# AN OMBUDSMAN FOR CANADA

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## Introduction

*Growth of government activity.* — The unceasing growth of government has multiplied the contacts of citizens with the administration. Increasingly detailed regulations govern most business and professional endeavours. In addition, the state has assumed a multitude of positive functions in such fields as welfare, hygiene, education, medical care, traffic and transportation facilities, finances, insurance, agriculture, and housing. As a result, officials are constantly making decisions affecting the material and intellectual interests of individuals. Obviously, the possibilities of dissatisfaction are innumerable. While generally speaking most people in Canada appear to feel that

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they are being dealt with fairly by the various levels of authority with which they are in contact, some instances of error, injustice or negligence are inevitable. Misgivings about particular acts or omissions of the Administration have increased in direct proportion to the development of official responsibilities and of the departments, boards and corporations necessary to carry them out.

*Shift in legal interest.* — In the present century lawyers and political scientists have become increasingly concerned with the relationship between citizens and the "welfare state" as conceived in our Western democracies. More specifically they have worried about the protection of the individual who is caught in the tightening tentacles of the administrative octopus. For a long time this interest centred chiefly on the various judicial or political recourses available against the state.

*Interest in the ombudsman.* — In the last few years increasing attention has been given to the Scandinavian institution of the *Ombudsman* designed to investigate, and in some cases, remedy indivudual grievances against the authorities.[1] This interest has become especially keen in Canada, where, in addition to a great deal of discussion about the introduction of a federal *Ombudsman*, there is evidence that the governments of Nova Scotia and of Saskatchewan are planning to establish *ombudsmen* in their provinces.[2] Furthermore, strong pressures are being exerted on the Quebec Government to follow suit.[3]

*Purpose of present essay.* — Since the *Ombudsman* is apparently about to make his entry on the Canadian scene, it becomes imperative to make a careful study of how this institution operates in the four Scandinavian countries and in New Zealand where it has been adopted. It is also essential to examine the manner in which such office can and should function in the federal and bi-ethnic context of our country.

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[1] As to the meaning of the word, in Sweden it means "attorney" or "representative"; in Norway and Denmark, a person who has a public duty which he must discharge. But in the present context all countries use it in the sense of attorney or commissioner of Parliament: *cf. The Citizen and the Administration*, report of the British section of the International Commission of Jurists, directed by Sir John Whyatt, hereinafter referred to as the *Whyatt Report*, London, 1961, p. 45.

[2] or at least they so announced in recent Speeches from the Throne: *cf.* the Montreal *Gazette*, Feb. 13, 1964, p. 6.

[3] In addition to avowed pressures by the Opposition, the Quebec Liberal Federation and the Liberal government are said to be studying the possibility in earnest: *cf.* despatch by Gordon Pape: "Support Mushrooms for Quebec 'Ombudsman'", in the Montreal *Gazette*, May 22, 1964, p. 33. The proposal enjoys considerable editorial support: *cf.* for instance editorials in the *Gazette*, February 13, 1964, p. 6 and *Le Devoir*, February 14, 1964, p. 4.

This is the purpose of the present essay. It is written primordially from the lawyer's point of view.[4] For the opinions of a political scientist on the subject, reference should be made to the various studies published by Prof. Donald C. Rowat of Carleton University, in Ottawa, who is Canada's expert on the subject.[5]

## CHAPTER I

## EXISTING SCHEMES

### A. Sweden [6]

*The 1809 Constitution : justitieombudsman.* — The institution of the *ombudsman* originated in Sweden more than 150 years ago. In 1809 the Swedish *Riksdag* adopted a new constitution which, inspired by the ideas of Montesquieu and a desire to curb the powers of the executive, gave Parliament the power to appoint a special Commissioner "to act as the attorney of Parliament, under the instructions issued by Parliament, and in that capacity to control the observance

[4] Little if anything has been written by lawyers on the subject in Canada. For the sake of the record, reference should be made to the short comparative essay of A. N. Patterson: "The Ombudsman", in (1958) 1 *U.B.C. Law Review* 777. On the other hand, the writer is very conscious of the warning of A. W. Bradley in "The Redress of Grievances", (1962) *Can. L. J.* 82 at 87 against too legalistic an approach: "the balance has to be kept between, on the one hand, the interests of the individual directly affected by a governmental decision, and, on the other hand, the public interest that the administrative agencies should carry out effectively the social and economic policies which Parliament has laid down in the interests of the community." *Cf.* also the recently published study of Prof. D. W. Mundell: "Ombudsman for Canada", in (1964) 7 *Can. Bar Journal*, p. 179.

[5] *Cf. inter alia*: "An Ombudsman Scheme in Canada", (1962) 28 *Can. Journal of Economics and Political Sciences*, p. 543; "The Parliamentary Ombudsman: should the Scandinavian scheme be transplanted ?", (1962) 28 *International Review of Administrative Sciences*, p. 399; "Finland's Defenders of the Law", (1961) 4 *Can. Public Administration* 316 and 412. Moreover Prof. Rowat is editing for publication in the Fall of 1964 a pioneering volume of essays on the ombudsman and related institutions in various countries.

[6] This section is based on the following material: *Modern Swedish Government*, by Nils Andrèn, Stockholm, 1961; "The Swedish Institution of the Justitieombudsman", by the present incumbent, Alfred Bexelius, in (1961) *Intl. Review of Administrative Sciences* 243; an undated, 34-page mimeographed essay by the same author on *The Swedish Ombudsman*, published by the Press Department of the Swedish Ministry for Foreign Affairs; an undated, and unsigned, 8-page memorandum on the *Militieombudsman*, issued by the Swedish Institute; the *Whyatt Report*, ch. 10. For much of this material the writer is indebted to both the Royal Embassy of Sweden in Ottawa and the Canadian Embassy in Steckholm.

of the laws" (article 96 of the Constitution). This official was given the name of *Justitieombudsman* which he still bears. His function was "to make certain that laws and statutes were adhered to by the courts and other authorities and to prosecute judges and other officials who in their office had committed unlawful acts or neglected their official duties".[7]

Fearing an autocratic government, Parliament sought to instill respect for its laws and thereby to safeguard the rights of the individual. The basic idea, in the words of the present incumbent, was "that the courts and other authorities would be less inclined to disregard the laws in order to serve the wishes of the Government, if the activities of the authorities were watched by a People's Tribune who was independent of the Government".[8]

*In 1915 : Military ombudsman.* — In 1915, after a debate which lasted more than a decade, a second commissioner, the *Militieombudsman,* was appointed with jurisdiction over the armed forces. He investigates the administration of martial and military law, the treatment of military personnel and the use of funds and equipment in the armed forces. He handles between seven hundred and eight hundred cases a year, of which 100 to 150 result from complaints. His powers are similar to those of the *Justitieombudsman.*

Before 1915, these functions were exercised by the *Justitieombudsman.* Except Norway, other countries which have modelled their Parliamentary commissioner on the Swedish pattern have not so divided his responsibilities and entrust both jurisdictions to one single official. On the 26th of June, 1957, Western Germany enacted a law creating the office of *Wehrbeauftragte,* a commissioner elected by the *Bundestag* to ensure that the constitutional rights of servicemen and officers in the German army were respected. Article 7 of the Statute gives to each soldier the right to complain directly to the commissioner and forbids sanctions against soldiers who avail themselves of this right. It must be noted that this is a limited application of the *Militieombudsman* and is designed to meet a peculiarly German problem.

*In 1957 : extensions to local matters.* — In 1957 the powers of the *Justitieombudsman* were extended to local boards and to local government officials which had been previously exempt from his supervision. However, some restrictions were set on this new jurisdiction in order to preserve local autonomy. A similar extension of the jurisdiction of the *Ombudsman* over local officials will be noted in other countries.

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[7] Bexelius, *op. cit., Intl. Review of Administrative Sciences,* p. 243.
[8] *Ibid.*

*Importance of Swedish Ombudsman.* — The Swedish institution deserves to be studied in detail, both because it is the prototype of all subsequent legislation and because it has been found necessary in other countries to modify its form.

*Duties of the Ombudsman.* — According to Article 96 of the Swedish Constitution, the *Ombudsman* is entrusted with the following general duties :

(a) he controls the observance of the laws and regulations by government officials;

(b) he institutes proceedings against derelict civil servants;

(c) he reports to Parliament the deficiencies in existing legislation;

(d) he acts as prosecutor in certain cases before the Supreme Court of the Realm.

*Jurisdiction.* — The jurisdiction of the *Justitieombudsman* comprises all government officials at both national or local levels, Sweden being a unitary, as opposed to a federal, state. However, cabinet ministers are *not* subject to his control. This is due to the fact that in Sweden, cabinet ministers are only advisers to the King and are not responsible for the acts of civil servtnts within their departments.[9] The control of government officials by Parliament cannot be exercised in Sweden by means of ministerial responsibility; hence the need for direct supervision such as that of the *Ombudsman.*

*Jurisdiction over the courts.* — On the other hand, judges and court officials are not exempt from scrutiny by the Commissioner, a jurisdiction he has only in Sweden and Finland. In Sweden, at least, this power does not seem to have affected the independence of the judiciary. The present Commissioner, Alfred Bexelius, writes:[10]

> "Foreign visitors who come to study the office of JO sometimes wonder whether the JO control of the judiciary is commensurate with the independence that should be secured to a judge. I myself come from the ranks of judges, and can assure that I have never heard a Swedish judge complain that his independent and unattached position is endangered by the fact that the JO may examine his activity in office. The claim to an independent position does not necessarily mean that a judge should be free from responsibility or criticism when acting against the law. From the JO's annual reports of the past 150 years, anybody may see that there has been a need for the supervision of judges also. It is to be noted that excepting only the King's Chancellor, the JO and the MO may order the prosecution of judges as well as other high officials for breach of duty. The following examples of recent actions against judges may be quoted: In a suit instituted by the JO a few years ago, a judge was fined 1,400 Swedish crowns for behaving

[9] Bexelius, *ibid.*, p. 245.

[10] *Ibid.*

> inappropriately towards parties and witnesses. In 1959, the JO sued a justice in the Court of Appeal for assisting a friend, a lawyer, in drawing up a great number of documents to be handed to the courts. This was done outside of the duties of the judge and against payment. For this activity, which was found incompatible with his office as a judge, he was condemned by the Supreme Court to pay a fine of 1,600 Swedish crowns. From the practice of the last few years, it may also be mentioned that two judges have been fined for delaying suits."

Inspections are used to check whether the courts decide cases as quickly as possible, each court being inspected at least once every 10 years. During every such inspection, the files of 25 civil and 25 criminal cases are selected at random and scrutinized with regard to preparation and delay.

*Powers of the ombudsman.* — In order to carry out his duties the *Ombudsman* is given extensive powers:

(a) he can request the assistance of all government officials who must comply with his demands;

(b) he has the right to examine the records of all courts of law and of all government departments (except internal minutes);

(c) he has the right to be present at the deliberations of all courts and government authorities including the Cabinet;

(d) he has the right to institute proceedings against government officials who are guilty of error or neglect, a duty he shares with the King's Chancellor of Justice, a government official (the *Ombudsman* being Parliament's own prosecutor);

(e) he can make whatever representations or recommendations he deems necessary to government officials or to judges;

(f) he reports on his findings and activities annually to the *Riksdag.*

Extensive though these powers are, they do not permit the *Ombudsman* to revoke or change administrative decisions, nor is he empowered to force the authorities to take measures. He will not intervene ordinarily in areas where the authorities have discretion.[11]

*Publicity.* — One characteristic of the Swedish system is the complete publicity surrounding all complaints, investigations and decisions. Other countries have tended to limit this practice and the New Zealand statute requires all investigations to be held *in camera.* In Sweden all complaints, investigations and reports are entirely public.

*Forms of intervention.* — While at the beginning the main form of intervention by the *Ombudsman* was criminal prosecution — indeed

[11] Bexelius, in above-mentioned mimeographed essay, at p. 3.

the punitive characteristics of the Swedish model are striking — today his interventions most frequently take the form of representations or reminders to the officials concerned with a view to ending an illegality or securing redress. Criminal or civil prosecutions are still undertaken, but are comparatively rare. A third form of intervention is a recommendation that compensation be paid to the aggrieved party, either by the guilty official, if the damages are small, or by the government, if they are considerable. Such suggestions are practically always followed.[12] A fourth method is the exercise of the prerogative of mercy to correct excessive penal sentences or other miscarriages of justice. In our country the prerogative of mercy belongs to the Crown and not to Parliament.

*Complaints.* — The prime source of action by the *Ombudsman* are the formal or informal complaints he receives from various individuals. There are no legal formalities. Complaints can be made most informally. For the first 100 years the complaints averaged 70 a year. But with the development of government activity in every field, the number of complaints has been rising steadily, as appears from the following table:[13]

| *Year* | *Number of Complaints* |
|---|---|
| 1956 | 598 |
| 1957 | 757 |
| 1958 | 818 |
| 1959 | 780 |
| 1960 | 983 |

Few of these complaints (about 10%) are found to be justified or to come within the jurisdiction of the Commissioner.[14] This percentage is about the same in the four other countries where the institution operates.

