



COMMON FEATURES IN THE SYSTEM OF OMBUDSMAN IN VARIOUS COUNTRIES : A COMPARATIVE STUDY

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KEYWORDS :

1. ADOPTION OF THE OMBUDSMAN INSTITUTION

The study of the Ombudsmen operating in various countries suggests that the steps taken by all those countries that have in one way or another provide for an Ombudsman or a similar watch-dog over administration in pursuance of a

good administration on the Scandinavian pattern is not exactly the same as the Ombudsman in Sweden. Each of the country which has so far adopted the institution, has adopted it in a modified form to suit the country and especially to the government who established the office. There are many countries which are thinking over for quite a long to have a 'watch-dog' over administration but perhaps they themselves are afraid of "being bitten by their own dogs".

2. OBJECTIVES OF THE INSTITUTION

It is true that ultimate objective of such institution, wherever they happen to be, either in the name of Ombudsman or Parliamentary Commissioner or in any other name, is the same, namely, to protect the liberty of the subject from being raped by the maladministration. In other words, their sole objective is that the individual must be protected from the maladministration.

But the law establishing and governing such institutions, and the method and procedure adopted by them vary from country to country depending on the political, social and economic factors in each country. In other words, the national character must find expression in the institution. A Swedish or Danish institution would not necessarily be of practical use in many other countries. Institution of this kind must fit in the economic, social and political set up of the country in which it has to operate.⁴

When speaking broadly, we can say that throughout the world there are two types of persons. One can loosely be called as 'big man' and the other 'little man'. Again with the existence of a great bureaucracy there would inevitably be certain occasions, when through error, indifference, or more often, deliberately misuse of powers, injustice is caused to the persons. The 'big man' can deal with such situations without much trouble. Because, according to Lord Shawcross: "he is near to the establishment he enjoys the status or possess the influence which will ensure him the ear of those authority, he can afford to pursue such legal remedies as they may be available. He knows his way around. But too often the 'little man' the ordinary humble citizen is incapable of asserting himself."⁵

The other factor which is to be kept in mind is that in modern set up it is not the government who rules but it is the party in power which rules. Therefore it will not be out of context to mention here that the party in power should also take active initiative to curb the malpractices. Many people assert that generally administration indulges in malpractices not on its own but it is the party in power or party men who compel the administration to indulge in such practices. These party men claim favour from the department as a matter of right, almost in fifty per cent false or wrong cases, maintaining that the government is theirs and

whatsoever is remaining is fulfilled by the administration itself in the name of 'government'. Government officials have to accept the demand or request made by these party men, failing which they themselves become the target of bitter attack by these persons. In a rapidly developing country, it is, therefore desirable that both the party in power and government should be authorized to exercise wide discre-

tionary powers in their efforts to discharge their duties to the people efficiently and to the best public advantage.

3. BROAD CLASSIFICATION

A close analysis of the Ombudsman system in various countries reveals that the concept is easily adapted to constitutional requirements and differing needs of a country. Existing offices of Ombudsman in different countries can broadly be classified into three main categories.

Firstly, Legislative Ombudsman: Such offices have been established by the Constitution, Legislative Act or Ordinance; and

Secondly, Executive Ombudsman: Such offices have no legislative base and are established by action of the executive branch of the Government, President, Governor General, Lieutenant Governor, Cabinet Ministerial action, Council action or on the motion of the Mayor; and

Thirdly, Non- Ombudsman Complaint Handling System: These offices are in close resemblance to the office of Ombudsman.

4. GENERAL POWERS AND FUNCTIONS

The National Ombudsman from its origin in 1809, in Sweden has been an arm of the Legislature or Parliament. Generally, the Ombudsman enjoys a surprising amount of independence even from the Legislature. The independence is fundamental to the Ombudsman system. The Ombudsman receives complaints about government action or inaction from the public or he sets on his own initiatives except in Great Britain, France and Northern Ireland where the Member of Parliament is used to route the grievances of the public. The system basically involves speedy inexpensive and formal procedure. The Ombudsman generally conducts an impartial investigation calls upon all persons for information, requires the production of documents and his access to government records subject to specific limitations in some countries. The most surprising element of the Ombudsman concept is that except in Sweden and Finland he has no power to order or impose sanctions. He has no right to quash or reverse a decision or order of any official and can only made a report, recommendation or suggestion. Even in Sweden and Finland his most potent weapon is an expression of his opinion.⁶

He gives reasons for the dismissal of a complaint (if a complaint is unfounded or beyond his jurisdiction). He has the power to inspect agencies, institutions or departments either as a general power or power in connection with the investigation of a complaint. He is easily accessible. There is no expense in filing a complaint. An advocate is not required once a complaint is filed, the Ombudsman himself becomes the moving party.

