

WORKING PAPERS

CEYLON COLLOQUIUM ON THE RULE OF LAW

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WORKING PAPERS

CEYLON COLLOQUIUM

ON THE

RULE OF LAW

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This Volume embodies the following Working Papers for use
by the Committees at the Ceylon Colloquium on the Rule of Law:

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WORKING PAPER

on

THE RULE OF LAW AND THE COMMON MAN

by

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For the purpose of this Working Paper the concept of the Rule of Law will be taken to mean those definitions and explanations given to it at various meetings of the International Commission of Jurists now largely contained in the various pronouncements in Delhi, Lagos, Rio and Bangkok. The other concept, that of 'the Common Man', is capable of denoting a variety of things. Most commonly it is taken to mean the body of persons usually called 'the man in the street'. It is sometimes taken to mean 'the mass of the people', sometimes 'the under-privileged'. It may even be equated with that mythical being so often the corner-stone of legal rules - 'the reasonable man'. In this paper however, the definition suggested is one that includes all these but is wider than all of them. The term is used here to denote all non-lawyers. It will be seen at once that this includes within the fold of 'the Common Man' a variety of different people whose culture, standing in society and attitude to the law varies greatly. If our purpose is to bring about a better understanding of the Rule of Law, we must realise in the choice of method that we are appealing to a heterogenous group whose only homogeneity is their lack of knowledge of the law. Naturally, therefore, the techniques we adopt will have to be varied.

This paper will be largely concerned with the methods to be employed in explaining to the common man what the Rule of Law is about and creating within him a respect for it. This effort therefore proceeds on the assumption that there is a need for creating a respect for the Rule of Law.

It would perhaps be useful to survey how far the concept of the Rule of Law is part of the common man's thinking today. In Ceylon today, almost wholly due to the efforts of the International Commission of Jurists here and abroad, the existence of the concept is known by a good number of educated persons. The Rule of Law is often referred to as a moral standard on which all laws must be judged. It is unlikely that even among the intellectually sophisticated classes there is any understanding of the various detailed pronouncements made on the subject by the Commission, and there is no evidence to show that there is any widespread knowledge of the content of the Rule of Law as expounded by the Commission. Public inquiry and references to the Rule of Law quite often reflect an attitude which thinks of the 'Rule of Law' as another theory of 'Natural Law'.

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In taking the Rule of Law to the common man, it will perhaps be necessary to pose the question of whether the whole of what we mean by the Rule of Law can be got across to all those embraced by the term 'the Common Man'. If this is not possible, then it may be necessary to convey to the non-lawyer the central ideas that run through the Rule of Law. What these central ideas are would then need to be identified.

It should be pointed out that, where the public understands the process of the law and holds the law in great respect, it would be easier to create an atmosphere favourable to the Rule of Law. It is therefore necessary that the Commission should address its mind to the problem of seeing that the process of the law is well understood and that a healthy respect of the legal method exists. On such fertile soil the concept of the Rule of Law would find growth all the easier.

To do this it seems desirable that the lawyer and the non-lawyer should come to know each other better; and it would be necessary for the latter to know enough to appreciate the former's role in society. Greater understanding of the lawyer and his work appears to be linked with the question of 'popularising' the Rule of Law.

It follows that anything that brings the officers of the law into disrepute, whether they be counsel, judges, or court officials, should be avoided. Corruption within a legal system cannot be tolerated. Not only must the system be free of corruption, it must not be tainted by the slightest suspicion. To achieve this, institutional devices will be necessary.

The devices necessary will no doubt vary from country to country, but they must include constitutional methods to ensure the independence of the Judiciary and the existence of a fearless Bar. Most countries today have systems which have helped to eliminate corruption and bias from the Judiciary. But minor court officials are reputedly not free from charges of corruption.

