person who in his opinion would be able to furnish information or produce documents relevant to the inquiry to be made by him to furnish such information or produce such documents. However, this power had been made subject to the freedom of government servant to withhold information as might prejudice the security, or defence or international relations with the government of any other country or with any international organisation or with the investigation or detection of crime or as might involve disclosure of proceedings of the Cabinet of the Union Government or of any committee of the Union Cabinet. For this purpose the certificate that any information was of the above description shall be considered as "binding and conclusive". It is submitted that this clause totally nullifies the effect of the earlier provision making the giving of information obligatory. Even if the *Lokpal* wishes to contest the opinion of the Secretary, it would have to do so by filing a writ petition in the High Court. The Bill, therefore, gives by one hand and takes away by another.

Although the *Lokpal* had been given power to determine the procedure of inquiry, it had no power to act *suo motu*. The *Lokpal* was given power to search and seize the relevant documents, the criminal prosecution would have to be launched in the court of special judge. The task of presenting the prosecution case would be on the public prosecutor appointed by the government. Such a prosecution might not command the confidence of the public and, therefore, it would be desirable if the *Lokpal* has its own prosecution machinery.

The proceedings or decisions of the *Lokpal* could not be challenged, reviewed, quashed or called in question in any court. Though *prima facie* an impression can be formed that the provision of protection ousts the jurisdiction of the courts but the attitude of the courts evident from a long series of cases leaves no doubt that the power of judicial review exercisable by the higher courts (Supreme Court and High Courts) is very wide and this power is a basic feature of the Constitution of India which cannot be abrogated. This power can, therefore be, exercisable by the court in appropriate cases notwithstanding the existence of such provision, particularly on the point of jurisdiction.⁴³

⁴³ *Supra* n. 40 at 103.

For all these reasons the Bill totally buries the concept of Ombudsman which Administrative Reforms Commission had spelt out in its report. Public grievances have been wholly kept out of its purview and there is over-emphasis on corruption alone. Unfortunately, the corrupt secretaries do not at all figure in the Bill. The *Lokpal* will not be of any use to the common man whose main grievance is against mal-administration, callousness and negligence. So far as corruption is concerned, the Prevention of Corruption Act could be suitably strengthened and even a special tribunal or court with appeal only to the Supreme Court on question of law could be provided for dealing with these cases. Ombudsman is not the remedy for that purpose.⁴⁴

Once again in the monsoon session of the Parliament in 1993, the government made a promise to appoint a *Lokpal* to look into the charges of corruption against the government, but it could not be passed. By introducing the *Lokpal* Bill in 1996⁴⁵ in the Budget Session of the Parliament, the United Front Government can be said to have kept the promise it had made about cleansing public life and injecting an element of accountability at the highest level. However, because of the fall of the government, the Bill could not, once again, see the light of the day.

Another attempt for the establishment of *Lokpal* at the center was made on August 3, 1998 when a fresh *Lokpal* Bill was introduced in the Parliament. The Bill provided that the institution of *Lokpal* shall consist of a Chairperson who is or has been a Chief Justice or a judge of the Supreme Court or the Chief Justice of the High Courts.⁴⁶ The President of India shall appoint them after obtaining the recommendation of a committee consisting of (a) Vice-President of India, (b) Prime Minister, (c) Speaker of the Lok Sabha (d) Home Minister, (e) Leader of Opposition in Lok Sabha and Rajya Sabha. However, no sitting judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.⁴⁷ The person who was to be appointed as *Lokpal* must have severed his connection, if any with any political party, his membership in Parliament or the Legislature of State or any office of profit.⁴⁸ The Chairperson and member shall not be removed from his office except by an order of the President on the recommendations of a committee consisting of the Chief Justice of India and two other judges of the Supreme Court next to Chief

⁴⁴ *Supra* n. 41 at 500.

⁴⁵ Bill No. 101 of 1996.

⁴⁶ Section 3, The Lokpal Bill, 1998.

⁴⁷ Section 4, *id.*

⁴⁸ Section 5, *id.*

Justice in seniority.⁴⁹ *Lokpal* shall have jurisdiction to inquire into any allegation made in the complaint. Limitation for filing a complaint shall be ten years from the date when alleged offence is committed. However, if bias is alleged against Chairman or any member, the President, on application, shall obtain the opinion of the Chief Justice of India and should decide accordingly.⁵⁰ Any person other than a public servant can made a direct complaint from a person in jail or other place of custody.⁵¹ Every inquiry shall be conducted by the Chairman and the members sitting jointly. The inquiry shall be open to which public may have access except in exceptional circumstances and for reasons to be recorded in writing such inquiry may be conducted in camera.