Generally he may suggest changes or improvements in administrative procedure or changes in legislation. He publicizes his opinions and issue annual and in some countries more frequent reports.

By and large the British Parliamentary Commissioner for Administration investigate any action taken by Government department or other authority which is alleged to involve abuse of power in the exercise of administrative functions. He acts only at the instance of Member of Parliament and on complaints of personal injustice suffered by the complainants.

New Zealand imported the Ombudsman in 1962, well five years before the United Kingdom which introduced the British Parliamentary Commissioner for Administration in 1967. In Soviet Union, the Procurator-General exercises a very powerful supervision over most of the governmental agencies to ensure the liberty of man.

5. SOME OTHER COMMON ELEMENTS

Institutions or systems, in the various countries discussed in earlier chapter is more or less working efficiently and exactly as desired. However, when a country decides to adopt such institution or system, it has to face a lot of questions. But the following are few points which are commonly applicable to all.

5.1 Choosing of 'Right Persons'

How to find the 'right person' for such an important office has been a major problem everywhere.

The Ombudsman for Civil Affairs in Scandinavian countries must be a law trained person. In Sweden he should be a person of known legal ability and outstanding integrity. In Denmark he must have legal education, Finland he be distinguished in law, and Norway he should have the qualifications demanded for a judge of the Supreme Court. Procurator General in Soviet Union is the highest lawyer and all of his subordinates also should have higher legal education. In New Zealand no occupational background is prescribed. In India, the Lokpal shall be appointed by the President of India after consultation with Chief Justice of India. He shall be a person who is, or has been qualified to be judge of the Supreme Court. (clause 3(3) of Lokpal Bill, 1989).

Thus, the general trend goes in favour of a law knowing person whether he is a judge, lawyer or professor of law of high repute.⁷ Except in England where a former Comptroller and Auditor General of England and senior civil servants were appointed as parliamentary commissioner.⁸

5.2 Appointing Authority

Now comes the question of his appointment; who should be the appointing authority for the post? British Parliamentary Commissioner is the creature of the Parliament. The Ombudsman in Denmark, Finland and Norway are elected by the respective Parliaments. In New Zealand he is appointed by the Lieutenant Governor, the Queen's delegate, but he acts upon the recommendation of the Legislature. Similarly, the Procurator General in Soviet Union is nominally chosen by the Legislature. The Swedish Ombudsman is elected by 48 electors drawn from the two chambers of the Parliament.⁹ In India, the President after consultation with the Chief Justice of India appoint by warrant under his hand and seal Chairman and Members of Lokpal.¹⁰

5.3 Method of Selection

Method of selection is then another problem. In democratic set up the general practice (or drawback) is that all the high posts are filled up giving due weightage to the partisan considerations. Say, for example, in Finland election to the post has traditionally been contested, resulting in a weak Ombudsman.¹¹ But general survey suggests that the Ombudsman in most of the countries has been the product of all party consensus and has been elected without even a slight opposition. Selection thus made is free from complications arising out of partisan considerations.

5.4 Tenure, Salary and Other Perquisites

Ombudsman in Sweden, Denmark, Finland and Norway are chosen by each new Parliament. Normal term of the Parliament in these countries is four years. In New Zealand, each new Parliament which is chosen after three years, can select the Ombudsman. Here the incumbent carries on indefinitely unless and until a successor has been designated. For British Parliamentary Commissioner holds office during good behaviour and till he attains the age of sixty-five years. It means that the incumbent in the office can work for years together till the age of retirement, i.e., 65, provided he is not removed by the Crown either at his own request or in consequence of addresses from both the Houses of Parliament. The Soviet union's Procurator General has a five year term but his appointment can be terminated sooner. In India, Lokpal shall hold the office for five years and shall not be a member of parliament or of the legislature of any state and shall not hold any office of trust or profit or be connected with any political party or carry on any business or practice any profession when he be-

comes the Lokpal.¹² The salary, allowances and pension payable to, and all other conditions of service of the Lokpal shall be the same as those of the Chief Justice of India.