More often than not it is in our courts and tribunals that the common man comes into contact for the first time with the application of the Rule of Law. It is important therefore to ensure that at this point of contact the common man is made to realise the value and purpose of the Rule of Law. It happens quite often that the common man, although satisfied with the actual vindication of his legal rights through the judicial process, is still dissatisfied with the procedure for vindicating them. Apart from malpractice, the biggest single cause of this dissatisfaction appears to be the law's delays. Some of these delays are avoidable, some are necessary. When the delay is unavoidable, it is necessary to keep the public informed of the reasons for such delay e.g. when decree absolute is delayed. Avoidable delays ought not however to be allowed to take place. The creation of a legal process through which legal rights may be speedily vindicated must be a part of the ideal of the Rule of Law and machinery must be created to keep rules of procedure constantly under review. Rules which have outlived their usefulness should be abolished. National Sections of the International Commission of Jurists may well find it useful to study and report upon various aspects of the law of procedure.

In some minor courts (e.g. Rural Courts in Ceylon) and in certain tribunals lawyers are excluded. In some even the judges are non-lawyers. In some countries, large areas where the adjudicative process is involved are handled entirely by non-lawyers. Quite often, the argument employed for this is that the exclusion of lawyers is necessary for ensuring speedy and substantial justice. In some of these tribunals the work disposed of is often more than that in an

ordinary court. Consequently, a large number of members of the public are required to attend these courts. The absence of lawyers often results in a negation of the Rule of Law, particularly in matters of procedure. It is imperative that steps be taken to remedy this situation, for which purpose a proper appreciation of the role a lawyer can play in these courts is required.

This paper has so far been concerned with the problems that face the Rule of Law in the courts and other tribunals. The task of popularising the Rule of Law is not restricted to this narrow compass. The Rule of Law must be understood and explained to the common man outside the court-room sphere. The principal area of this operation will have to be in the field of education. Activities in the schools and other places of learning must be stepped up. It is perhaps not appropriate to suggest that this is in itself a proper subject for a school curriculum. But it may be introduced in many indirect ways. For instance, in Ceylon, a part of the course on Civics, a very popular subject among students in the Arts stream, may properly concern itself with the Rule of Law. Civics, which is a study of various governmental activities, while paying careful attention to the legislative and executive branches of government, often passes cursorily over the judicial sphere. How courts work and what the law is about, should form part of a school course and this understanding will help the average student to appreciate what our concept of the Rule of Law seeks to achieve. The difference between the methods of tyranny and those of the Rule of Law would then be conveyed sufficiently early to make a lasting impression. Activities in the class room need to be supplemented with other programmes such as quiz contests, essay competitions and such like. This may be adopted at the school level or preferably at the inter-school level. The advantage of these competitions is that they will stimulate student interest, particularly that of the brighter students. Even more, the competitions will focus attention on the Rule of Law generally and, if held annually or regularly enough, may become a device high-lighting current problems affecting the Rule of Law. In order to achieve success in the programme concerning schools, it is important to see that as many publications as possible which relate to the Rule of Law are found a place in school libraries. If these and other methods which may emerge from the discussions at the Colloquium achieve a measure of success, it may perhaps lead to the formation of student groups dedicated to the Rule of Law at the school or inter-school level. This would be much in line with the development of United Nations Students' Associations.

In an effort to bring the Rule of Law to the masses, one of the problems that has to be considered is the nature of the relationship, if any, that is to be built with religious groups. It is imperative that this relationship be worked out in the context of South and East Asia. One of the features of society in our part of the world is the strong pervading influence of religion, whatever the faith or denomination. Religion and religious leaders are treated with profound respect and reverence, and the influence of religious groups, both lay and clerical, have been felt in a variety of activities and on many occasions in politics. The influence of religion is all the stronger in the rural areas where the bulk of the population lives. Moreover, all religious groups have a well-established institutional network as well as disciplined and able cadre throughout the country. Further, the religious centre in the village, whether it be temple, church or mosque, is often the centre of intellectual discussion in the village. In the more remote village the place of religious worship is the only available centre for discussion. It would appear that the Rule of Law does not conflict with religious principles and, perhaps, a workable arrangement may be reached. The nature and extent of such an arrangement needs careful thought and may even have to vary from country to country.