Sweden has almost 8 million inhabitants. Thus on the whole, the number of complaints is relatively small, as elsewhere. Several reasons can be given for this. One is the existence of a developed appeal apparatus through which most complaints against the Administration ean be channeled. Another, is the fact that the various countries which have adopted an *ombudsman* have long traditions of respect for individual liberty and consequently fairly little arbitrary action. Finally, the very possibility of an inquiry by the *Ombudsman* has an inhibiting effect on government officials.

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12 Bexelius, *ibid.*, p. 6.

13 Based on figures supplied by Bexelius in his quoted essays.

14 Bexelius, *op. cit., Intl. Review of Administrative Sciences*, p. 254.

*Other sources of action.* — In recent years attention elsewhere in the world has been focussed on this aspect of the *Ombudsman's* work and he has come to be visualized mainly as a people's tribune charged with handling the complaints of individuals against the administration. But the investigation of complaints is not his only function. He makes his own random inspections, particularly of the activities of the civil service. Press reports also have often led to investigations.

*Faults causing intervention by the Ombudsman.* — In Sweden, as in the other Scandinavian countries or in New Zealand, the *Ombudsman* is seldom called upon to intervene against flagrant violations of the law. In any case, such violations are comparatively rare in democracies and are generally dealt with by ordinary courts of law. Embezzlement, for instance, is prosecuted before the criminal courts. Ordinary delicts normally lead to damage actions. But there are many other instances of misconduct or maladministration to be investigated:

(a) One very active area of control is that of imprisonment which the present *Ombudsman* calls one of his "most important tasks".[15] From the very beginning, the *Ombudsman* has been concerned with the treatment of persons detained for crimes or other reasons. Indeed, in all the countries studied, communications by prisoners to the *Ombudsman* are made in sealed envelopes which cannot be opened and which must be transmitted immediately. One example of such intervention is the restoration inside a prison of a popular magazine which had been banned for no other reason than that it had criticized prison authorities. In Denmark the *Ombudsman* even obtained an improvement in the quality of the coffee served to prisoners! Since such small grievances are important to men deprived of their freedom, the *Ombudsman* treats them with great attention.

(b) "A great number of actions have been further directed against prosecutors, judges and county governments for neglect to hear and decide with sufficient speed such cases where the accused had been arrested."[16] Indeed one of the most frequent causes of intervention have been unnecessary delays in bringing cases to trial. In the past, judges have even been fined for slowness. And the *Ombudsman* has not hesitated to request the speeding up of legal proceedings where the delay was due to neglect or maladministration.

(c) Another area of concern to the *Ombudsman* has been freedom of speech and he has intervened, especially in earlier days, to protect the right of citizens to speak of any subject and to hold public meetings on the most controversial issues. Similarly he has to protect freedom of the press against arbitrary action by government officials.

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[15] Bexelius, mimeographed essay, *op. cit.*, p. 13.

[16] Bexelius, *ibid.*, p. 24.

(d) The *Ombudsman* has also sought to suppress, by legal action if necessary, local regulations which were not founded on statutory authority or which were unreasonable.

(e) The most frequent cause of intervention, however, is a faulty interpretation of particular statutory instruments. Judges have been prosecuted for meting out less than the minimum sentence provided for by law.[17] He has also been concerned with trying to secure uniformity of interpretation and application, a function especially necessary in a country where *stare decisis* does not exist.

(f) Occasionally the *Ombudsman* has intervened to correct improper or haughty behaviour or abusive conduct by officials.

(g) He has even investigated why Sweden's Film Censors Board did not cut some allegedly objectionable scenes from the recent movie *The Silence*, of Ingmar Bergman.[18]

*Pointing out defects in the law.* — In Sweden, as in other countries, an important duty of the *Ombudsman* is to point out defects in the law or in administrative practices which he discovers in the course of his investigations. For instance, it was as the result of the recommendations of the *Ombudsman* that a percentage of alcohol in the blood was fixed to serve as a limit for determining intoxication. The Swedish *Ombudsman* recommended, as has his New Zealand colleague last year, that administrative bodies be compelled to give reasons for their decisions.[19] Indeed many complaints and misunderstandings could be avoided if citizens were always fully informed of the reasons for administrative actions.

*Independence of the Ombudsman.* — One important characteristic of the institution is the complete independence of the Commissioner. The *Ombudsman* is appointed by Parliament for a four-year term with an attractive salary and pension. Every precaution is taken to ensure his independence and that he will not be reluctant to intervene for fear of jeopardizing his chances of subsequent advancement. Generally, he has been chosen unanimously by all the political parties from among prominent judges. As in other countries, he selects his own personnel. This desire to protect the total independence of the commissioner, both from the executive and Parliament, is a common feature of the institution everywhere.

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[17] Bexelius, *ibid.*, pp. 23-24.

[18] *Cf.* despatch in *The New York Times*, Nov. 8, 1963, p. 37: "Swedish Dispute Renewed over Ingmar Bergman."

[19] Bexelius, *op. cit., Intl. Review of Administrative Sciences*, p. 247. See also *Report of the Ombudsman*, Government Printer, Wellington, N.Z., 1963, p. 4.

## B. Finland [20]

*Adopted in 1919.* — The second country to adopt an *ombudsman* was Finland. It did so in its constitution in 1919. The institution is patterned generally on that of Sweden, but with some notable differences.

*Differences from Swedish system.* — First of all, the Finnish Commissioner combines the powers of the Swedish *Justitieombudsman* and *Militieombudsman* although the latter jurisdiction is used very little and consequently not developed.[21]

Secondly, he shares some of his powers with the Chancellor of Justice who is appointed, not by Parliament, but by the President and is charged with the enforcement of the law in a manner somewhat similar to that of our own Attorney-General. The *Ombudsman* has been called a consultative member of the cabinet since he attends cabinet meetings, but does not vote.[22] In effect, he is the government's legal adviser. He is also concerned with enforcement of the law but rather from the point of view of protecting the rights of the *individual.*[23] He watches specifically over the civil service, the armed forces and the penal system.

A third and more significant difference is that the supervisory power of the Finnish *Ombudsman* extends to cabinet ministers and the cabinet as a whole.[24] In fact, in recent years, the Finnish *Ombudsman* has investigated cabinet ministers and even prosecuted four of them including the prime minister.[25]

*Jurisdiction over courts.* — It must be noted that as in Sweden but as opposed to Denmark, Norway and New Zealand, the *Ombudsman's* jurisdiction extends over the courts as well as over the administration. Since the very idea of any interference with the courts is anathema to self-respecting Anglo-Saxon jurists, the remarks of Paavo

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[20] For further study of the Finnish *Ombudsman*, reference should be made to: *Précis de Droit Public de la Finlande*, by V. Merikoski, translated by Arvid Enchell, Helsinki, 1954 and to Paavo Kastari's article: "The Parliamentary Ombudsman: his functions, position, and relation to the Chancellor of Justice in Finland", (1962) 28 *Intl. Review of Administrative Sciences*, p. 391. Also invaluable is the article of Professor Donald C. Rowat: "Finland's Defenders of tbe Law: The Chancellor of Justice and the Parliamentary Ombudsman", (1961) 4 *Can. Public Administration* 316 and "Postcript", at p. 412. The writer acknowledges the kind help of the Embassy of Finland in Ottawa.

[21] Kastari, *op. cit.*, pp. 394-5.

[22] *Ibid.*, p. 392.

[23] *Ibid.*, p. 395. See also, Merikoski, *op. cit.*, pp. 41-42.

[24] *Ibid.*, p. 395.

[25] Rowat, *op. cit.*, p. 320 and 414.

Kastari, former Finnish *Ombudsman*, are worthy of quotation. They echo those already quoted of his Swedish colleague :

> "Until recent years, the superintending activity of the Ombudsman in Sweden seems to have been directed mainly towards the courts, ending very often with the presentation of charges. Neither in Sweden nor in Finland have such superintendence detracted from the independence of the courts, which consideration seems in Denmark and Norway as well as in the Anglo-Saxon countries to he regarded as a hindrance to extending the competence of the Ombudsman to the courts."[26]

Admittedly the idea will appear to be revolutionary, especially to Anglo-Saxon lawyers who have been taught to cherish the independence of the courts. But on occasion individuals have been aggrieved by the courts. One might well ask how an *ombudsman* could endanger the independence of the courts by calling the attention of judges to illegalities in their behaviour or to arbitrary conduct in the court-room. In any event, the *Ombudsman* has no right to intervene in pending cases or in matters which may go to appeal.[27]

*Right to prosecute.* — Although the Chancellor of Justice is also the Attorney General, the *Ombudsman*, like his Swedish colleague, shares with him the right to order prosecutions against negligent civil servants.[28]

*Independence of the ombudsman.* — The Finnish institution does not appear to have been always free of partisan politics. As the former incumbent, Professor Kastari writes:[29]

> "In general, as the highest judges have not been willing to undertake the job, the more outstanding younger jurists have been called upon and, as political expediency has often played a part in the selection, these matters have to some extent had a negative influence on the position and prestige of the Parliamentary Ombudsman. Recently, several Parliamentary Ombudsmen have been promoted to membership of the Supreme Administrative Court, which really in itself hardly signified any promotion, but is considered worth while because of the permanency of the office."

Obviously, an *ombudsman* scheme can only achieve its ends if there is no political interference and if election to the office is not considered as a mere stepping-stone for better things.

*Complaints.*[30] — Complaints are the largest source of investigation. Thus, in 1960, the *Ombudsman* handled 1050 complaints but made only 52 investigations at his own initiative. The *Ombudsman* rejected 831 or almost 80% of these complaints for one reason or another as being unfounded. It must be noted that the Chancellor of

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[26] Kastari, *op. cit.*, p. 396, footnote 8. See also Rowat, *op. cit.*, p. 323.

[27] Kastari, *op. cit.*, p. 397.

[28] Merikoski, *op. cit.*, p. 42; Kastari, *op. cit.*, p. 394.

[29] *Op. cit.*, p. 393. See also: Rowat, *op. cit.*, pp. 322-3.

[30] The figures used in this paragraph are taken from Kastari, *op. cit.*, pp. 395-6.

Justice, during the same period handled 635 complaints (in addition to 150 referred by him to the *Ombudsman*), in addition to 254 cases started at his own initiative and 123 referred to him by government officials. The Chancellor prosecuted officials in 59 cases and took disciplinary steps in 68 cases. Most of these charges were brought against judges. The *Ombudsman*, on the other hand, brought charges in only 9 cases and initiated disciplinary action or reprimands in only 25 cases.

### C. Denmark

*Importance of Danish statute.* — The office of the Danish *Ombudsman* was created in 1954 by a statute providing for a single Commissioner supervising both the civil and military administration.[31] Although the institution is also modelled on the Swedish example, it differs from it in certain respects and has innovated in others. Since it was the Danish statute rather than the Swedish prototype which inspired the Norwegian and New Zealand legislation on the subject, it is well worth examining these differences in some detail. Except for the variations noted hereinafter, the office operates in very much the same manner as the Swedish or Finnish ones.[32]

*Duties.* — The duty of the Danish Parliamentary Commissioner, as is stated in article 3 of the Directives issued to him by Parliament in 1956, is to

> "keep himself informed as to whether any person comprised by his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties."

*Jurisdiction.* — His jurisdiction comprises all civil servants and state employees and, as in Finland but unlike in Sweden, all cabinet ministers. In 1961 it was extended to cover certain activities of local government. But, in contradistinction to his Swedish and Finnish colleagues, s. 1 of the statute specifically excludes the entire judiciary from his jurisdiction. In this connection, the present incumbent writes:[33]

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[31] An English translation of the text of this statute together with that of the general Directives of Parliament issued pursuant thereto are found at p. 37 *et seq.* of *The Ombudsman*, by the current Danish office-holder, Prof. Stephan Hurwitz, Copenhagen, 1961. This volume contains a detailed statement of the operation of the office. Ch. 11 of the *Whyatt Report* also contains a great deal of useful information. The writer expresses his thanks to the Royal Danish Embassy in Ottawa for the assistance received in preparation of this essay.

[32] *Whyatt Report*, pp. 59-60.

[33] Hurwitz, *op. cit.*, *pp.* 6-7.

"Regarding judges it was proposed in the original bill in 1953 that the jurisdiction of the Commissionner should include the administrative functions of judges, whereas the judicial conduct should be outside his jurisdiction. During the Folketing debate of the Bill objections were raised against this provision with the result that also the administrative activities of judges were set outside the jurisdiction of the Commissioner. In this connection it should be mentioned that complaints concerning the conduct of judges can be brought either before a special Court of Complaints or before the presidents of the respective courts.