It seems that for the posts like these, limited terms are probably preferable to life-time appointments. However, in deserving cases reappointment is made for one or two or even more terms. In India the salary allowances and other conditions of the service of Lokpal will be the same as that of Chief Justice of India. The salary, allowance and conditions of services are the members of Lokpal shall be same as those of Judge of Supreme Court.¹³

Regarding the salary, Ombudsman in Denmark and Sweden are drawing pay equal to a judge of the Supreme Court. Except New Zealand, the salary and other perquisites have been at a high level in all countries.

5.5 Staff

Almost in every country, Ombudsman is free to select his subordinates. Finland's Assistant Ombudsman is elected by the National Legislature. He serves only when the Ombudsman is on leave or otherwise out of action. All other employees are the Ombudsman's personal choice. The Procurator General in U.S.S.R. recommends his Chief Deputies who are appointed for five years terms by Executive Committee of the Legislature. All other Procurators throughout the country are appointed by the Procurator-General.

In India the members of Lokpal are also appointed by the President of India after consultation with the Chief Justice of India like that of Lokpal.¹⁴

Thus in almost all the countries, the Ombudsman has been empowered to select his own personal staff.

5.6 Jurisdiction

Legislatures are beyond the jurisdiction of the Ombudsman. Swedish and Norwegian Ombudsmen have not been given power to inquire into and criticize the actions of the Ministers, but Danish and Finnish Ombudsmen have been given this power. In New Zealand, Ombudsman cannot criticize and action of the Cabinet but can criticize the departmental recommendations on which the action was based. British Parliamentary Commissioner is empowered to look into the affairs of Ministry and Ministers as well. Even Local Government and health Services are covered under the scheme adopted recently.

Lord's Chancellor's department is also included in the list of Parliamentary Commissioner Act, 1967 (Parliamentary Commissioner Act, 1967) in U.K. The Courts are subject to examination and criticism by Swedish and Finnish Ombudsmen. Procurators in Soviet Union can seek review of judicial determinations in suitable cases.¹⁵

In all other countries, courts are excluded from the jurisdiction of the Ombudsman.

Local government officials, by and large, come within the reach of Ombudsman in Sweden Denmark Finland and Norway. In U.K. separate provision has been made for Local governments as well as for Health Services. In Soviet Union, Procurators have considerable influence over local administration. New Zealand Ombudsman can deal only with the Central government Organisations.

Thus it seems that general consensus is in favour of bringing Ministers and local administration, etc., in the purview of Ombudsman, but not the courts.

The Lokpal may inquire in to any matter involved in or arising from or connected with any allegation made in a complaint. And enquire into any act of or conduct of any person other

than a public functionary in so far as he considered necessary to do so for the purpose of his inquiry in to any such allegations. Lokpal shall have power to investigate complaints which are punishable under Chapter-IX of I.P.C. or Prevention of Corruption Act, 1947. The matters which are in the jurisdiction of Lokpal shall not be referred for any inquiry under Commissioner of Inquiry Act 1952.

5.7 Complaints

Lodging of complaints and their disposal is another essential ingredient in such systems. Complaints are the main source of information to the office of Ombudsman. His activities are mainly based on complaints. In Sweden, Denmark, Norway, Finland, U.K. and New Zealand, the complaints are written one. In many other countries it is not a condition precedent. Denmark, Norway, New Zealand and in U.K., a complaint is likely to be rejected if not filed within a year after the occurrence complained about. In Soviet Union, complaints can be freely made and must be acted upon within two months. In Sweden there is no such time limit. Complaints can be lodged therefore in respect of the events that had taken place even ten year before.

The overall study reveals that there is no filing fee, and the complaints are generously received without much formality. Regarding the time limit, general thinking is that there should be no time limit, but as far as possible complaints should relate to current problems. There may be occasion such as 'Sachsenhausen affairs' which seem to raise some important issues worthy to be decided upon. Ombudsman should be given power to inquire into such important affairs.