In this connection it is perhaps well to bear in mind that there may be, conceivably, some situations where the Rule of Law may not be entirely in accordance with religious interests or the ambitions of religious groups. Whatever arrangement is worked out, it seems necessary that all religious groups should be made aware of the activities of the Commission in connection with the promotion of the Rule of Law. This will help to prevent any misunderstanding of our position and it may lead to a recognition and, perhaps, acceptance of mutual interest. It may not be undesirable to commence a dialogue between religious groups and ourselves in order to examine possible links.

Much of the work in connection with the Rule of Law has been done by lawyers. No doubt the legal profession is the best qualified to undertake this task. But it is always necessary to guard against an insularity in our work. In other words, it would be harmful to keep persons of other walks of life out of the work of our National Sections. Ultimately the effectiveness of what we do depends on the degree of public support our pronouncements receive. Further, if our present effort is to 'popularise' the Rule of Law, the degree of public participation will have to be all the higher. It is perhaps unnecessary to accept persons from all walks of life as members. But the plea here is for greater public participation in our activities. Such participation would help to destroy any idea that we are a group living in an 'ivory tower'. On many questions which concern us deeply, such as the freedom of the press, the public has a profound interest and large stake. And in our discussions of subjects such as this, public participation would be very useful. The experience of the Ceylon Section in 1964 on the question of the freedom of the press where members of the public were invited is very encouraging. On the other hand, it appears that, while public participation in some of our activities is essential, it should be borne in mind that much of the strength of our pronouncements on any matter lies in the fact that they are made after due study by lawyers. The extent of public participation in our activities should therefore be determined after consideration of these and other factors.

Pronouncements on the Rule of Law by the International Commission of Jurists cover a variety of subjects. Some of these affect particular interests and groups with special force. Thus, for instance, our pronouncements relating to nationalisation of foreign-owned property affect certain business and political interests. These pronouncements of ours appear to have been reached with an inadequate consultation of these interests. It is necessary to create an atmosphere in which these different interests would be willing to present their views to us. Once our pronouncements are made, it is imperative that they are communicated to as wide a public as possible - and particularly to those interests specifically affected by the view taken by us.

Explaining the work of the International Commission of Jurists to the common man should not be confined to spreading information by ordinary bulletins and handouts. These are no doubt useful, but they are perhaps inadequate. What is needed is a scheme which would help to focus attention on the Commission and its work. This could take a variety of forms and the Colloquium would perhaps be the best place to consider the methods available. Perhaps, inter alia, something akin to the present 'Law Day' idea which is found in some countries may be helpful. A day dubbed 'Rule of Law Day', which is devoted to the work of the International Commission of Jurists and is held on a special day throughout the world, will serve to bring home to the public the importance and international character of our work. Each year a particular aspect of the Commission's work or its pronouncements may form the theme of international discussion. The suggestion is in accordance with the methods adopted by the United Nations in such programmes as 'International Co-operation Year'.

The Commission has in recent years produced a variety of important publications and documents. Unfortunately these are available only in English and a few other European languages. In South and East Asia, although the great majority of the educated-elite have some knowledge of English or French, the overwhelming majority of the population are quite ignorant of a major international language. This group includes in their fold a number of powerful persons who are in their own realm leaders in business, religious, social or cultural circles. Many of the priests and monks of the great religions of Asia are not as yet fully conversant with English or French. It is perhaps accurate to estimate that the English (or French) speaking section of the community does not exceed 20% of the population in any one country and in most countries of the region the number would be less than 5%. In most cases, however, this section of the population would belong to the better-educated, more privileged groups and would wield an influence disproportionate to their numbers. But these groups are losing part of the influence which their knowledge of the language of the imperial power enabled them to wield in colonial times. The rise of indigenous cultures has in many countries, including Ceylon, seen political power passing out of the hands of the so-called Western-educated classes. Many of the lawyers belong to this group. Use of the English (or French) language confines our activities to this group. To bring home the ideal of the Rule of Law to the common man it is vital that our activities are extended beyond this group.