The *Lokpal* shall complete inquiry within a period of six months, but where it would not be possible it shall record reasons in writing.⁵² For the purpose of conducting inquiry, *Lokpal* shall have the powers of a civil court and proceedings before *Lokpal* shall be deemed to be judicial proceedings within the meaning of section 193 of the Indian Penal Code. The government or any public servant shall not be entitled to any privilege relating to the production of any document or oral evidence. For the proper conduct of inquiry, *Lokpal* shall have power, to summon and enforce attendance of any person and to examine him on oath, to enforce discovery and production of any document, to requisition any public record, to issue commissions for examination of witnesses and documents and to search and seize any documents.⁵³ After inquiry, if offence was proved, the *Lokpal* shall communicate its report and findings to the competent authority. Such competent authority shall be the Speaker in case of Prime Minister and member of Lok Sabha and Chairman of the Rajya Sabha in case of a member of Rajya Sabha. The competent authority shall communicate to the *Lokpal*, within a period of ninety days from the date of receipt of the report. *Lokpal* shall present annually to the President of India a consolidated report who shall cause the same to be placed before each House of Parliament as soon as possible but not later than ninety days from the date of receipt of the report. Every person who made a complaint which was found by the *Lokpal* to be false would be punished by it, after summary trial, with imprisonment which should not be less than one year but which may extend to three years and also a fine which may extend to fifty thousand rupees.⁵⁴ Out of this fine

⁴⁹ Section 7, *id.*

⁵⁰ Sections 10, 11, 13, *id.*

⁵¹ Section 12, *id.*

⁵² Section 14, *id.*

⁵³ Sections 15, 16, *id.*

⁵⁴ Section 22, *id.*

Lokpal may award compensation to the public functionary against whom false report was filed.⁵⁵ President of India may also confer additional functions on *Lokpal* and may require it to inquire into any allegations against any public functionary.⁵⁶ If the complaint is wholly or partially substantiated the *Lokpal* may make necessary orders to compensate the complainant having regard to the expenses incurred by complainant in respect of such complaint.⁵⁷ *Lokpal* and its officers shall be immune from prosecution or other legal proceedings in respect of any thing done in good faith and its proceedings or decisions shall not be called in questions in any court of law.⁵⁸ It may be mentioned that this provision shall not oust the jurisdiction of the High Courts and the Supreme Court. *Lokpal* shall have power to make rules for the purpose of carrying out its functions.⁵⁹

The *Lokpal* Bill, 1998 again suffers from major deficiencies. The Bill seeks to place unreasonable restrictions on those who may have genuine complaints but do not have the necessary proof to substantiate the charges. The complainant must be absolutely sure of the facts and must have proof to substantiate the complaint. It is like asking the complainant to investigate the case, collect evidence and prepare a fool proof charge sheet. If the complaint made in good faith is not proved, the complainant may be required to pay a fine up to fifty thousand rupees and face a jail term up to three years. This provision would certainly deter even a genuine complaint.⁶⁰

Furthermore, there is no specific provision that *Lokpal* should specify the action to be taken against public functionary in case charges were substantiated. Placing of the report before the Parliament for action would mean that the action would be lost in party policies. If the purpose of this institution is to check corruption in high places then it is equally necessary that there should be a binding provision for making obligatory for all public functionaries to file their property returns before the *Lokpal* after becoming a member of Lok Sabha or Rajya Sabha. They should also submit a copy of their annual income tax returns to the *Lokpal*.⁶¹

However, the 1998 Bill also could not see the light of the day because of controversy regarding the inclusion of Prime Minister within the jurisdiction of *Lokpal*.

⁵⁵ Section 23, *id.*

⁵⁶ Section 24, *id.*

⁵⁷ Section 25, *id.*

⁵⁸ Section 26, *id.*

⁵⁹ Section 29, *id.*

⁶⁰ *Supra* n.1 at 465.