In India, complaints to the Lokpal can be made by any citizen other than a public servant complaint shall be accompanied with an affidavit and Rs.1000/- as fee for complaint provided that the Lokpal may sufficient cause to be recorded in writing ,exempt a complainant fee. The subject matter of complaint should be more that five years old.16

Thus it is desirable that the complaints should be in writing and as far as possible an aggrieved person himself should lodge the complaint. In genuine cases oral, anonymous, complaints gathered through tours, radio, newspapers and such other media should not be ignored.

5.8 Availability of Alternative Remedies

In New Zealand, Ombudsman cannot act upon a complaint which relates to administrative action. For such complaints there are special tribunals and courts. In Denmark a complaint about a decision which is still subject to change by a higher non-judicial organ, is not considered by the Ombudsman. Norway is straight forward in this regard. There the Ombudsman has discretion to reject objections concerning matters that could be administratively or judicially reviewed. In U.S.S.R. a Procurator who receives a complaint about a matter that may still be administratively reviewable simply refers it to appropriate authority. The British

Parliamentary Commissioner is not absolutely blocked from inquiring into a matter that may still be judicially reviewable.

No doubt, containing a matter within a prescribed decisional channel has its own merits. It favourably affects on the working of the administration, but channelising complaints sometimes causes undue delay and further hardship to the aggrieved person. Therefore, the study suggests that Ombudsman should be given discretionary power as to the admissibility of certain complaints even though the alternative remedy has not yet been availed of. Sometimes complainant himself is not knowing as to whom the complaint is to be lodged. Denmark has shown the way. There the Ombudsman has to guide a complainant at this stage. Not only this, Danish Ombudsman can recommend that free legal service should be provided to the aggrieved.

In India, the Lokpal shall not enquire into any complaint, if the complaint is made after the expiry of 5 years after the date on which the offence is alleged to have been committed.¹⁷ The Lokpal shall dismiss a complaint after recording his reasons if the complaint is frivolous or vexatious or is not made in good faith or there are no sufficient grounds for enquiring into the complaint.¹⁸

5.9 Functions and Procedure

Generally the Ombudsman has been given wide freedom to choose the procedure he may find appropriate in each particular case and the powers to deal with the problems which he may face while in action. Moreover, he is also given power (in some countries it is his duty) to make inspection tours throughout the country. Ombudsman in Denmark, Finland, New Zealand and Procurator in the U.S.S.R. make extensive tours to inspect various offices. It seems that inspection tours, undertaken by the Ombudsmen have an added effect on the 'institution' in the administration.

The Lokpal Bill, 1989 provides the procedure to be followed by Lokpal in respect of its exercising its powers. Generally, Lokpal does not exercise any powers without giving reasonable opportunity of being heard and to produce evidence in unlike in other countries.²⁰ the India Ombudsman does not undertake tours and inspections of Government Offices.

5.10 Review of Ombudsman's Action by Court

In Sweden Ombudsman has a power to review his own decision. Moreover, when an official is dissatisfied with the admonition, he may ask the Ombudsman to prosecute him so that the court may decide whether he has committed a fault.

Generally, overall thinking seems to be that the Ombudsman stand in a special relationship with the courts, who are ultimately guards of individual rights and to whose jurisdiction the Ombudsman like every one else is subject. There is no confusion in between the

two, the Ombudsman is not an extension of judicial process, he is an extension of legislative process. New Zealand law has taken a more guided line. There is a provision for protecting the proceedings of the Commissioner from being called in question in a court except on the ground of lack of jurisdiction. In India, no suit, provision or other legal proceedings shall lie against Lokpal or any member or against any officer of Lokpal institution in respect of any thing which in good faith done or intended to done under the Act.²¹ No proceedings or decision Lokpal shall be liable to be challenged, reviewed, quashed or called in question in any court.

The courts are the proper bodies for determining the questions of jurisdiction. Therefore, for any serious dispute arising out of Ombudsman's activity should finally be decided upon by the Courts.

5.11 Supervision Over Courts

In Denmark judges were, from the very beginning, kept completely outside the Ombudsman's competence, although Sweden and Finland have a different system. Norway has accepted the Danish rule i.e., supervision of the court by the Ombudsman is against the principle of the independence of the judiciary. But, in Soviet Union, Procurators may conduct a scrutiny of the judges work. After a court judgement has become final, the Procurator General of the Soviet Union and his deputies can demand that the proceedings be reopened for considerations of a 'protest' against the decision rendered previously.