The suggestions made in this paper are only tentative. They are designed as starting points for discussion rather than as final solutions. They have been conceived on the assumption that the time has come for the Rule of Law to make a greater impact on the common people. This paper attempts to draw attention to some of the ways this can be done. It does not claim to have made a comprehensive survey. Much of a task of this kind depends for its success on experiments. There can hardly be final solution to changing situations in society. Much of the work in South and East Asia is devoted to developing societies anxious to catch up with the technically advanced nations of the world. Our task is perhaps to endeavour to see that the observance of the Rule of Law is one of the permanent developments that would take place in our part of the world.

WORKING PAPER

on

NATIONALIZATION OF PROPERTY AND THE RULE OF LAW

by

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This subject was considered at the Conference of Jurists held at Bangkok in February 1965, and the Conclusion was reached that

"Nationalization of private enterprises by a democratically elected government when necessary in the public interest is not contrary to the Rule of Law. However, such nationalization should be carried out in accordance with principles laid down by the legislature and in a manner consistent with the Rule of Law, including the payment of fair and reasonable compensation as determined by an independent tribunal."¹

This Conclusion was approved in the background of a dynamic concept of the Rule of Law which sought to emphasize that legality was not enough and that the broader conceptions of justice as distinct from positive legal rules are embraced by the term and, indeed, provide its more vital aspect.² Such a Rule of Law presupposes the acceptance of certain fundamental human values in the structure of government and the legal system.³

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1. The Dynamic Aspects of the Rule of Law in the Modern Age (1965) at p. 183.
2. Id. at p. 14
3. Norman S. Marsh, Editorial - "The Rule of Law: Form and Substance", Journal of the International Commission of Jurists, Vol. I No. 2, Spring-Summer 1958, p. 153.

The Conclusion above cited makes some significant points and accepts as a basic principle of social democracy that nationalization of private property is permissible when in the public interest, while at the same time, insofar as it does not sufficiently define certain terms, leaves some vital questions open. The following points seem to be clear.

- (i) Nationalization is only permitted when accomplished by a democratically elected government;
- (ii) Nationalization must be in the public interest;
- (iii) Nationalization must be in accordance with the local law;
- (iv) Nationalization must be accompanied by the payment of compensation;
- (v) Compensation must be assessed by an independent tribunal.

But even among these matters the definition of "public interest" as a requirement for a valid nationalization is left comparatively vague. On the other hand, there are certain questions which certainly require further clarification if the Conclusion is to have its full value:

- (i) Nationalization itself could be usefully defined.
- (ii) The meaning of the condition that the nationalization must be carried out in a manner consistent with the Rule of Law does not emerge clearly.
- (iii) The requirement of "fair and reasonable compensation" does not carry with it its further definition.

It may be asked then, whether the requisite clarification should not be made by reference to international law as reflecting the present conception of justice in international society in the matter of nationalization, which is also in accord with a dynamic concept of the Rule of Law. Insofar as nationalization is conceived as being in accordance with the Rule of Law there is some correspondence with international law, while the restriction of the validity of nationalization to situations where a democratically elected government nationalizes would seem to be somewhat narrower than what international law contemplates; since modern international law recognizes nationalization even by non-democratic states. However, this is a basic issue, the difference on which results from the wider ambit that international law is forced to cover in the modern world. However, it is significant that in the discussions of Committee II of the Bangkok Conference some delegates expressed the view that the requirements stated in the Conclusion applied also to nationalizations by a non-democratically elected government.⁴

4. loc. cit. footnote 1 at p. 137.