⁶¹ *Ibid.*

On August 14, 2001⁶² the *Lokpal* Bill had again been introduced in the Lok Sabha. However, the Bill could not be enacted into an Act. The 2001 Bill lapsed after the dissolution of the thirteenth Lok Sabha in February, 2004. Now in 2004 *Lokpal* Bill has again been introduced in the Parliament. The Bill is still lying pending in the Lok Sabha. Thus, attempts have been made to establish the institution of *Lokpal* in India but it has not been established so far. The Report of the Administrative Reform Commission is allowed to gather dust and the Bills introduced by the government for the purpose of making provision for appointment of the *Lokpal* are allowed to lapse. The Government of India never showed much enthusiasm for implementation of the recommendations of the Administrative Reforms Commission, because of the in-built bureaucratic resistance to any machinery for the citizens' grievance redressal on the Ombudsman pattern.

V. DIFFICULTIES IN ADOPTING THE INSTITUTION OF LOKPAL

There may be some constitutional difficulties in adopting the institution of *Lokpal*. According to P.K. Tripathi⁶³, the doctrine of collective responsibility of Ministers, which constitutes a basic principle of our parliamentary democracy may come in conflict with the institution of *Lokpal* in India. Investigation into the allegations against a Minister by the *Lokpal* and recommendation of an action against him would in some respect, undermine the doctrine of ministerial responsibility. If the actions of Minister himself are brought within the purview of the proposed institution, the institution of responsible government in a particular system will break down and the identity of the Constitution will be impaired. Similarly Justice P.B. Mukherji⁶⁴ has pointed out that the Ombudsman is contrary to the basic letter and spirit of the Indian Constitution. Unless one is prepared to throw the whole Indian Constitution lock stock and barrel over-board, an Ombudsman cannot fit into Indian Constitution.

With regard to the impact of the institution of Parliamentary Commissioner on the doctrine of ministerial responsibility, the Select Committee of House of Commons in England pointed out that by setting up the office of Parliamentary Commissioner, Parliament to some extent undermined the doctrine of ministerial responsibility, in that the power of the Commissioner to carry out an independent investigation and to publish what he finds is an encroachment on the Minister's responsibility. The

⁶² Bill No. 73 of 2001.

⁶³ P.K. Tripathi, *Lokpal - The Proposed Indian Ombudsman*, 9 JOURNAL OF INDIAN LAW INSTITUTE (1967) at 135.

⁶⁴ In Chamanlal Setalvad Memorial Lectures delivered at Bombay University in 1967 quoted in Paras Diwan, *supra* n. 21 at 280.

anonymity of civil servants too, might be infringed by the Commissioner's findings.

However, from the functioning of the institution of Parliamentary Commissioner in England it appears that it does not undermine the principle of ministerial responsibility. In fact the experience shows that his investigation so far from conflicting with ministerial responsibility, helped it to work better by enabling both Parliament and Ministers to correct faults in administration which would otherwise never have been brought into light.⁶⁵

Therefore, the apprehension that the Ombudsman will impair ministerial responsibility has lost its substance. If a Minister can be made responsible to courts there should not be any unconstitutionality if he is made accountable to the Ombudsman, who is a creature of Parliament itself. For policy and efficiency of their departments, Ministers are responsible to Parliament but for administrative lawlessness they may be made accountable to the Ombudsman. Far from weakening ministerial responsibility, the Ombudsman will help that principle works better. On the basis of investigation, Parliament can reach the bottom of the problem and can hold a Minister responsible and accountable for it. Even in England it is being increasingly felt that direct complaints (now they are routed through a member of Parliament) to the Parliamentary Commissioner would fit in the constitutional structuring because the Commissioner is necessarily an arm of Parliament.⁶⁶

Ministers in any self-governing country like India belong to a majority party and so long as the popular vote prevails, a party in majority today may become the minority tomorrow. Hence Ministers who shape the policies of the government should be aware that official inequities if tolerated today may tomorrow oppress yesterday's rulers. Hence everyone, whether or not in momentary ascendancy, shares a long-range interest in nurturing even-handed, effective and honest law administration; the rulers and the ruled alike benefit from devices that correct governmental mistakes and help prevent their occurring again.⁶⁷ The existence of the Ombudsman will induce Ministers to a greater degree of accountability and responsibility.

Another source of uncertainty in India is that a single Ombudsman institution may not operate effectively in so large a country because complaints may be too large for a single institution of three persons to dispose of. It is submitted that the appointment of one *Lokpal* and a number of

⁶⁵ *Supra* n. 2 at 83.

⁶⁶ *Supra* n.1 at 466.