On the other hand deputy judges did, to a certain extent, come within the jurisdiction of the Parliamentary Commissioner. However, in practice this arrangement was not very expedient; therefore in the amended Act of 1959 it is provided that deputy judges as well as all other judges shall be outside the jurisdiction of the Commissioner."

*Jurisdiction and administrative discretion.* — Ordinarily the *Ombudsman* will not criticize an *intra vires* exercise of administrative discretion. But he will do so "when he can cite the knowledge of experts in support, and when as far as can be ascertained, there exists reliable documentary evidence of an arbitrary or unreasonable decision".[34] Art. 3 of the Directives is the *Ombudsman's* authority for such intervention since it requires him to keep himself informed of "arbitrary or unreasonable decisions" of the administration. But this power to intervene in areas of administrative discretion is very rarely used.[35] Furthermore, this right to criticize administrative acts or omissions or to make recommendations in respect thereto does not include the power to *change* administrative decisions. As Prof. Hurwitz said:[36] "The duty of the Commissioner is to act as a supervisor of government administration and not as a special court of appeal." He does not revise policy, but only ensures compliance with the law.

*No jurisdiction before administrative recourses are exhausted.* — Complaints against administrative decisions which may be set aside by a superior administrative authority cannot be lodged with the *Ombudsman* until the final authority has rendered its decision. In other words, the person aggrieved must first exhaust all the proper administrative recourses before he can complain to the Commissioner.[37] The purpose of this restriction is to prevent premature complaints.[38]

*Protection of civil servants.* — As in Sweden and Finland, the *Ombudsman* can order the institution of prosecutions and of disci-

[34] *Ibid.*, p. 8; *cf.* also *Whyatt Report*, p. 55.
[35] *Whyatt Report, ibid.*
[36] *Ibid.*, p. 11.
[37] *Ibid.*, p. 16.
[38] *Whyatt Report*, p. 59.

plinary measures against erring officials.[39] On the other hand, there are a number of provisions to protect civil servants against unnecessary adverse publicity from his public reports to Parliament. The first one,[40] is that the Commissioner, if he criticizes an official in his report, shall state what the person concerned has pleaded by way of defence. The second one [41] states that if the complaint is unfounded, the name or address of the person, against whom the complaint was made, shall not be cited unless he has specifically requested such mention.

*Complaints do not require personal interest.* — While in Norway and in New Zealand the right to lodge complaints is restricted to persons having a personal interest in the matter, s. 6 of the Danish statute permits "anybody" to lodge a complaint whether he has an interest or not.[42] This is also the rule in Finland.[43]

*Prescription of complaints.* — Complaints must be made within one year after their subject matter arose or after the last administrative appeal has been heard. But such time limit is not absolute since there is no prescription of investigations that the Commissioner undertakes on his own initiative.[44] A similar limitation is found in the Norwegian and New Zealand statutes.

*Experience of the Danish Ombudsman.* — The experience of the Danish *Ombudsman* is similar to that of his Swedish and Finnish colleagues.[45] He receives approximately 1,000 complaints a year of which only one-third require investigation *prima facie.* Most of the complaints investigated are found to be without foundation or to be outside the jurisdiction of the *Ombudsman.* Only between 10 to 15% of the cases have led to criticism or to recommendations.

*No persecution of civil servants.* — The fears of Danish civil servants that the *Ombudsman's* office would be used to bully them has proven to be groundless.[46] It is significant that in Norway the civil service raised no objections to the introduction of an *Ombuds-*

[39] *Ibid.*, p. 9. Under art. 10 (1) of the Directives he can even recommend to Parliament the civil or criminal prosecution of cabinet ministers.

[40] S. 10 of the statute and art. 13 of the Directives.

[41] Art. 13 of the Directives.

[42] Hurwitz, *op. cit.*, p. 14.

[43] Kastari, *op. cit.*, p. 397.

[44] Hurwitz, *op. cit.*, p. 16.

[45] Hurwitz, *op. cit.*, pp. 20 *et seq.* See also a report by Leon Levinson, in the Montreal *Gazette* of January 2, 1964, p. 5: "He looks after Complaints", and *Whyatt Report*, pp. 59-60.

[46] Hurwitz, *op. cit.*, p. 22.

*man*,[47] although in New Zealand, the Prime Minister saw fit to reassure the civil service that they had nothing to fear. Interestingly enough, it has been found in Denmark that a large number of complainants are civil servants themselves ![48]

*Areas of investigation and action.* — The principal form of intervention is by recommendation to the official concerned.[49] As to the types of complaint which have led to intervention by the Danish *Ombudsman*, they cover the usual spectrum: treatment of prisoners, discriminatory treatment of citizens, *ultra vires* actions or actions without authority, breach of prescribed rules of form or procedure such as failure to inform an accused that he is not obliged to testify or illegal searches and seizures and delays of the administration in dealing with cases.[50]

One significant intervention was his successful recommendation to the powerful Danish counterpart of our C.B.C. that free political party program-time be made available not only to parties represented in Parliament, but to all parties with at least 10,000 proved backers.[51] This incident illustrates well the flexible uses to which the institution can be put to settle grievances which may not be normally subject to the ordinary legal recourses. Similarly, an important feature of the Commissioner's activity is to negotiate with the State on behalf of citizens "where a serious injustice seems to have occurred but the law does not provide any redress" (e.g. compensation).[52] But this power is exercised sparingly and only after a careful, impartial investigation.

It should also be noted that the Commissioner, if he finds that the complaint comes within the jurisdiction of the law courts, may not only "give guidance to the complainant with that possibility in view", but may recommend that the complainant be granted free legal aid ![53] The Commissioner has used this power cautiously and only in cases of indigent complainants, with the result that his recommendations in the matter have always been followed.[54]

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[47] *Cf.* Andvar Os, "The Ombudsman in Norway", mimeographed and undated, p. 3.

[48] *Ibid.*, p. 15.

[49] *Ibid.*, p. 9.

[50] *Ibid.*, pp. 29-30.

[51] Levinson, *op. cit.*

[52] *Whyatt Report*, p. 58.

[53] Art. 7 (3) of the Directives.

[54] Hurwitz, *op. cit.*, p. 10.

## D. Norway [55]

*Introduced in 1962.* — The last of the Scandinavian countries to adopt an *ombudsman* was Norway which did so in 1962. It is noteworthy that this decision was the result of the recommendations of a Committee on Administrative Procedure which had made an extensive study not only of Norwegian administrative law, but of British, American and continental administrative procedure. The Norwegian system is based on the Danish precedent.

*Purpose of institution.* — When it introduced its *Ombudsman* bill before the Norwegian Parliament *(Storting)* in 1961, the Government made one of the classic statements [56] as to the usefulness of an *Ombudsman* in modern society:

> "The system with an Ombudsman may be of great help to anyone who feels that he has been subject to abuse of power by administrative authorities. To bring a suit at a court of justice may appear to be circumstantial and expensive. Not everybody will have the opportunity of having a case debated in the Storting by interpellation and question. Many people will also recede from the idea of going to the newspapers with the case. By bringing the matter before the Ombudsman, the private person concerned may have it examined in a simple and inexpensive manner.
>
> The system will probably be advantageous to the public administration also, as the Ombudsman will clear up and eliminate complaints which have no basis in the merits. In this way he may turn out to be protector of government employees as against querulous and other quarrelsome persons. Further the Ombudsman may lessen the burden of work for the members of the Storting, who now constantly get complaints from private persons concerning the activities of some administrative authority...
>
> With the standard our administration has today, it is indeed not likely that the Ombudsman will find basis for criticism in any considerable number of cases. Experience both in Sweden and Denmark has shown that only in a relatively small number of the complaint basis is found for further procedure. But, the system may to some extent contribute to a higher degree of vigilance in the public administration. And through a longer period of time its effect may be to strengthen the confidence in the public administration, and to create a feeling of security in the individual as to his relations to the public administration."

*Right of Parliament to request opinions.* — The Norwegian statute contains most of the characteristics of the institution as

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[55] The writer wishes to acknowledge the assistance of the Canadian Embassy in Oslo which made available to him an English translation of the 1962 *Ombudsman* bill and of the Rules or Directives of the Storting as well as an undated 21-page mimeographed essay by Audvar Os of the Royal Norwegian Ministry of Justice entitled "The Ombudsman in Norway". Some comment on the statute is to be found in the *Whyatt Report*, ch. 12.

[56] As quoted in Os, *op. cit.*, pp. 3-4.

found in the other countries, and particularly in Denmark. One peculiarity of the Norwegian system which distinguishes it from the Danish one is that the *Ombudsman* may be required by the lower or higher Chamber of Parliament to present an opinion on cases deferred to him.[57] This provision has been criticized even in official quarters:[58]

> "Thereby a special form of procedure was established, which deviates from the regular procedure in two essential respects: Firstly, the Ombudsman seems to be *under a duty* to take up and express his opinion on matters submitted to him by the Storting in this way. Secondly, his opinion will not appear in the regular annual report, but in an *ad hoc* report, which will be discussed separately in the Storting. In such cases there is an evident risk that the Ombudsman will not only be opposed or criticized for his opinion, but even plainly repudiated in the Storting.
>
> Even if such a consequence might only assume to be of a mere theoretical nature, it does not harmonize particularly well with the principle of independency of the Ombudsman."

It should be noted that s. 11 (3) of the New Zealand statute enables committees of the House of Representatives to refer petitions to the Commissioner for investigation and report.

*Jurisdiction.* — According to s. 4 of the 1962 statute, the jurisdiction of the *Ombudsman* is the following:

> "The ombudsman's province covers the Government administrative organs and civil servants and others in the service of Government. His province does not cover:
>
> 1. decisions made by the Cabinet,
> 2. the functions of the Courts of Justice,
> 3. the functions of the Auditor of Public Accounts.
>
> In the rules issued to the ombudsman the Storting may determine:
>
> 1. whether a particular public institution or function shall be regarded as being Government administration or part of the service of the Government pursuant to this Act,
> 2. that certain parts of a Government institution's functions shall not come within the province of the Ombudsman,
> 3. that in connection with dealing with the individual case the ombudsman may also take up the hearing of the case by the municipal administrative organ which has dealt with the case at a lower level.
>
> The ombudsman can deal with any administrative matter, including municipal administrative matters, concerned with the deprivation of personal liberty or connected with the deprivation of personal liberty."

*Exhaustion of administrative recourses normally required.* — A characteristic of the Norwegian system is that the *Ombudsman* normally has no jurisdiction if there is another administrative recourse

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[57] Rule 5 of the *Storting*.

[58] Os, *op. cit.*, pp. 7-8.

(s. 5 of the Rules). Nevertheless, for "particular reasons" he can intervene even before administrative recourses are exhausted. The purpose of permitting the *Ombudsman* to step in at an early stage, in such cases as in his discretion seem to call for it, is well stated by Audvar Os:[59]

> "It has been a matter for consideration whether administrative appeal should be exhausted before a case can be sent to the Ombudsman. The Government was of the opinion that he should not ordinarily deal with *decisions* as long as the right to make appeal to a superior authority was open. However, sometimes it can be an advantage if the Ombudsman may interfere at once and examine the matter when fresh. It might also give the Ombudsman better occasion to conciliate if he is brought into the picture before the decision is "final" and has become a matter of prestige. When the complaint relates to procedural matters — e.g. neglect to answer applications or other tardiness — it is quite clear that the Ombudsman shall not have to wait until the case has been dealt with by the superior authority.
>
> The best solution was therefore assumed to be to leave this question to the Regulation, and the relevant provision is now to be found in section 5 of the Regulation, stating exhaustion of remedies as the general rule, but at the same time giving the Ombudsman the opportunity to deal with the complaint right away if "he finds certain reasons to do so"."

*Personal interest required.* — Insofar as complaints are concerned, a difference from Denmark and Finland is that some personal interest is required from the complainant: "Whosoever considers himself to be unjustly treated by the public administration may complain to the ombudsman" (s. 6 of the statute). This unofficial translation of the statute does not seem to exclude categorically complaints by third parties, but such an interpretation has behind it the weight of the Royal Norwegian Ministry of Justice:[60]

> "According to the Draft Bill of the Commission, complaint might be submitted to the Ombudsman by anybody. The Government tightened the Bill on this point by demanding a certain *party interest* as a condition for right to complain. This is not, however, carried further than to the extent that the complainant himself must be affected by the matter or by the adjudication or the rules he brings before the Ombudsman... If the complainant does not have a party interest as mentioned, the Ombudsman shall not be obliged to deal with the complaint. In this way one may get rid of some entirely querulous complaints from persons or instances, who, not being affected themselves, more or less self-appointed, attempt to act on behalf of others or exploit the Ombudsman-system for purposes of propaganda. It is fairly reasonable to believe that this provision especially has regard to certain organs of the Press, which might otherwise endeavour to profit by "blowing up" cases in putting them before the Ombudsman."

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[59] *Op. cit.*, p. 12.

[60] Os, *op. cit.*, pp. 11-12.