On other issues, there is some correspondence with modern international law, e.g., the permissibility of nationalization, the need for compliance with the local law and the requirement of compensation. It is, therefore, submitted that modern international law may be consulted to determine the points that require clarification in the above Conclusions. This Working Paper, therefore, sets out to delineate the stand taken by international law on the points left open on the basis that the principles of international law are in accord with the Rule of Law in its dynamic aspect, and especially considering that the Conclusion above cited does not contradict international law in the sense that it permits what international law forbids. On the other hand, it must be noted that international law at present concerns itself with the property of alien nationals, while the Rule of Law is concerned with the property of all, so that it has to be understood that the principles of international law have to be adapted to situations outside its present competence for the purposes of the Rule of Law. This is possible on the basis that what is good for aliens is good for others as well.

The issues that may be discussed are

1. The meaning of Nationalization;
2. Requirements other than Compensation;
3. The Content of the Requirement of Compensation.

1. The Meaning of Nationalization

Since there may be special concessions made in favour of the State in the case of nationalization in comparison with the case of ordinary expropriation of private property, the definition of nationalization is important. Many definitions have been suggested for the purposes of the law,⁵ with varying emphasis on form, motive, extent or purpose or a combination of these. However, the best definitions are those which reflect the purpose of the phenomenon in specific terms and also acknowledge the particularly economic nature of the motives behind it. It would seem that what in the main distinguishes nationalization from ordinary expropriation is:

5. See e.g. 43(1) *Annuaire de l'Institut de Droit International* (1950) at p. 126, *Ibid.* at p. 128, Doman, 48 *Col. L.R.* (1948) at p. 1125, Rivero, *Le Régime des Nationalisations* (1948) at p. 6, Rolin, 43(1) *Annuaire de l'Institut de Droit International* (1950) at p. 99, Friedman, *Expropriation in International Law* (1953) at p. 12, Wortley, *Expropriation in Public International Law* (1959) at p. 36, authorities cited in Katzarov, *Théorie de la Nationalisation* (1960) at p. 196 ff., Domke, 55 *A.J. I.L.* (1961) at p. 588, Katzarov *loc. cit.* at p. 226, Foighal, *Nationalization* (1957) at p. 19.

- A. its primarily economic motivation,
- B. the fact that means of production or exchange become part of what is publicly owned or controlled and
- C. the purpose that the property should be exploited for the public benefit and not in the interests of private persons.

Thus, the taking of property for purposes of health, security or war or the transfer of property to private persons would fall outside the definition. On the other hand, the fact that the property taken over is vested in a collectivity as a legal entity different from the State would not change its character as a nationalization, provided the collectivity or legal entity was a public one and exploited the property or the enterprise in the public interest. It is only on these principles that a nationalization can be identified as different from an ordinary expropriation deserving of special consideration. It is possible to assert that the general sum of expropriation since 1917 can be identified as nationalizations in this sense.⁶

2. Requirements other than Compensation

These are limitations relating to purpose, manner and form, which in international law are the same in the case of nationalization as for expropriation in general.

The first limitation is that the nationalization must be for a public purpose. This was a requirement laid down in regard to expropriation in general, although there has been disagreement on the subject.⁷ In regard to nationalization, it would seem that the definition presupposes a taking of property in the public interest which means that the requirement is necessary for valid nationalization. Nevertheless, the vagueness of the concept leaves the question whether a taking is in the public interest largely a matter for the nationalizing State. To insist on bona fides and that the determination of "public interest" by the nationalizing State should not be beyond reasonable limit⁸ are perhaps the only limitations that can consistently be imposed. In general, it has rarely been questioned that most modern nationalizations have been in the public interest. Because of the importance of economic development based on the principle of public ownership to a greater or lesser degree, nationalization is probably accepted

6. See e.g. the Ceylon Oil, Insurance and Bus nationalizations, the French nationalization of the gas and electricity industry, the British coal nationalizations, the Burmese Bank nationalizations.