This question seems somewhat sensitive than any other question. Therefore, just to avoid head on collision between the two 'watch-dogs' it is advisable to keep them aloof as far as possible. But in most deserving cases they should be allowed to look in to the affairs of each other.

5.12 Supervision Over Ministers

In Denmark, Ministers are subject to control by the Ombudsman, but he had no jurisdiction to criticize a statement made in the 'Folketing' (Parliament) by the Prime Minister on his usual ministerial responsibility. Similarly, Ombudsman in Finland has a power to criticize the Minister. In New Zealand none of the sensitive departments such as External Affairs, Prime Ministers' Defence or Inland Revenue is included in the Ombudsman's jurisdiction. Although directly he has no power over Ministers, but in practice he does criticize Minister indirectly. Somewhat similarly, the Ombudsman in Norway has authority to scrutinize a member of the Cabinet in his capacity as head of a Ministry. In Sweden, however, no opinion has been expressed that the Ombudsman's (JO's) authority should be extended to the Ministers as well. In U.K. Parliamentary Commissioner has power to investigate matters in which Ministers have taken any initiatives. Like in UK, in India, the Lokpal has jurisdiction to investigate a complaint against any Union Minister or State Minister except the Prime Minister of India.²²

Thus it seems that general opinion is that the Ministers as well. In U.K. Parliamentary commissioner has power to investigate matter in which Ministers have taken any initiatives.

Thus it seems that general opinion is that the Ministers should be included in the list of Ombudsman for the purpose of investigation.

5.13 Local Administration

In Denmark, from April 1962, the Ombudsman's jurisdiction has been extended to persons acting in the service of municipal administration in all matters concerning which an appeal may be lodged with the government authority. But the municipal councils themselves acting as a body are generally speaking outside the Ombudsman's competence. In U.K. a system of independent investigation for complaints against local government has been introduced since 1974.

In Sweden, the law had been amended in 1957 to extend the Ombudsman's province to part of municipal administration. In Finland this area of administration had always been within the Ombudsman's control. In Norway it was thought better, as a practical solution to let the Storting (Parliament), according to the need for time to time determine in the instructions as to which municipal authorities should come within the competence of the Ombudsman. Instructions of 1962 gave the Ombudsman rather free hand in this respect. Procurators in the U.S.S.R. are having powers to scrutinize the acts of local authorities.

In India, the Lokpal exercises jurisdiction over a local authority or a corporation established by or under Central or State Act.23

Thus the general agreement on the point is that local governments should also be brought within the province of Ombudsman to check the rampant corruption in this branch of administration.

5.14 Publicity of Action and Relation with the Press

In Denmark and Norway the 'Documents' in a case are not made available to the press. Even in Sweden and Finland, where there is a public access to most official documents, many files are secret. Nonetheless, in Denmark, Ombudsman's decision are public (but not other documents as noted above), and in Norway it is generally assumed that the press will take a keen interest in the work of the Ombudsman. Accordingly, Ombudsman has been given power to decide whether and if so in what manner he shall inform the public of his action in the case. Wide publicity is given in U.K. for the PCA's activities. In India Lokpal Act has not yet been finalized. However the many Lokayukta in various states in India are giving wide publicity regarding their activities.

Thus the general opinion on this point is that, for the proper and effective functioning of the 'system' a considerable amount of publicity of Ombudsman's activities is a must for exceptional cases where interests of State security etc., are involved.

5.15 Reports and Follow-up Action on Them

Watchmen in Sweden, Finland, Denmark, New Zealand and the U.K. annually (as well as time to time in public interest) submit an Annual Report to their respective Parliaments embodying their ideas for the future as well as their account of past activities. In Norway, the Ombudsman submits an Annual Report to the Parliament.

Generally these reports are handled by a Committee constituted for this purpose. Sometimes these committees give a critical statement on the reports or express its belief and concern that the Ombudsman should intensify his activity or pay special attention to certain matters. In some of the countries say Norway, the 'Reports' are subject to discussions in the Storting (Parliament).