*Prescription of complaints.* — The one-year prescription encountered in Denmark is also found in Norway.[61] Nevertheless, art. 6 of the Rules states:

> "Lapse of the right of complaint will not prevent the ombudsman from dealing with the complaint at his own initiative."

*No access to internal minutes.* — The powers of the *Ombudsman* are similar to those of his colleagues in other Scandinavian countries. He can request information, records and documents from government officials. On the other hand, this power is limited to some extent by the need to allow officials to deal internally in complete frankness:

> "The *Commission* presupposed that the Ombudsman should also have access to the internal working papers of the administrative organs. Several administrative instances expressed doubt as to such extensive right to demand information — having in mind the manner in which the administration performs its duties today. It was feared that such a right would entail a new routine in the execution of public business; today the officials may use an informal mode of expression knowing that it will be read only by the superior officials used to his special form of language. Should all files be open to the Ombudsman, the official would be compelled to phrase himself in a more formal way or give his opinion orally only. Such a change in the daily working routine was thought not to be any advantage at all to the administrative procedure at large. The frankness and confidence between the superior and the subordinated officials would especially be injured.
>
> On this background it should be emphasized that the expression "documents" in the first paragraph of section 7 does not include the internal working papers, but only the "official" documents. This means firstly letters, utterances and declarations and the like, forwarded to the administrative authority or procured by it from others, and letters from the administrative authority occasioned by the case. By the expression "record" is especially considered records which the administrative authority concerned, according to statute or instructions, are required to use. But the Ombudsman should have power to demand also records used only according to established practice, unless they are only kept for intornal use."[62]

*Right to subpoena witnesses for in camera hearings.* — As in Denmark,[63] the *Ombudsman* cannot force witnesses to appear before him but he can subpoena them to be examined before a court of law. In both countries such hearings before the courts are *in camera.*[64]

*Secrecy.* — In Sweden the *Ombudsman* operates in the full glare of publicity and to a lesser extent, in Finland and Denmark also.

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[61] s. 6 of the statute.
[62] Os, *op. cit.*, pp. 13-14.
[63] s. 7 of the Danish statute.
[64] s. 7 of the Norwegian statute.

A different approach was followed in Norway where it was felt that since an *ombudsman* could not work successfully without access to all sorts of normally confidential information, some secrecy was needed. Consequently s. 9 of the statute states:

> "In so far as it is not necessary for the performance of his duty according to this Act, the ombudsman must not divulge any information he obtains in his official capacity regarding circumstances which are not generally known. Information relating to trade and business secrets must in no case be made public. He must continue to observe such secrecy after retirement from office. The same secrecy must also be observed by his personnel."

This rule is further developed in s. 14 of the Rules:

> "If the ombudsman considers a complaint to be unfounded, neither the name of the complainant nor that of the civil servant (administrative organ) concerned shall be mentioned in the report. The ombudsman may decide, in other cases too, to omit names if he finds special reasons for doing so. The report may not contain information pertaining to business secrets. The ombudsman shall also prevent from appearing in the report informations which are subject to professional secrecy."

The very same approach was adopted in New Zealand.

*No right to prosecute.* — The *Ombudsman* has no power to order proceedings to be instituted as in Denmark, still less to institute proceedings himself as in Sweden, although he may "inform the public prosecutor or the appointing authority of steps he considers should be taken against the civil servant concerned".[65]

*Administrative discretion.* — As in the other Scandinavian countries,, the *Ombudsman* has no right to review the exercise of administrative discretion but may, under s. 10 of the statute, criticize decisions which are "invalid or clearly unreasonable".

*Norwegian experience.* — The Norwegian *Ombudsman* has completed only one full year in office (1963). During that period he received 1275 complaints of which 868 were rejected, shelved or withdrawn and 5 suspended for further information. A total of 402 cases were found to merit further study.[66]

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[65] s. 10 of the statute; cf. Os, *op. cit.*, p. 17.

[66] These figures are taken from a despatch in the *New York Times*, April 22, 1964, at p. 36: "Oslo Ombudsman reports 1,275 complaints in 1963".

## E. New Zealand [67]

*Importance of New Zealand bill.* — In 1962, New Zealand introduced its *Parliamentary Commissioner (Ombudsman) Act* modelled, with minor variations, on the Danish prototype. The great importance of the New Zealand experiment is that it constitutes the first attempt by a country with a system of public law analogous to our own to adopt this institution.

*Reasons for adoption.* — It is consequently of interest to note the motivation for the bill. As stated by New Zealand's Attorney-General, J. R. Hanan,[68] the reasons are similar to those which convinced the Norwegian Government and which motivate many of the advocates of an *ombudsman* in our country:

> "There has been in recent years a rapidly increasing recognition in New Zealand of the need to give better protection to the private citizen against the increasing centralisation of power in the hands of the State. The balance between the citizen and the State has over a long period been swinging more and more in favour of the State. The process is not new; it has been going on for several hundred years. Of course, the citizen has had many wins — the Bill of Rights, the principle of *habeas corpus*, and a few other great landmarks in our history — but during recent times the trend has been in favour of increasing State power. During the last 30 years it has accelerated so that our lives today are lived in an increasingly elaborate web of regulations and controls.
>
> Today there are few spheres of activity that are not affected by the exercise of administrative power. The responsibility for this does not rest with any particular Administration. For good or ill — and in many respects it has produced much good — it is the product of society itself; but this concentration of power in the State has made it all the more essential, in a democracy, that the citizen should be protected against the abuses of power.
>
> I do not mean so much the conscious or malicious abuses of power, for these are happily very rare in this country and the law can deal with them adequately. I refer to the genuine mistakes, misjudgments, and what may be termed unreasonable decisions which are inevitable wherever power is exercised. In other words, the question often is, has the best decision been made ? We tend to think of the increase in the power of the State largely

[67] The writer wishes to acknowledge the assistance of the New Zealand High Commission in Ottawa which made available to him the full text of the N.Z. statute, of the *Report of the Ombudsman* for the 6 months ended on March 31st, 1963 and a 13-page mimeographed extract dated at Ottawa on Nov. 20, 1963 of the debates of June 14 and July 25, 1962 in the N.Z. Parliament, hereinafter referred to as *Debates*. The Commission also supplied the writer with a copy of an enlightening speech by Sir Guy Powles, the first New Zealand incumbent, entitled "The Citizen's Rights Against the Modern State, and its Responsibilities to Him" given to the Royal Institute of Public Administration in Canberra, Australia, in November, 1963.

[68] *Debates*, pp. 5-6.

in terms of restriction and regulation of our freedom, but there is a further aspect: the positive functions of the State, aimed at achieving social justice and security, have waxed enormously during the last century, and we should ensure not only that restrictions and controls are not abused but also that assistance and benefits in the welfare State are not wrongfully denied. That is perhaps the important theme of this Bill.

How can a citizen obtain a review of administrative decisions at present? If he claims that the Administration has acted unlawfully he can sue the Crown in the ordinary Courts of the land, and in some cases there are statutory provisions giving an appeal on the merits to independent tribunals. It would generally be agreed that these remedies, where they apply, give substantially adequate protection. In many cases, however, the Administration has clearly acted within its legal powers and there is no specially constituted tribunal, but nevertheless it is claimed by some aggrieved citizen that an act or decision is unreasonable or high-handed, and there is no really effective redress. Of course, the citizen can do something about it. He can approach the appropriate Minister if a Minister is concerned; he can go to his member of Parliament, who will take the matter up with the Minister or may ask a question in the House; and finally he can petition Parliament. These methods of redress are important and I do not wish to disparage their value; nevertheless, there is a widespread feeling that they are not always sufficient. However fair a Minister may be, he is to some extent an interested party. He must rely to a considerable extent on his advisers, who may be the very persons whose decision is in question. Often a Minister simply will not have the time to go into a highly complicated technical matter from the beginning; he will not have time to look at all the papers and form his own conclusions uninfluenced by anyone else; and it is a great tribute both to Ministers of the Crown in successive Governments and to their departmental officers that the practice of ministerial review has worked as well as it has. The system is, however, not well adapted to ensure that justice is always done. Equally important it is to see that justice is seen to be done."

*Appointment and term of office.*[69] — The New Zealand *Ombudsman* is "an officer of Parliament", appointed by the Governor-General upon a recommendation of the House of Representatives. As elsewhere, he cannot be a member of Parliament, but unlike his Scandinavian counterparts, he need not have legal training or the qualifications of a judge. He holds office until his successor is appointed and may at any time be removed or suspended upon address of the House of Representatives "for disability, bankruptcy, neglect of duty, or misconduct". Normally, he holds office for the duration of Parliament, but can be re-appointed.

*Independence.* — While the bill incorporates the usual measures designed to ensure the independence of the *Ombudsman*, it has a number of questionable features which could very well be used by an unscrupulous government to curb the operations of the *Ombuds-*

[69] ss. 2-5 of the statute.

*man's* office. For instance, his salary, rather than being stated to be equal to that of some high judicial official, as it is elsewhere, is left to be fixed by the "Governor-General by order in council".[70] By fixing an unattractive salary, the cabinet could very well make it difficult to find suitable independent candidates. Secondly, while the Commissioner is allowed to appoint such officers and employees as may be necessary for the efficient carrying out of his duties, the number of persons he may appoint "shall from time to time be determined by the Prime Minister" and their salaries "shall be such as are approved by the "Minister of Finance".[71] There is no need to underline the control which the Government can exercise with powers such as these over the operations of the *Ombudsman.* In Norway, salaries and staff are decided by the *Storting* itself.[72] In Denmark, his salary is stated by law to be that of a judge of the Supreme Court and his staff is under control of Parliament itself.[73]

*Jurisdiction.* — The jurisdiction of the New Zealand *Ombudsman* extends to all government departments and to a large number of stated boards, commissions and councils. It also covers the army, navy and air force as well as the police. But it does not extend to cabinet ministers save for his right to investigate recommendations made *to* a Minister of the Crown. In dealing with objections raised to this limitation on the powers of the *Ombudsman,* Attorney-General Hanan stated[74] somewhat ingenuously:

> "although Ministers are not specifically brought into the commissioner's jurisdiction, it is not true that their decisions cannot be examined by him. The Bill expressly empowers the commissioner to investigate a recommendation by a Department to its Minister. If the Minister follows that recommendation, then criticism of the recommendation will, in effect, be criticism of the decision. If he does not follow the recommendation, then that fact will doubtless be stated by the commissionner. In either event the Minister, in the light of the commissioner's finding, will inevitably be called on to justify his action in Parliament, and that is wbere a Minister should be called to account for his administrative acts."[74a]

*Exclusions from jurisdiction.* — There are a number of exclusions which should be noted:

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[70] s. 7 of the statute.

[71] s. 9 of the statute.

[72] ss. 13-14 of the Norwegian statute.

[73] ss. 12-13 of Danish statute.

[74] Debates, p. 2.

[74a] The lack of clarity of this provision has been criticized in a stinging manner by C. E. Purcbase in the August 7 and September 4 issues of the 1962 *New Zealand Law Journal,* a copy of which criticism in mimeographed form has been made available to the writer by the New Zealand High Commission in Ottawa.

(a) The Commissioner has no jurisdiction when there is a right of appeal or objection or a right of review on the merits of a case to any court or tribunal, whether such right has been exercised and whether or not it is prescribed;[75]

(b) Decisions, recommendations, acts or omissions of Crown counsel cannot be investigated;[76]

(c) Although the Commissioner has jurisdiction over the armed forces he cannot investigate matters relating to

i) the terms and conditions of service of any member of the armed forces;

ii) "any order, command, decision, penalty or punishment given to or affecting" any member of the armed forces.[77]

(d) As in Norway, but in contradistinction with other Scandinavian countries, the Commissioner has no jurisdiction over certain local boards and bodies, although the Government has stated [78] in Parliament that if the institution proved to be workable, it would be extended to cover other public authorities and perhaps also local matters. We saw that this has been the usual development in Scandinavian countries.

*Right to demand declaratory judgment.* — If any doubt arises as to whether the Commissioner has jurisdiction to investigate any case he may obtain a declaratory order from the New Zealand Supreme Court.[79]

*Complaints over which jurisdiction.* — Article 14 of the statute by defining which complaints the Commissioner may, in his discretion, refuse to hear, provides *a contrario* an insight into the kind of complaints the *Ombudsman* is expected to deal with. He may "in his discretion" refuse to hear complaints in the following cases:

(a) when, under the law or existing administrative practice, there is an adequate remedy or right of appeal, other than the right to petition Parliament;

(b) when, having regard to all the circumstances, further investigation is unnecessary;

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[75] s. 11 (5). In New Zealand, unlike in the Scandinavian countries, the existence of administrative recourses does not merely delay but totally excludes the Ombudsman's jurisdiction. As Attorney-General Hanan stated, *op. cit.*, p. 7: "His function is to supplement existing procedures, and not to replace them !"

[76] *Ibid.*

[77] s. 11 (6).