7. Amerasinghe, 6 Cey. J. Aist, Soc. St. (1963) p. 124 at 131.

8. Domke, loc. cit. note 5 at p. 590.

as being in the public interest.⁹ Most States have tried to justify their actions in nationalizing property and enterprises by reference to the public interest.¹⁰

The second limitation according to the traditional view of expropriation is that there should be no discrimination against aliens.¹¹ In recent times this duty not to discriminate against foreigners was denied by a German Court.¹² There is also evidence that certain post-war nationalizations showed a remarkable disregard of the principle.¹³ Nevertheless it cannot be denied that the principle of non-discrimination is a sound one, for it rests on a fundamental principle of justice and is vital to ordered relations. This principle is inherent in any conception of the Rule of Law and should take the form of prohibiting discrimination as between individuals or entities as such. The interpretation of this principle requires careful study as there are problems connected with it. For instance, it cannot be said that nationalizing a monopoly involves discrimination against the owners of the monopoly. At the same time the principle cannot be applied too literally. Thus, if a section of an industry is being taken over, all that can be insisted on is that the plan of taking over individual property should be in good faith, should be governed by economic motives and should be in some relation of a reasonable nature to the various proportions of property owned or business done in the country by the various entities or individuals. It would be too harsh a principle that property or business of equal value must be taken from each entity or individual or that the value of the property or business taken from each individual or entity must bear the same proportion to the total value of the property or business of that individual or entity as the property or business taken from other individuals or entities bears to the total value of their property or business. Of course, this principle of non-discrimination would apply only where part of a particular section of the economy is nationalized. A modification of the principle which permits discrimination against nationals of a former colonial ruler is not in order.

A third limitation of international law emanates from the principle that there is an international minimum standard to be observed in the treat-

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9. The General Assembly resolution 1803 (xvii) of 14th December 1962 on Sovereignty over Natural Resources refers to "public utility, security or the national interest" as being required for nationalization. This is, however, reconcilable with what has been said above.
 10. See e.g. the Burmese Bank nationalizations (1962)-The Hindustan Times 25th February 1963 and the Ceylon Oil nationalizations (1962) -Hansard (House of Representatives), 20th February 1963 at cc. 1633 - 1634.
 11. See Amerasinghe, loc cit. note 7 at p. 133 and authorities there cited.
 12. See the case cited in Domke, loc. cit. note 5 at p. 315.
 13. See White, Nationalization of Foreign Property (1961) p. 12 ff.

ment of aliens. This international minimum standard is to be considered as consistent with the Rule of Law and required by it and is applicable to the treatment of aliens as well as others in a State. This standard concerns the form of the nationalization. The exact requirement is not easy to define but it can certainly be stated that it demands that the nationalization conform to the municipal law and that it should not be outrageous.¹⁴

3. The Content of the Requirement of Compensation

This is by far the most important problem in regard to nationalization. It seems to be generally agreed that some compensation is payable both as a requirement of international law¹⁵ and of the Rule of Law.¹⁶ The problems that arise relate to

- A. the amount of compensation to be paid;
- B. the form that compensation must take;
- C. the time at which compensation must be paid.

A. The amount of compensation to be paid.

As to "A", it would seem that in international law, apart from the requirement of non-discrimination, in the case of ordinary expropriation not amounting to nationalization, "adequate" compensation had to be paid and this represented "the market value" of the expropriated property or business. In the case of nationalization as defined above it seems to be now recognized by international law that "the market value" is not necessarily what has to be paid.¹⁷ The General Assembly resolution of 14th December 1962 speaks of "appropriate" compensation leaving the epithet undefined.¹⁸ The doctrines of acquired rights¹⁹ and unjust enrichment²⁰ have been called in aid in this connection but the practice of States does not seem to accord with the results of either doctrine. It is difficult to conclude on what basis "appropriate" compensation is to be calculated according to international law. In this connection it is significant that it was stated in Committee II of the Bangkok Conference of Jurists that in many cases compensation may fall short of the market price.²¹

14. For a discussion of the requirement see Friedman, loc. cit. note 5 at p. 136 ff.

15. See Amerasinghe, loc. cit. note 7 at p. 137 ff.

16. See loc. cit. note 1 at p. 183.

17. See the discussion in Amerasinghe, loc. cit. note at p. 139 ff.

18. Resolution 1803 (xvii) "The Status of Permanent Sovereignty over Natural Wealth and Resources".

19. See e.g. Fachiri, in 6 B.Y.I.L. (1925) p. 159, Verdross, in 37 Hague Recueil (1931), p. 355 at p. 358, Friedman, loc. cit. note 5 at p. 120 and authorities there cited.