In India, if the Lokpal after completion of the investigation finds a complaint proved or partly proved, shall submit a report to the Prime Minister. Prime Minister intum shall send a reply to the Lokpal, within three months, informing him about the steps taken or proposed to be taken in the matter. The Lokpal shall present the report to the President a consolidated report and the President shall as soon as may be after and in any case not later than ninety days from the receipt of such report.²⁴

5.16 Principle of Parliamentary Supremacy

Ombudsman may exist in perfect harmony with the other organs, because they are not there to work at cross purposes. Truly, of the Ombudsman's work, in one sense, would be deciding to interpret Parliament's manifestation of its own will through the various departments of the government. The Ombudsman is supposed to supplement and not to supplement the existing organs of State, which are

already engaged in redressing citizen's grievances. A close analysis of the 'system' in various countries, especially where the Parliament is supreme, reveals that 'Parliamentary supremacy and Ombudsman may exist in perfect harmony because they are there not to oppose each other or to work at cross purposes.' Moreover, the control exercised by the Ombudsman is neither political nor judicial, it is somewhat a decision from an independent authority whose main function is to act as a protector of citizens' rights. In India also this constitutional provision holds good.

5.17 Control Over Ombudsman

As per Danish law the Folketing (Parliament) may issue general instructions (directives) to the Ombudsman, it cannot interfere with the way in which he deals with individual cases. In other words, he is entirely free as to which case and as to which aspect of it he wanted to deal with. But he must enjoy the general confidence of the Folketing without which he is liable to be dismissed.

In Finland, the real source of the Ombudsman's authority is Parliament, which elects him, and on whose behalf in a way he is acting and to whom he gives a yearly report on his activities. Yet Parliament cannot dismiss him during his term of office.

New Zealand's Parliamentary Commissioner is appointed by the Governor-General on the recommendation of not the government but the house of Representatives. This procedure of appointment is to ensure that Ombudsman will be responsible to Parliament and not the government. He may be removed from the office (or even suspended) by the Governor-General upon an address from the House for disability, bankruptcy, neglect of duty or misconduct.

In Norway Ombudsman is under a duty to take up and express his opinion on matters submitted to him by the Storting (Parliament). On this point, the Norwegian system differs from that in Denmark where the Parliament has no authority to enjoin the Ombudsman to take up certain matters. In Sweden, Ombudsman's yearly report to Parliament is scrutinized by a Committee. Such scrutiny is nothing but a means of controlling his activity.

Issue of instructions to the Ombudsman in Norway serves the purpose directly. In India, even though the Lokpal approved by the President of India he has to submit Annual Report to the Government and the Government will lay the report before both the House of Parliament. That the report will become the subject matter of discussion and the parliament indirectly exercise control over Lokpal.²⁵

Thus, it seems that the general feeling on this point is that, though the Ombudsman's expressed opinions on questions of law are not binding but they enjoy great authority and are usually followed. Therefore, some sort of check should be there to control the Ombudsman himself.

6. CONCLUDING OBSERVATIONS

On the basis of this, we can easily formulate the requirements of an ideal Ombudsman. They should be:

- a. Qualification – legal training.
- b. Selection – by legislative bodies.
- c. Tenure, salary and other payments – High salary roughly equivalent to that of a Supreme Court Judge.
- d. Staff – There should be no paucity of funds and staff and he himself should select his staff.
- e. Jurisdiction – He should be given jurisdiction over maximum possible subjects.
- f. Complaints – Mode of complaints should be quite informal ; no rigid procedure, or technicality should be attached with for lodging a complaint.
- g. Availability of alternative ground should not come in his way for dealing with a complaint.

h. His functions and procedure should be informal. Rigid rules of evidence, etc., should not hinder in his working.

i. Review of Ombudsman's own work should be undertaken by a Committee of Legislature. In deserving cases, an aggrieved may also be allowed to go to the court against the findings of Ombudsman.

j. He should have supervision over courts, Ministers and all other local bodies.

k. Press should be requested to give wide coverage to the activities of Ombudsman.

l. His report should be given due weightage by all the concerning authorities.

The countries included in the study are the few among the countries which have adopted this institution. There are many other which are going to adopt this 'system'. India is one of the country which is seriously thinking for establishing a better Lokpal – Indian Ombudsman.