[78] Debates, p. 9.

[79] s. 11 (7).

(c) he has discretion to refuse to investigate complaints of which the complainant has had knowledge for more than twelve months, but it must be noted that this is not an absolute prescription;

(d) he need not entertain complaints which are trivial, frivolous, vexatious or in bad faith;

(e) nor need he investigate when "the complainant has not a sufficient personal interest in the subject matter of the complaint".

*Commissioner can waive restriction.* — It is significant that while the legislator seems to have intended complaints to be made by interested parties only and within twelve months, the commissioner is not tied down and can investigate complaints received from people who have no personal interest in the subject matter or whose complaint is made more than twelve months after the object arose. This is obvious from the fact that s. 14 of the statute states that the Commissioner *may*, "in his discretion", refuse to act. This is merely permissive and does not preclude him from acting if he elects to do so.

*Investigations.* — The manner in which the New Zealand Commissioner is to carry out his investigations and perform his duties is carefully enunciated in a number of long articles: [80]

(a) all investigations must be preceded by notice to the head of the Department or organization affected;

(b) all investigations are private;

(c) no one is entitled as of right to be heard by him except that if the Commissioner finds sufficient grounds for criticizing a department, organization or individual, he shall give them an opportunity to be heard;

(d) he may consult the Minister affected and must do so in certain stated cases upon the Minister's request;

(e) if he becomes aware of any breach of duty or misconduct on the part of a civil servant, he must refer the matter to the appropriate authority (presumably the disciplinary or prosecuting authorities);

(f) he has the power to subpoena witnesses before him as well as all documents and records necessary to carry out his investigation and may examine such witnesses under oath. In Denmark and Norway he can only subpoena witnesses to appear *before a court of law*. The following qualifications should be made:

i) Witnesses cannot be compelled to violate professional secrecy when such is granted by law;

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[80] ss. 15 *et seq.*

ii) Witnesses shall have the same privileges and protections in testifying or producing documents before the Commissioner as they would have before a court of law;

iii) Evidence given before the Commissioner cannot be admitted against any person, including the witness, in any court in connection with any inquiry or any other proceeding;

iv) The Commissioner is entitled to request even information normally protected by the Official Secrets Act.[81]

v) While no witness is allowed to claim Crown privilege (*i.e.* the right to refuse to disclose information or produce documents on the ground of public interest) the Commissioner cannot require testimony when the Attorney-General certifies that such testimony might prejudice the security, defence or international relations of New Zealand or the investigation or detection of offenses or might involve the disclosure of the deliberations of the Cabinet; or might involve the disclosure of proceedings of Cabinet, or of any Committee of Cabinet, relating to matters of a secret or confidential nature and injurious to the public interest.[82]

(g) The Commissioner has the right to make on-the-spot inspections and investigations, but must first notify the responsible official. He is precluded from such inspections when the security, defence or international relations of New Zealand might be endangered by such inspection.[83]

It is debatable whether these restrictions are necessary, particularly in view of the fact that investigations are not public and that the Commissioner is bound to secrecy.

*Secrecy.* — Indeed, not only are the Commissioner's investigations held *in camera,* but s. 18 of the statute imposes on him and on all his employees total secrecy "in respect of all matters that come to their knowledge in the exercise of their function." An oath of secrecy is required of them. [84] Nevertheless, s. 18 (4) states:

> "the Commissioner may disclose in any report made by him under this Act such matters as, in his opinion, ought to be disclosed in order to establish grounds for his conclusions and recommendations. The power conferred by this subsection shall not extend to any matter that might prejudice security, defence or international relations of New Zealand (including New Zealand's relations with the Government of any other country or with any international organisation) or the investigation or detection of offenses, or that might involve the disclosure of the deliberations of Cabinet."

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[81] s. 16 (3).
[82] s. 17.
[83] s. 23.
[84] s. 8.

In the long run these drastic precautions may prove to be wise and to increase the efficiency of the *Ombudsman*. The confidential character of his investigations and the provisions in the bill aimed at protecting civil servants will no doubt encourage frankness and contribute to eliminate the natural reluctance of government officials to open the files of their departments. On the other hand, the Commissioner is given enough leeway to disclose his findings not to be suspected of hushing up things.

*Action by the Commissioner.* — After his investigation is completed, the Commissioner shall be entitled to recommend remedial action provided that he finds the decision, act or omission under investigation to be

(a) "contrary to law" or

(b) "unreasonable, unjust, oppressive, or improperly discriminatory, or in accordance with a rule of law or a provision of a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory";

(c) based on a mistake of law or fact;

(d) "wrong";

(e) resulting from the exercise of a discretionary power "for an improper purpose or irrelevant grounds or on the taking into account of irrelevant considerations; or that reasons should have been given for the exercise of such power".[85]

*Protection of civil servants.* — To protect civil servants the Commissioner must annex to his report the comments, if any, made by the Department affected, and cannot criticize any one who has not been given opportunity to be heard.

*No power to reverse discretionary decisions.* — As in the Scandinavian countries, the Commissioner has no power to reverse administrative decisions or to modify them. Nor can he order, or institute, legal proceedings against erring officials.

*Immunity.* — An important provision to be found only in the New Zealand statute and designed to strengthen the independence of the Commissioner is the immunity of all proceedings before him or of his own actions from attack before courts of law (except for bad faith). All testimony before him enjoys the same privilege as if it were rendered before a court of law. Nor can he, or any of his employees, be called upon to testify in any court as to anything they have learned in the exercise of their functions.[86]

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[85] s. 19.

[86] ss. 21-22.

*New Zealand experience.* — In practice, the New Zealand *Ombudsman,* although in office for slightly more than 18 months, seems to have been highly successful.[87] During his first year he received 760 complaints, of which 90% were disposed of at the time of writing. Nearly half were found to be outside his jurisdiction. Of the 389 cases actually investigated, 308 were considered not to be justified. The *Ombudsman* found that 81 complaints (*i.e.* slightly more than 10% of the total) were warranted. In 52 of these, officials rectified the grievance voluntarily and usually even before the Commissioner's inquiry terminated. Rectification was impossible for practical reasons in the remaining 29 cases. Remarkably enough, in every instance, the authorities complied willingly with the Commissioner's recommendations so that he has not had to refer any grievance to Parliament. On the other hand, in several cases, unjustified complainants were advised to cease groundless attacks on officials. This further illustrates the possible role of the institution in fostering confidence in the Administration.

## CHAPTER H

## THE WHYATT REPORT

*The Whyatt Report.* — The only Commonwealth country besides New Zealand where serious consideration appears to have been given to the institution of an *ombudsman* is England. Admittedly there is little likelihood of Parliament following the New Zealand lead in the foreseeable future. Nevertheless the only authoritative study on the implantation of an *ombudsman* in a system similar to ours is to be found in the *The Citizen and The Administration,*[88] a report of the British Section of the International Commission of Jurists, directed by Sir John Whyatt.

*Two recommendations* — The *Whyatt Report,* after a detailed study of the need for redress of grievances against the administration in Britain, and an examination of the operations of the *Ombudsman*

[87] *cf.* above-mentioned *Report of the Ombudsman* and a Canadian Press despatch in *The New York Times,* November 3, 1963, p. 16: "Ombudsman praised by New Zealanders"; June 19, 1964 despatch: "New Zealand Ombudsman Does a Good Business in Complaints" in *The New York Times,* June 28, 1964, p. 24.

[88] London, 1961. The Report has received widespread comment, some of it very critical, *e.g.*: review by Geoffrey Sawer in (1962) 25 *Mod. L.R.* 220; review by Prof Kenneth Culp Davis in (1961-62) 75 *Harv. L.R.* 1258; "The Redress of Grievancees", by A. W. Bradley, (1962) *Cam. L.J.* 82.

in Sweden, Denmark and Norway, recommended two important reforms:

(1) the appointment of a Parliamentary commissioner to investigate grievances against the administration and

(2) the creation of a General Tribunal to deal with miscellaneous appeals from discretionary decisions of the administration.

*Gap in the British constitution.* — The report pointed to [89] the gap in the British constitution which does not provide for dealing with complaints against either the exercise of administrative discretion or against mere maladministration. Ordinarily, such complaints cannot form the basis of a legal recourse and leave to the citizen only such doubtful avenues of redress as writing to the administration directly or to their members of Parliament or to the press. Indeed, where the administration has discretion, the citizen has no redress against a decision which, while not constituting an abuse of power, is nevertheless inappropriate. The Commission felt that there should be a right of appeal to an independent tribunal which could substitute its own discretion. On the other hand, a Parliamentary Commissioner would be useful in dealing with acts of maladministration or official misconduct whether or not such misconduct might give way to legal redress.[90]

*General Tribunal.* — The Commission recommended the creation, on the model of the Swedish Supreme Administrative Court, of a General Tribunal to hear appeals from discretionary decisions with power to substitute its own discretion to that of the administration. Not only would such tribunal contribute, as in Sweden, to reduce considerably the number of complaints made to the *Ombudsman,* but

> "it would do much to remove the sense of frustation and injustice felt by members of the public when faced with departmental decisions which they believe to be mistaken but which they have no effective means of challenging"[91]

It should be recalled that neither in Scandinavia nor in New Zealand does the *Ombudsman* have the right generally to intervene in the exercise of administrative discretion. The purpose of the proposed General Tribunal would be to fill this gap.

*Proposed Ombudsman.* — To curb maladministration and provide an outlet for individual grievances, the Committee proposed the creation of the office of Parliamentary Commissioner or *Ombuds-*

[89] pp. 1-5; *cf.* also Bradley, *op. cit.,* p. 95.

[90] The Report did not discuss the difference between a wrong exercise of discretion and maladministration. The distinction is not always easy to draw.

[91] *Whyatt Report,* p. 29.

*man.* As in the Scandinavian countries he would not deal with the exercise of administrative discretion nor would he have the power to substitute his own discretion. His functions would be to protect citizens against oppressive conduct, unfairness, inefficiency, negligence, error or conduct contrary to justice by government officials and to ensure that the latter "observe proper standards of conduct and behaviour when exercising (their) administrative powers".[92]

*Advantages.* — This was the best method of dealing with such complaints, the *Whyatt Report* stated, since investigations by a parliamentary Commissioner would be both *impartial* (in view of his independence from the executive) and *informal* enough not to disrupt the administration or to provoke a defensive reaction on its part. As in Norway and in New Zealand the *Report* also stressed that the *Ombudsman* would not replace existing methods of redress but would serve to supplement them.

*Concrete proposals.* — The concrete proposals of the Whyatt Report were the following:

(1) *Independence.* — The Commissioner should have the same status as the Auditor General and thus be irremovable except by address of both Houses. He should be answerable only to Parliament.

(2) *Complaints.* — With respect to the right to bring complaints the *Whyatt Report* showed a surprising reserve which has been severely criticized [93] and was specifically rejected by the New Zealand Government when it introduced its own bill a year later.[94]

The *Report* recommended indeed that at the beginning the Commissioner should entertain complaints only if channelled through members of Parliament, although at a later date he might be authorized to receive complaints directly from the general public.

(3) *Right to veto.* — Furthermore, the Minister concerned should have the right to veto any proposed investigation, although the *Report* piously added:[95]

> "we hope that a convention would be established that he would not do so save in exceptional circumstances".

To justify this right of veto the Committee wrote:[96]

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[92] *Ibid.*, p. 34.
[93] *e.g.* by Davis, *op. cit., passim,* and Sawer, *op. cit.*, pp. 221-2.
[94] *Debates,* p. 1.
[95] *Ibid.*, p. 68.
[96] *Ibid.*, pp. 74-5.

> "Under our Constitution a Minister is responsible for the efficient administration of his Department and it might well be said that he would find it difficult, if not impossible, to discharge this duty if an independent body could, as of right, enter his Department and investigate allegations of maladministration without his permission."

Such restriction could well make a mockery of the institution. The New Zealand solution of secrecy and consultation with the Minister concerned is more than sufficient a compromise between the claims of efficient administration and the needs of the citizenry at large.

(4) *Reports to Parliament.* — The Commissioner should make an annual report to Parliament of the more important cases he has handled but should not mention the names of the individual civil servants against whom grievances have been pressed. His report should be available to the public. He should also be allowed to draw attention to the deficiencies he has found in the law.

*Criticism.* — The *Whyatt Report* is undoubtedly a milestone in that it represents the first thorough study of the possibility of introducing an *Ombudsman* in a country having a British constitution. But it is far too cautious and, as was pointed out by an American critic,[97] not too logical.