⁶⁷ Prof. Gellhorn quoted by R.L. Narsimhan, *supra* n. 23.

Lokayuktas will take this factor into account. Further, being a federal country, the central administration is not concerned with the totality of governmental functions but only with a portion of these, the other portion being discharged by the States, and each State may have its own Ombudsman system.

It must be noted, however, that the institution of *Lokpal* is an innovation and it may take some years before its effectiveness can be accurately measured. Though the Ombudsman may take pressure off the courts and prevent legal principles being strained, yet he is not a panacea for all the evils of bureaucracy. His function is to improve administration; hence, his success depends on the existence of a reasonably well administered State. He cannot cope with a situation where the administration is riddled with patronage or corruption. It would be the greatest injustice to the institution of *Lokpal* if we regard him as the possessor of cure-all. Where corruption is rampant, and nepotism has infiltrated right from the ministerial level to the lower officials, it is highly doubtful whether a *Lokpal* can produce any appreciable improvement in administration. Unless and until we provide a basically sound and healthy society no good result should be expected from the proposed Ombudsman. The institution is nevertheless, well worth a trial.⁶⁸

VI. CONCLUSION

It is too early to comment on the working of this institution because it is still in take-off stage. However, its desirability has been fully realised. The delay in formulating the *Lokpal* Bill is unfortunate. This institution is much needed in our country where corruption among public officials is widespread. A strict separation of the three arms of governance - the legislature, administration and judiciary - is absurd and impossible in a country such as ours. Thus, many times the administration intrudes into the domain of the legislature and the judiciary. Also, many major administrative decisions are taken for political reasons, for the benefit of a particular section of people so that it may bring political rewards. Here, the rule of law and equality before law are the things to be found in books only. Government servants have many special privileges and prerogatives while individuals have hardly any power to fight administrative injustice. All this underlines the need for a *Lokpal*.⁶⁹

⁶⁸ U.P.D. Kesari, *The Indian Lokpal – A Panacea of Administration Maladies*, JOURNAL OF NATIONAL ACADEMY OF ADMINISTRATION at 281.

⁶⁹ Bhupal Sinha Chowdhury, *Big Brother to Keep a Watch*, THE TELEGRAPH, November 25, 2004: See <http://www.telegraphindia.com>.

The redressal of the grievances of the citizens is basic to the functioning of the democratic government. It will strengthen the hands of the government in administering the laws of the land without fear or favour, affection or ill will. It will enable it to go up in public faith and confidence without which progress would not be possible. The democratic government has an obligation to satisfy the citizens about its functions and provide them adequate means for the redressal of their grievances. There prevails a public feeling against prevalence of corruption and administrative inefficiency. Besides, there is need to dispel from the mind of the people false notions and prejudices against the quality and character of the administration.

In India, the existing machinery for the correction of administrative faults is highly inadequate. The public law review system of administrative action through writs and orders under Articles 32, 226, 227 and 136 is not only technical and expensive, but also involves delay because of congestion in courts which has reached staggering proportions. Private law review by injunction, declaration and suit for damages is also not an adequate remedy due to similar reasons. The vigilance exercised by government vigilance and anti-corruption cells is far from satisfactory because of red-tapism and political overtones by which the big fish always escape the net. Therefore, the institution of Ombudsman seems to be the only hope for a quick remedy for administrative inertia, corruption and indifference.

Many situations such as prolonged imprisonment of undertrial prisoners⁷⁰, torture of prison inmates⁷¹, plight of women prisoners⁷², or of women in protective homes⁷³, payment of sub-standard wage to workers, by contractors engaged by government⁷⁴ in which the Supreme Court has intervened on behalf of the victims were really such as could have been effectively dealt with by the Ombudsman.⁷⁵ The setting up of these offices would relieve the Supreme Court of such functions. However, the *Lokpal* and the Supreme Court might have to work complementary to each other. The Supreme Court has no resources for pursuing the implementation of its decisions and taking other follow up measures needed to take matters to their logical conclusion. The *Lokpal* could better deal with such matters.

⁷⁰ *Hussainara Khatoun v. Bihar*, AIR 1979 SC 1360 : (1980) 1 SCC 81.

⁷¹ *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.

⁷² *Sheela Barse v. Maharashtra*, AIR 1983 SC 378 : (1983) 2 SCC 96.

⁷³ *Dr. Upendra Baxi v. U.P.*, (1983) 2 SCC 308 : (1981) SCALE 1136.