## CHAPTER III

## COMMON DENOMINATORS

*Common backgrounds.* — The existing institutions examined in the first chapter are found in countries similar to our own. They are parliamentary democracies with long traditions of stability and respect for individual rights. Their societies are fairly homogeneous. To a considerable extent they could all qualify as so-called welfare states. In other words, in all these countries, citizens make considerable demands upon the community. The result has been a rapid growth of government regulation and of positive action by the state in a multitude of areas. On the other hand, increased government intorvention has brought about a concomitant threat of arbitrariness or unwarranted interference with the subjects' liberties. Yet all these countries have constitutional traditions of respect for the rights of the individual. They have unimpeachable and independent judicial systems which do not hesitate if need be to grant redress even against the state and they have a broad range of admi-

[97] Davis, *op. cit.*

nistrative tribunals to which appeals can be brought from decisions of the authorities. Nevertheless, all these states have found that these safeguards do not provide adequate protection to citizens against a ballooning administration. They have found it necessary to supplement existing institutions with a parliamentary commissioner or *ombudsman* whose function it is to investigate the complaints of individual citizens and to recommend redress. This in itself is a lesson.

*Common denominators.* — In addition to the resemblances in social and political backgrounds, the most striking feature of existing *ombudsman* schemes is the number of similarities among them. The common denominators are numerous; the differences, rare. We have stressed these differences in the first chapter. Let us now examine the common denominators:

(1) *Officer of Parliament.* — The *Ombudsman* is an Officer appointed by Parliament to ensure that the executive carries out not only the letter but the spirit of the law. He carries out this duty both by investigating the complaints of citizens against the administration and recommending appropriate redress, and by undertaking investigations on his own initiative. If he finds flaws in the law or in adminstrative regulatons he must point them out to Parliament. In the earlier schemes (Sweden, Finland and Denmark), he can order or institute actions against erring officials. Except in Sweden, and even there in more recent years, this power has been used very sparingly. In Norway and New Zealand he can only make recommendations. In practice it has been found that the great prestige of the office and the publicity surrounding the commissioner's recommendations are more than sufficient to obtain the desired effect without further sanctions.

(2) *Qualifications.* — In Sweden he is selected "from among jurists of higher reputation".[98] In Finland he must be a "distinguished jurist".[99] In Denmark he must have legal training.[100] In Norway he must have "the qualifications demanded for a judge of the Supreme Court".[101] But no such restriction exists in New Zealand.

(3) *Independence of the Commissioner.* — To ensure the proper functioning of the Office, great stress has been laid everywhere on the absolute independence of the Commissioner not only from the

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[98] *Whyatt Report*, p. 46.
[99] art. 49 of the Constitution.
[100] s. 2 of the Danish statute.
[101] s. 1 of the statute.

Executive but even from Parliament. He is granted a high salary and generous pension rights. On the other hand, he cannot hold any other public or private office. Economic independence is deemed essential and rightly so.

The Commissioner is elected for the term of Parliament and cannot be removed except for grave reasons and then frequently only by substantial majorities or address of the House, as in New Zealand. In effect, he is generally given the same independence as a judge. As a matter of record, no *ombudsman* appears ever to have been removed, although some have not been reelected. In all countries, Parliament can and does make general rules or directives for his guidance but cannot otherwise interfere with his activities. In Norway and in New Zealand, Parliament can refer to him specific matters for investigation and report. We have noted that this has been felt sometimes to endanger his independence.

He hires and fires his own staff. In this respect, the powers given in New Zealand to the Prime Minister to determine the number of employees and to the Minister of Finance to fix their salaries is exceptional and creates the danger of executive interference. If some control is desired it would be preferable to leave it to Parliament itself as it is in Norway.

The Cabinet or government officials cannot in any way interfere with the Commissioner's investigation. The power of veto proposed by the *Whyatt Report* is undesirable and has not been found necessary in any of the existing schemes. The right of the Attorney General in New Zealand to halt an investigation or inspection by certifying that it would interfere with security, foreign affairs or the prosecution of criminals is also a departure from Scandinavian practice and is not strictly necessary. The Commissioner is a personage of great prestige who enjoys the highest confidence of Parliament. Furthermore, he is sworn to secrecy even in cases not involving national security. If he cannot be trusted with state secrets, who can?

(4) *Jurisdiction.* — The jurisdiction of the Commissioner is to investigate complaints against maladministration. He cannot interfere with policy. Except in Finland, he has no jurisdiction over the Cabinet or over cabinet ministers except perhaps insofar as a minister commits an act of maladministration. Nor can he normally interfere with the exercise of administrative discretion although the distinction is often tenuous. What if the discretion has been validly exercised, but in an arbitrary manner? What if it has been exercised with too much delay? Norway permits interference if the decision

was "clearly unreasonable",[102] and New Zealand if it was "unreasonable, unjust, oppressive, or improperly discriminatory... or wrong".[103]

Similarly he has no jurisdiction over Parliament which appoints him. But part of his duties are to report to Parliament deficiencies he has found in existing laws. However, the intention does not seem to be to permit him to criticize Parliament but only to assist it by suggesting, on the strength of his findings, suitable reforms in legislation.

Initially, the jurisdiction of the Commissioner is generally limited to organs of the central government such as national departments, boards and commissions. The inevitable trend, however, has been to expand his power to local matters and local authorities. This presents little constitutional difficulties in unitary countries such as those we have studied. In Canada, however, constitutional consideration requires that any Commissioner appointed by the Federal Parliament confine himself to matters coming within the jurisdiction of Parliament. The same would be true for an *Ombudsman* appointed by any Provincial legislature.

(5) *Existence of other recourses.* — The more recent statutes require complainants to first exhaust all administrative recourses before their complaints can be entertained. In other words it is intended to avoid premature investigations in cases where the administration has not rendered its final decision. But Rule 5 of the Norwegian *Storting* permits the commissioner to investigate anyway if "he finds particular reasons for doing so without delay".

On the other hand, the existence of the ordinary legal recourses in the courts of law — such as actions in damages, injunctions, mandamuses and similar remedies — in no way prevents the person aggrieved from seeking redress by complaining to the Commissioner. Yet in New Zealand, the Commissioner is given the right to refuse to investigate a complaint if it appears to him that "under the law or existing administrative practice there is an adequate remedy or right of appeal".[104] But as a rule it is preferable to give individuals the choice between a complaint and an action at law. Persons of means or whose grievances can be translated into substantial financial damages will in all likelihood still resort to the courts. But there are many smaller complaints which either do not lend them-

[102] s. 10 of the Norwegian statute; s. 9 of the Rules says: "manifestly unreasonable".

[103] s. 19 (1) of the New Zealand statute.

[104] s. 14 (1) of the New Zealand statute.

selves to lawsuits or which it would be too expensive or futile to take to court. They can be made through the *Ombudsman.* It is precisely these small grievances which the institution is designed to alleviate. Moreover, if some citizens refrain from suing and prefer to make a complaint to the *Ombudsman* in the hope that his recommendations will lead to redress, they should be encouraged. Lawsuits, with the expense and bitterness they generate, should be avoided whenever possible. Moreover, the amicable settlement of grievances and their voluntary redress by the authorities is socially a much healthier solution than litigation. On the other hand, if there is a legal recourse, the Commissioner should be entitled to point it out to the complainant and, as in Denmark, even recommend free legal aid.

(6) *Complaints.* — Although the Commissioner can undertake investigations *proprio motu,* his main source of action is the complaints that individuals forward to him. In most countries, except Finland and Denmark, the Commissioner is not compelled to entertain complaints from persons who are not personally aggrieved. Some personal interest is required. On the other hand, the Commissioner can use the information provided in complaints by third parties to initiate investigations on his own. The restriction is thus not very meaningful. Moreover, as maladministration is a matter of public interest, there is really no justification for such limitation. Indeed, a personal interest is not required from the complainant in a criminal case. As for the one-year prescription on complaints imposed by Denmark, Norway and New Zealand, it is a useful method of curbing the more frivolous complaints, particularly in view of the fact that the Commissioner can always disregard it.

(7) *Investigations.* — The *ombudsman* is given wide investigating powers. He can make inquiries and hear witnesses. In Denmark, Norway and New Zealand he is given specifically the right to subpoena witnesses and documents and to interrogate witnesses under oath. Officals must reply to his queries and supply him with all pertinent records. In most countries officials are not obliged to furnish him with intra-departmental memoranda and with private evaluations but only with in-going or out-going documents and official records, a limitation which has been criticized. Furthermore, as noted, in New Zealand, the Attorney General can bar investigations involving national security. No such limitation exists in the Scandinavian countries. In all countries the Commissioner is permitted to make on-the-spot inspections and investigations, although in New Zealand he is obliged to give warning of his intention. Again this restriction does not seem to be advisable since

unheralded inspections are much more desirable as a means of checking on real conditions without giving officials an opportunity to disguise the facts.

The procedure followed in the investigation is informal. The Commissioner does not constitute a court of law nor is he a Royal Commission. He investigates the complaint in such a manner as he deems fit. While no one can claim as of right to be heard, the more recent schemes (Norway and New Zealand) provide that if the Commissioner's report will reflect adversely on any official, such official must have been heard and the Commissioner must relate his defence. This is only fair and is a practice which should be adopted by our own Royal Commissions to avoid the kind of controversy surrounding the report of the recent Bouchard Commission in Quebec which criticized the conduct of individuals who had not been given a full opportunity to state their case.

(8) *Reports and recommendation.* — If the Commissioner comes to the conclusion that the complaint is well-founded he is entitled to make the appropriate recommendation to the authority concerned including the suggestion that the administrative action be modified or, as in some Scandinavian countries, that damages or compensation be paid. The power to advise the payment of compensation is useful particularly in cases where no legal redress exists or where it would be protracted and difficult. It is also a fair method of avoiding unnecessary litigation. Nowhere can the *ombudsman* do more than make recommendations, except in Sweden, Finland and Denmark where he can also initiate or order prosecutions. But nowhere is he allowed to order administrative action. He can only recommend.

These recommendations are generally followed. The *Ombudsman* reports to Parliament the result of his investigations and of his recommendations. His reports are public. A Minister whose department has failed to comply with the *Ombudsman's* recommendations will be called to account before Parliament and before public opinion. Fundamentally, however, the Commissioner's effectiveness is the result of the prestige surrounding his office and the support of public opinion in a democratic country.

(9) *Common experience.* — While it is impossible to predict how many complaints Canadian *ombudsmen* may have to handle, the Scandinavian and New Zealand office holders in countries with varying social conditions and populations of much less than 10 million receive an average of between 1000 to 1500 complaints annually. Most of them are unfounded on their face, or outside the

jurisdiction of the *ombudsman,* or can be disposed of summarily. Only about 10% (the proportion, remarkably enough, is the same in the 5 countries) deserve further investigation. Many of these complaints deal with relatively minor matters, the importance of which, to the person aggrieved, nevertheless should not be underestimated. On the other hand, there is considerably more variation in the number of investigations started *proprio motu.* In any case, all *ombudsmen* operate with small staffs and limited budgets. In Finland, the staff in 1962 consisted of two lawyers.[105] In Denmark, at last count, the *ombudsman* had 6 part-time lawyers and 5 typists.[106] In New Zealand, the Commissioner started with a staff of 4 legal and clerical help, but found it insufficient after 6 months of operation.[107] In the first year, the total cost of his entire office amounted only to U.S. $32,200.00.[107a]

## CHAPTER IV

## AN ANALOGOUS INSTITUTION : THE CANADIAN AUDITOR GENERAL

*Analogy to ombudsman.* — While we do not have in Canada any official whose functions, strictly speaking, resemble those of an *ombudsman* as it is generally understood, the office of the Auditor General and of his provincial counterparts, bears enough analogy with it, if only in an embryonic way, to demonstrate that the notion of a parliamentary officer appointed to check that the law is applied in the proper manner is far from alien to our legal and political traditions.

*Appointment.* — Under the *Financial Administration Act,*[108] although in essence he is an officer of Parliament, the Auditor General is appointed by the Government. He holds office during good behavior and is removable only on address by both Houses of Parliament, in the same manner as judges.

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[105] Rowat, "Finland's Defenders of the Law", *op. cit.,* p. 321.

[106] Levinson, *op. cit.*

[107] *Report of the Ombudsman,* March 31, 1963, Government Printer, Wellington, N.Z., pp. 6-7.

[107a] *cf.* despatch dated June 19, 1964: "New Zealand Ombudsman Does a Good Business in Complaints" in *The New York Times,* June 28, 1964, at p. 24.

[108] 1952 R.S.C., c. 16, as ameuded by 3 - 4 Eliz. II, c. 3; 7 Eliz. II, c. 31 and 9 - 10 Eliz. II c. 48. See also on the subject: *The Public Purse,* by Norman Ward, Toronto, 1962.

*Duties.* — His main duties, as stated in s. 67 of the Act, are to examine the accounts relating to the Consolidated Revenue Fund (defined in s. 2(e) as "the aggregate of all public monies that are on deposit at the credit of the Receiver General") and to ascertain whether in his opinion

"(a) the accounts have been faithfully and properly kept,

(b) all public money has been fully accounted for, and the rules and procedures applied are sufficient to secure an effective check on the assessment, collection and proper allocation of the revenue,

(c) money has been expended for the purposes for which it was appropriated by Parliament and the expenditures have been made as authorized, and

(d) essential records are maintained and the rules and procedures applied are sufficient to safeguard and control public property."

Furthermore, he must make inquiries at the request of the Government, the Treasury Board or the Minister of Finance and Receiver General concerning "any matter relating to the financial affairs of Canada or to public property and on any person or organization that has received financial aid from the Government of Canada or in respect of which financial aid from the Government of Canada is sought".[109]

*Reports to Parliament.* — The Auditor General reports annually to the House of Commons the results of his examinations and he is bound to call attention to every case in which he has observed that

"(a) any officer or employee has wilfully or negligently omitted to collect or receive any money belonging to Canada,

(b) any public money was not duly accounted for and paid into the Consolidated Revenue Fund,

(c) any appropriation was exceeded or was applied to a purpose or in a manner not authorized by Parliament,

(d) an expenditure was not authorized or was not properly couched or certified,

(e) there has been a deficiency or loss through the fraud, default or mistake of any person, or

(f) a special warrant authorized the payment of any money,

and to any other case that the Auditor General considers should be brought to the notice of the House of Commons."

Furthermore, s. 73 states:

"Whenever it appears to the Auditor General that any public money has been improperly retained by any person, he shall forthwith report the circumstances of such cases to the Minister."

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[109] s. 71 of the *Financial Administration Act*, 1952 R.S.C. c. 16.

*Powers.* — In order to carry out his duties, the Auditor General is given powers which bear some resemblance to those of an *ombudsman.* These powers are defined in s. 66:

> "(1) Notwithstanding any Act, the Auditor General is entitled to free access at all convenient times to all files, documents and other records relating to the account of every department, and he is also entitled to require and receive from members of the public service such information, reports and explanations as he may deem necessary for the proper performance of his duties.
>
> (2) The Auditor General may station in any department any person employed in his office to enable him more effectively to carry out his duties, and the department shall provide the necessary office accommodation for any such officer so stationed.
>
> (3) The Auditor General shall require every person employed in his office who is to examine the accounts of a department pursuant to this Act to comply with any security requirements applicable to, and to take any oath of secrecy required to be taken by, persons employed in that department."

He also has the right to examine witnesses under oath and to exercise all the powers of a Royal Commissioner in connection with such examinations.[110]

*Compared with ombudsman.* — In brief, the function of the Auditor General is to audit on behalf of Parliament the books of the Administration and to report to Parliament whether the executive spends the funds voted by Parliament in the prescribed manner. He is concerned only with the financial operations of the Government. An *Ombudsman* would exercise a parallel function somewhat in the same manner but with jurisdiction over the operations of the Administration insofar as they affect individual citizens. However, since the effectiveness of the *ombudsman* depends, to a large extent, on the deterrent effect of his reports to Parliament, it is to be hoped that the reports of an *Ombudsman* would be received by Parliament and the authorities with a great deal more attention and seriousness than the erratic reception generally meted out to the reports of the Auditor General.[111]

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[110] s. 74.

[111] *cf. The Government of Canada,* by R. MacGregor Dawson, 4th ed., revised by Norman Ward, Toronto, 1963, at p. 399. See also, for instance, the report of a complaint by the current Auditor General that his recommendations go unheeded, in a despatch by the Canadian Press, published in *The Montreal Star,* May 27, 1964, p. 30: "Red Tape Stymies Henderson."

## CHAPTER V

## IS THERE A NEED IN CANADA ?

*Usefulness.* — Having examined the operations of existing *ombudsman* legislation in 5 countries, we can now ask ourselves the two important questions raised by the current debate: (1) is there a need for such institution, either at the federal, or at the provincial level? and (2) if so, under what conditions can it be transplanted? The second question will be dealt with in the next chapter. As to the first question, the answer is: yes. Although there has been no serious breakdown in the relationship between citizens and the Administration, there is no doubt that a 'grievance man' could be useful both in the federal and in the provincial jurisdictions. An *ombudsman* would provide particularly a vehicule for smaller grievances which at the present time are not easily remedied; he would reduce litigation; and generally contribute to increasing the confidence of the people in their governments. He would supplement rather than supplant existing political or legal recourses.

*Political recourses are inadequate.* — At present what are the recourses of a person injured by an act or omission of one of the hundreds of official entities — government departments, boards, commissions, Crown corporations, municipalities, licensing bodies or professional corporations — with which he comes into contact? He can write a letter of complaint and hope for the best. He can write his newspaper. He can write his member of Parliament or of the Legislature who may find the time to communicate with the official concerned or ask a question in the House. But especially if the grievance is small, his chances of redress in this way are infinitesimal since the question may never be asked or lead to no official action at all.[112]

*Judicial recourses.* — In addition to these highly unsatisfactory political remedies, he has in many cases a variety of somewhat more adequate judicial recourses, not to mention the many administrative tribunals that may be available. Courts will prohibit or quash *ultra vires* decisions and review awards of administrative tribunals who exceed their jurisdiction, violate natural law, show bias or act unreasonably. If an official fails to perform a duty imposed upon him

[112] *cf.* Donald C. Rowat, "An Ombudsman Scheme for Canada", (1962) 28 *Can. Journal of Economics and Political Science*, p. 543 at 544, a shortened version of which appeared under the title: "The Parliamentary Ombudsman: should the Scandinavian scheme be transplanted?" in (1962) 28 *Intl. Review of Administrative Sciences*, p. 399, at 402-3.

by law, they may by *mandamus* order him to fulfill it. An injunction may lie in some cases to forbid unjustified conduct. Illegal detention may be ended by *habeas corpus*. Finally, an action in damages or a petition of right can be used to obtain compensation for the consequences of official misconduct.

*Insufficiency of judicial recourses.* — These recourses exist and are resorted to frequently. They constitute important safeguards. But they too are obviously insufficient to cure many grievances, particularly smaller ones. Legal action, especially against the authorities, is difficult, expensive and protracted.[112a] If the government loses, it will often go to appeal, not out of malice, but in order to obtain an authoritative precedent it can follow in the future. For a citizen of limited means, the battle is indeed unequal. Moreover, in order to ensure that the activities of civil servants are not paralyzed by prerogative writs, the legislators have anointed them with privative clauses designed more or less successfully to immunize them against the possibility of litigation. Then, many small grievances are just beyond the ken of courts of law. The Danish *Ombudsman* went to taste the coffee in Danish prisons and obtained an improvement. Our courts would dismiss curtly such complaint and add sententiously that *de minimis non curat lex.*

On the other hand there is no judicial review of the exercise of administrative discretion. The courts will not substitute their discretion to that of the competent officials. Nor will the law remedy the *manner* in which a citizen has been treated: delay or failure to reply to his enquiries or to decide his problem; disregard of his linguistic rights; petty obstructionisms and bureaucratic high-handedness. Obviously there is need for an alternative method of coping with some disputes.

*Examples of cases calling for impartial scrutiny.* — A few examples, selected at random among the more blatant ones, will illustrate areas within which an *ombudsman* could operate fruitfully either at the federal or provincial levels. Hundreds of others could be found in the statutes or administrative practices.

(a) *Driving licenses.* — Driving licenses are of vital importance to most people, especially if they need to drive to make a living. Section 24 of the Quebec *Highway Code* [113] gives the Director of the Motor Vehicule Bureau the discretion to refuse to issue a permit, to cancel or to suspend it. Save for an exceptional appeal to a High-

[112a] *cf.* the analysis by Prof. Mundell, *op. cit.*, pp. 183-193, of the technical complexities which often render such remedies futile.

[113] 1941 R.S.Q. c. 141, as amended by 8-9 Eliz. II, c. 67.

way Safety Board set up under the *Highway Victims Indemnity Act*,[114] there is no recourse against a discriminatory or unjustified exercise of the Director's discretion.

(b) *Censorship.* — Provincial censorship boards operate as little Gods unto themselves. They do not account to anyone for their decisions. For instance, under the *Quebec Moving Pictures Act*,[115] no film can be exhibited in theatres or over television, no posters advertising movies can be displayed, no movie advertisement can be published without approval of the Board of Censors, which is granted an unlimited discretion by the statute. The only appeal permitted is ... to the Board itself "sitting in review" of its own decisions![116] Anyone who violates these provisions is liable to fines, imprisonment and confiscation and destruction of the film. No one has the right to challenge the Board's decision to ban a film or to cut it or even the Board's mere neglect or refusal to review an application for approval.

(c) *Detention of insane criminals.* — Sections 523 and 524 of the *Criminal Code* provide for the detention of insane criminals "until the pleasure of the Lieutenant-Governor of the province is known." In fact, the government has an absolute and untrammelled discretion to detain them as long as it pleases the authorities. *Habeas corpus* will never lie against the Lieutenant-Governor even if a man has been wrongly detained for 10 years.[117] Unbelievable as it may seem, this is the law. Nor is the victim, as of right, entitled to compensation. This properly scandalous situation should be remedied by statute. But an *ombudsman* should also be entitled to scrutinize any such discretionary detentions.

(d) *Professional corporations.* — Professional corporations such as the Bar and medical societies possess great monopolies and exercise considerable powers, not only in relation to their own members, but also with respect to the general public. A citizen aggrieved by a professional may appeal to the disciplinary committees of such bodies. But thereafter, short of going to court against the individuals

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[114] 1941 R.S.Q. c. 142a.

[115] 1941 R.S.Q. c. 55, as amended by 1947 11 Geo. VI, c. 29; 1949 13 Geo. VI, c. 18 and 25; 1952-53 1-2 Eliz. II, c. 17; 1960-61 9 Eliz. II, c. 19.

[116] s. 16 of the Act.

[117] As examples of a unanimous jurisprudence to this effect, *cf.*: *Delorme* v. *Soeurs de la Charité de Québec*, (1922) 24 P.R. 435, 40 C.C.C. 218; *Duclos* v. *Soeurs de la Charité* or *Re Duclos* or *Duclos* v. *Asile St-Jean-de-Dieu*, (1907) 8 P.R. 372, (1907) 32 S.C. 154, 12 C.C.C. 278; *Champagne* v. *Plouffe*, (1940) 79 S.C. 310; *R.* v. *Coleman*, (1927) 47 C.C.C. 148; *Re Brooks' Detention*, (1961) 38 W.W.R. 51.

concerned, he has no means of checking whether his complaint has been treated fairly by the colleagues of the accused professional. A person complaining to the College of Physicians and Surgeons about the conduct of a doctor or to the Bar about a lawyer's advice or bill has no means of forcing the corporation to act or to deal with him fairly and speedily.

(e) *Nolle prosequi.* — Another example of unchecked administrative discretion in the field of criminal law is provided by s. 490 of the *Criminal Code* which permits the Attorney General, by the mere statement that he does not intend to prosecute *(nolle prosequi)* to stay charges against a person charged with an indictable offence. No reason need be given. Obviously some such discretion is necessary for the proper administration of the criminal law. It might be in the best interest of justice not to pursue a particular prosecution, just as it may be wise in some cases not to charge certain individuals with the crimes they have committed. But such discretion is also open to political and other abuse. A suspect could be tempted to implicate others, including innocents, in exchange for a promise of immunity. Political friends may escape prosecution altogether. The possibility of an impartial and confidential investigation into the exercise of such dangerous discretion is clearly needed.

(f) *Security checks.* — Another area in which an independent intervention would be desirable is that of so-called security risks. Many positions in the public service and in defence industries are closed to individuals who are found to have unpopular political opinions or associations or to have weaknesses of character. The investigation is conducted secretly; confidential reports are circulated; these secret evaluations often result in an effective bar to employment in certain fields. Not only is there no appeal from such decisions, but generally there is not even the opportunity to know the real reason for such dismissal or rejection. The individual is defenceless. Security checks are necessary, but so are checks on the way they are carried out, the criteria used and the validity of the decisions taken. Indeed, *qui custodiet custodes?* A blatant example of the need for impartial supervision is the well-known case of Gordon Knott, discharged from the Royal Canadian Navy as the result of an erroneous R.C.M.P. report that his uncle was a Communist. It might have come as a surprise to many that a loyal citizen could be considered as a security risk because of a leftist relative, but not by any means as much as the fact that the R.C.M.P. had the wrong uncle!

(g) *Prisons.* — The treatment of prisoners, both before and after sentence, has been a very active area of investigation by all

Scandinavian *ombudsmen*. Undoubtedly in a country such as ours, afflicted with an outmoded penal system, decrepit detention facilities, epidemics of prison riots and persistent complaints of mistreatment, this would be a source of constant concern to all the *ombudsmen*. Prisoners should be permitted, as in the other countries, to address sealed complaints to the Commissioner. At the present time, save for complaints to the warden (who may be the prime culprit) or to a skeptical judge in the fleeting moments of a court appearance, prisoners have no means of redress. Furthermore, the Commissioner should also have the right to recommend compensation for wrongful detention with the hope that the authorities would always follow his advice. Under the present system, the Attorney General sometimes makes *ex gratia* payments. Otherwise there is no recourse other than litigation, which may often be futile if the victim is destitute or if the imprisonment resulted not from negligence but from honest error (perjured evidence, mistaken identity, etc.).