⁷⁴ *Peoples' Union for Democratic Rights v. India*, AIR 1982 SC 1473.

⁷⁵ *Supra* n. 41 at 494.

In sum, there is a great need to supplement the existing mechanism to supervise administration in India, and the experiment of Ombudsman is worth a trial. It is bound to result in the improvement of administrative procedures affecting the individuals dealing with the administration. The establishment of Ombudsman in India is the demand of the time. However, there has been no success so far in giving shape to the institution of *Lokpal* at the Central level. Successive Bills, each contemplating a *Lokpal* less effective than the one envisaged in the previous Bill, have been introduced but all lapsed. It needs to be emphasised that the original concept of *Lokpal* has undergone a metamorphosis over the years. The genesis of this institution in the modern representative democracies can be traced to the Swedish Ombudsman established in 1809. The basic idea of the Ombudsman is a simple one. He is an official, independent of the administration with power to investigate the citizens' complaints of mal-administration.⁷⁶ The notion of mal-administration incorporates any complaint tainted with (a) nepotism, corruption or bias; (b) failure to observe a sound administrative basis; (c) negligence in carrying out a duty; (d) misuse of discretion; (e) incompetence; (f) loss of documents or papers; (g) tardiness and delay; (h) unjust segregation or discrimination; or (i) any similar matter.⁷⁷ The objective behind the appointment of Ombudsman was to institute new standards and evolve new and more congenial patterns of administrative behaviour. Of course, this did include doing away with corruption. But corruption was not the most important target. The administration and administrative behaviour as a whole needed to be scrutinised and reformed.

However, as discussed above the main target of the *Lokpal* in the Bills proposed for this purpose is to unearth cases of corruption. It is submitted that the main grievance of the common man is against mal-administration, callousness and negligence. Therefore, what we need is: a suitable grievance procedure for the individuals to invoke the complaints of mal-administration; creation of a mechanism which would reduce corruption in the administrative services and setting up of a mechanism which would take cognizance of complaints of favouritism and nepotism against the Central and State Ministers. To meet this end, it becomes necessary that the *Lokpal's* jurisdiction should not be restricted to the examination of only those complaints which involved corruption but should also cover complaints about abuse of power, gross misconduct, mal-administration causing harassment to citizens. In alternative, to deal efficiently with large number of complaints,

⁷⁶ Peter Cane, AN INTRODUCTION TO ADMINISTRATIVE LAW (1987) at 261.

⁷⁷ D.C.M. Yardley, PRINCIPLES OF ADMINISTRATIVE LAW (1986) at 225.

it is suggested that there can be two separate institutions. One, for dealing with redressal of grievances and another, for fighting corruption.

Further, the functioning of the proposed institution of *Lokpal* may be greatly improved by securing for him a constitutional position like the Election Commission under Article 324 of the Constitution. In the absence of this provision, his powers may come in conflict with those of High Courts under Article 226. Though the jurisdiction of the High Courts has been restricted to jurisdictional defects only, the proceedings before the *Lokpal* may be hampered by invoking the jurisdiction of the High Court. Keeping in view the status of *Lokpal* as envisaged in the Bills, he must be insulated from the interference of courts.

The provision regarding inclusion of the Prime Minister within the purview of *Lokpal* can be considered significant because the Prime Minister, unlike the President, Vice-President and other constitutional functionaries enjoying special immunity by virtue of their role, is the highest executive of the land and, therefore, any scheme designed to end corruption at the top political level will be rendered virtually meaningless if he were to be placed beyond it. The proposal contained in the Bills also empowers the *Lokpal* to inquire into any act or conduct of any person other than a public functionary in so far as he considers it necessary for the purpose of his inquiry. The provision requiring the *Lokpal* to give reasons when he is rejecting the complaint is an essential requirement to give the feeling of justice to the complainant.

The *Lokpal*, when constituted, has to be given complete independence and autonomy in order to be able to perform his delicate task without any interference or influence from the individuals, agencies or even the government. It would need independent professional investigative and prosecuting machinery which should be free from government and ministerial backlash. There would be no point in having a *Lokpal* if no action is contemplated within a time frame that ensures justice against faults in the administration. Moreover, no privilege should be allowed to the government against the *Lokpal* in the matter of production of evidence.

If the *Lokpal* Bill is passed with the modifications suggested above, it will have a healthy effect on the whole administration making it more sensitive to public opinion and to the demands of fairness.