(h) *Immigration cases*. — The handling of cases under the Canada *Immigration Act* [118] has given rise to so many misgivings that even in the event of a major overhaul of the statute constant scrutiny by an impartial delegate of Parliament would be highly desirable. The statute gives broad powers to the Minister of Citizenship and Immigration to admit or exclude immigrants or to order their deportation. Here again considerable discretion is necessary and policy decisions are often involved. The discretion should not be curbed but it should be open to examination, even if only to the confidential investigation of an *ombudsman* sworn not to disclose the secret information on which the Department may have been acting.

The statute provides for Immigration Appeal Boards to hear appeals from certain but not all deportation orders,[119] but there is no check on decisions to exclude persons from Canada as immigrants or visitors or, for that matter, to admit them. Decisions of the Appeal Board (which is appointed by the Minister) are in any case subject to final review by the Minister.[120] The excesses to which this wide discretion can lead was dramatically demonstrated in May 1964 when it was discovered that due to a departmental error one Eric Hooper, an American Negro, was, by the Department's own admission,

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[118] 1952 R.S.C. c. 325.

[119] s. 30 of the Act prohibits appeals against deportation by persons whose entry into Canada is forbidden under s. 5 (mental defectives, diseased and impaired persons).

[120] s. 31(4).

"forgotten" in Toronto's Don Jail for 100 days before being deported.[121]

(i) *Linguistic rights.* — A growing uneasiness exists in Canada with respect to the use of the two official languages in the conduct of public business. French Canadians have expressed numerous grievances about their inability to obtain communications in their own language, about delays due to linguistic difficulties and lateness in publishing the French versions of reports and other documents. There have also been complaints about neglect of French in the armed forces and about the poor quality of French translations of official papers. An *ombudsman* could accomplish a great deal in this area and help restore the confidence of French-speaking Canadians in the Administration. An equally useful function could be performed by the provincial commissioners in relation to ethnic minorities. They could be called upon to investigate complaints of discrimination by a variety of semi-official entities such as certain professional corporations, boards and commissions.

(j) *Expropriations.* — It is a basic tenet of expropriation law that once the right to expropriate exists, an expropriated party cannot complain of premature or discriminatory or useless expropriation. All he can do is fight for a higher indemnity. Yet expropriation powers can be abused, as was seen a few years ago in Montreal where a parking lot was expropriated for alleged street widening purposes but instead the City itself operated the land as a parking lot to the legitimate indignation of the dispossessed owner.

*Evaluation of effectiveness.* — The preceding examples illustrate not only the need for impartial investigation of official conduct but also the practical and political advantages of having such scrutiny made by an officer who is trusted by the public and by Parliament and whose enquiries are informal and confidential enough not to interfere with the operations of government and not to lead to dangerous disclosures of secret information. On the other hand, the evident merits of such an institution are no guarantee of its effectiveness. It will depend on many factors: the prestige of the office-holder, the willingness of the government to cooperate, and public opinion. A powerful and arrogant cabinet, benefitting from an indifferent or tolerant public opinion, could easily ride roughshod over the *Ombudsman.* In other words, the institution is no panacea for administrative ills. It is merely another, albeit very important, safeguard of individual rights. It will not replace, but only supple-

[121] *cf.* Canadian Press despatch of May 28, 1964 published in *The Montreal Star* of that date, p. 21 under the title: "MP Urges All Jails be Checked".

ment existing recourses. In the long run, however, its strength as that of all democratic institutions will depend on the support of the citizenry and on the attitude it will take to those who disregard its recommendations.

## CHAPTER VI

## TRANSPLANTATION OF THE SCHEME TO CANADA

*Constitutional problems.* — The introduction of an *ombudsman* scheme in Canada does not raise serious juridical obstacles. The main innovation required to adapt it to our country results from our federal constitution. It is obvious that Parliament could entrust to its Commissioner only jurisdiction over matters falling within its own competence. A corresponding limitation would affect provincial *Ombudsman.* Complaints against municipalities or regional boards and commissions would fall within the ambit of the provincial Commissioner. Complaints addressed to the wrong office could be referred without formalities. A certain amount of jurisdictional overlapping is inevitable, but should not present serious difficulties. In cases of doubt, both commissioners should be allowed to obtain declaratory opinions from the Superior Court of the province concerned or directly from the Supreme Court, as is permitted in New Zealand where doubt arises over jurisdiction.[122] In view of the grave constitutional consequences of such declaratory judgments, it should be required that the Attorneys General of the provinces and of Canada be made parties to any such petition. But apart from these jurisdictional distinctions, the rules governing the commissioners could be approximately the same at both levels.

*Office of the Commissioner.* — One single Commissioner should be sufficient at each level. Professor Rowat has suggested[123] a Federal Commission of 3 members who could travel separately to make inspections and investigate complaints, but would handle major cases together. In the undersigned's opinion there is no need for such 3-man commission until it is shown that a single Commissioner with an adequate staff cannot dispose of all the complaints. After all, both England and Canada make do with a single Auditor General and Staff. In any case, the expense involved would

[122] s. 11(7) of the N.Z. statute.

[123] In "An Ombudsman Scheme for Canada", *op. cit.*, at p. 555, also quoted in "Why Canada Needs an Ombudsman", by Robert McKeown, *Weekend Magazine*, Jan. 11, 1964, p. 2, at p. 24.

be relatively small. Smaller countries than Canada average about 1000 complaints a year. No one knows whether this can be a criterion for Canada, a North American state, with deep racial divisions and regional discontent. Professor Rowat's [124] guess that on the basis of population the number of cases in Canada must exceed 700, with perhaps 300 at the federal level alone is no better than that: a guess. Seven hundred cases, assuming that as in other countries only about 10% of the complaints would be justified, would mean about 7000 complaints a year. It could be many more, or less. To ensure the independence of the commissioner, he should be entitled not only to hire and fire his own staff, but to make recommendations to Parliament as to its number and salaries and Parliament, rather than the Cabinet, should decide, as in New Zealand.

*Overlapping of recourses.* — There is no doubt that the functions of the various commissioners will duplicate to some extent existing administrative or judicial recourses. But there is no reason to fear this overlapping, on the contrary, particularly since the Commissioner can only recommend redress but cannot order it. To avoid interference with administrative tribunals or ordinary courts of law the *Ombudsman* should refuse to investigate complaints before all administrative recourses have been exhausted or if the matter is before the courts. On the other hand a previous complaint to the Commissioner should not estop recourse to the courts.

*Jurisdiction over the courts.* — A contentious point is whether the *Ombudsman* should be given jurisdiction over the administration of the law courts. Only in Sweden and Finland are they given this right. There is no reason why this should not also be the case in Canada.[125] Admittedly the *Ombudsman* should not be allowed to question the decisions of the courts. But he should be permitted to entertain complaints about the maladministration of the courts, the negligence of court officials, unnecessary delays, the personal conduct of court officers, prosecutors and even judges. This would in no way breach the dignity or intellectual independence of the judiciary but might go a long way in curbing the petty arbitrariness of many court officials, the practices of some Crown counsel and even the ill-humored impertinence of some magistrates towards parties, witnesses and counsel alike. Judicial independence is a cornerstone of our democracy, but it should not serve to hide abuse. Take but one very recent illustration. On May 28, 1964, in the Quebec Legislative Assembly, the Member for Beauce, Mr. Paul Allard,

[124] *Ibid.*

[125] Rowat, *ibid.*, pp. 554-5.

quoted case numbers and pertinent details [126] to demonstrate that in his county, since 1961, there had been 326 prosecutions for violations of the liquor laws, 127 (*i.e.* 35%) of which resulted in sentences *below* the legal minimum. He accused the Crown of having connived to so circumvent the law and indeed the Crown did not appeal these apparently illegal judgments. Obviously, if these allegations are true, the bench and the Crown agreed to break the law. In Sweden the *Ombudsman* has fined judges for imposing less than a prescribed minimum sentence ! As the present Swedish incumbent writes:[127]

> "In the view of many observers, it seems ridiculous to prosecute judges for such faults as the infliction of one month hard labour upon a person, although the minimum time for that punishment is two months... However, one should not underrate the importance of these prosecutions — and the fact of their being published in the reports — for a more correct and careful administration of justice, and thus for a more efficient protection of private rights."

*Specific suggestions.* — It is suggested that any Canadian legislation on the subject be patterned on the Danish and New Zealand models, subject to the remarks made in the present and preceding chapters. Furthermore, in view of the peculiar Canadian conditions, the following specific suggestions are made:

(1) that a Federal and 10 provincial *Ombudsman* be appointed with jurisdiction over matters within the competence of their respective Parliaments;

(2) that the jurisdiction of provincial *Ombudsman* extend to municipalities, school commissions, regional boards and bodies, professional corporations, parity committees and other public and quasi-public entities within provincial jurisdiction;[128]

(3) that nominations to the office, insofar as possible, be made by bipartisan committees;

(4) that the commissioners have tenure during good behaviour, in the same manner as judges;[129]

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[126] See *Débats de l'Assemblée législative du Québec*, vol. I, no. 80, (May 28, 1964), pp. 3664-74.

[127] Alfred Bexelius, *The Sweedish Ombudsman*, mimeographed, *op. cit.*, pp. 23-4.

[128] A municipal ombudsman scheme is under active study in the City of Rotterdam as a result of the recommendation of September 25, 1963 of the mayor and executive committee to the City Council (copy of this report was made available to the writer by the Press and Information Services of the City of Rotterdam).

[129] Rowat, *op. cit.*, p. 553.

(5) that the number and salaries of the commissioners' staff be approved by Parliament upon the commissioners' own recommendations, without Cabinet control;

(6) that cabinet ministers in their administrative capacities (excluding policy making) be subject to supervision;

(7) that the *Ombudsman* be permitted to criticize the exercise of administrative discretion not only where it is illegal or discriminatory but also, as in Norway, where it is "clearly" or "manifestly" unreasonable;

(8) while the commissioners should not have the right to question decisions of the law courts, they should be allowed to investigate maladministration of the courts and complaints in connection with the personal conduct of court officials, Crown counsel and judges in the handling of cases;

(9) complaints should be made within one year of the facts giving rise to them and, in order to avoid frivolous grievances, upon payment, as in New Zealand, of a nominal fee — perhaps $5.00, except in the case of prisoners, from whom no fee should be exacted — but the commissioner should be permitted to waive both requirements;

(10) a personal interest in the subject matter of the complaint should not be required since maladministration is of public interest;

(11) subject to the commissioner's discretion, no complaint should be entertained before all administrative recourses have been exhausted but in no case if legal action has been taken, although a previous complaint to the commissioner should in no way prejudice the right to legal recourse;

(12) the commissioner should have the right to subpoena and examine witnesses under oath;

(13) any witnesses examined under oath should have automatically the benefit of the *Canada Evidence Act*, or, as the case may be, of the relevant provincial evidence statutes;

(14) none of the evidence received by the commissioner should be used in subsequent civil or criminal proceedings (except for perjury before the commissioner) and all such evidence should be absolutely privileged;

(15) the person against whom a complaint has been laid should have the right to be assisted by counsel;

(16) the commissioner should be totally immune from any legal proceedings whatsoever, except for bad faith;

(17) his investigations should be held *in camera,* as in New Zealand, but he should have the discretion to disclose in his reports as much of his findings as he deems necessary;

(18) he should be permitted to recommend monetary compensation in all cases where he believes such compensation to be justified.

## Conclusion

*Evolution of the institution.* — From an office created in Sweden 150 years ago to inform Parliament whether its laws were observed, the *Ombudsman* has rapidly evolved to an institution whose prime function is to investigate individual grievances against the state. Its relation to Parliament has been obscured by this overriding development. This evolution is reflected even in the popular appellation of the official. Rather than Parliamentary Commissioner or *Ombudsman,* he is now frequently called the "people's guardian" or "protector of the people" or "people's tribune".

*Persuasion is only power.* — And yet an *ombudsman* has no real powers to procure redress. He investigates, he recommends changes, he reports to Parliament. But he cannot order remedial action. If he has become the protector of the people, it is because of the power of persuasion of the office. Most often his recommendations are commands. Not that he can punish non-compliance. Public opinion will. The government will not flout him because to do so would not only be contrary to democratic principles, but politically suicidal in the long run. In other words, the *Ombudsman* is another, but particularly flexible, method of democratic control of the state.

*Stabilizing influence.* — Furthermore, an *ombudsman* contributes to political stability by fostering in people the confidence that they are not powerless against a huge civil service and that their grievances will be investigated and cured quickly and what is more, voluntarily. The psychological value of such non-coercive recourses should not be underestimated.

*Conclusion.* — An *ombudsman* is no cure-all. But it is one of the gamut of controls devised by an evolving democracy to achieve its aim of freedom and individual dignity.