20. See e.g. McNair, in 6 Natl.I.L.R. (1959) at p. 239 ff., Wortley, op. cit. note 5 at p. 95 ff., W. Friedmann, Law in a Changing Society (1959) at p. 456.

21. Loc. cit. note 1 at p. 136.

It is also significant that many States have paid compensation and few have been able successfully to maintain that compensation was not payable. Also the aliens concerned, as indeed nationals deprived of property, have not received what they demanded. It is true that the compensation paid has not included all the elements of loss that might be incurred in a given situation.²² Instruments providing for compensation have referred to the value for the purposes of taxation, the "general value", the purchase or market value or to "quoted prices." Numerous national courts in dealing with the question of compensation have not referred to "full market value" but have used other descriptive terms such as "equitable" or "adequate".²³ Draft conventions tend on the whole to guarantee protection on the basis of acquired rights or at least on the basis of unjust enrichment.²⁴ But this might be regarded as de lege ferenda. Text writers are divided, though the majority support the view that protection should be on the basis of acquired rights. Although it may be difficult to formulate a clear and definite principle, the following observations are pertinent.

(i) It would seem that the principle that the person should be put in the same position as he would have been in had the nationalization not taken place as the governing principle must be rejected in view of the fact that the extreme view which flows from this principle does not represent the law.

(ii) It is equally doubtful whether the principle of unjust enrichment can be maintained as governing the situation, let alone such principles as abuse of rights and estoppel.

(iii) Can it, then, be said that any compensation may be paid, provided some compensation is paid? This would permit even offers of nominal compensation. But neither is such a rule in accord with the ends of social justice nor do the sources warrant such a rule.

(iv) The solution is perhaps to be seen in seeing the present rule as to compensation as a concession to social ends. Since the interests of two economic schools must be protected, the person affected must be afforded a recompense which will not weigh too heavily against the nationalizing State. Insofar as the nationalization is for the public benefit of the State on which the person has depended for his profit, it is not out of accord with justice that he should be required to expect something less than the value of the property to him calculated on the basis that his acquired rights are being protected.

22. For an analysis of the loss incurred see Amerasinghe, loc. cit. note 7 at p. 140.

23. See ibid. at p. 143 ff.

24. See Nwogugu, The Legal Problems of Foreign Investment in Developing Countries (1965) p. 135 ff.

To state an easily applicable principle would be difficult. It has been suggested that "partial compensation" is in keeping with legal principles,²⁵ but this is too vague in that it leaves room for the choice of too small an amount as determinative of partiality. One may thus argue that one-hundredth of the 'value' is just as 'partial' as three-fourths. Yet it would seem that under the post-war agreements only partial compensation was paid in the sense that aliens did not get all that they asked for. For instance, the U.S. claims that the payment of 17 millions dollars under the U.S. - Yugoslav treaty represents 42.8% of the amount originally claimed, while under the Anglo-French treaty of 1951, the compensation amounted to 70% of the private investments valued according to principles most favourable to the aliens.²⁶ But treaties do not help to formulate any principle underlying partial compensation. At the same time the kind of modification envisaged by Katzarov,²⁷ which is based on a "théorie d'imprévision," provides for too many imponderables dependant on such as "l'opportunité et la nécessité sociale" which are not clearly reflected in the resulting compensation agreements.

Perhaps, the rule is that a substantial proportion of the value of the property nationalized determined by objective standards and not necessarily by the particular value to the owner must be paid.²⁸ The idea that the compensation must bear reasonable relation to the value of the property transferred is to be interpreted in this sense. The assessment is based on "value" which must be objective. This term requires interpretation, while "substantial proportion" must also remain vague, though it signifies something more advantageous to the alien than "partial compensation." As it will be readily seen, it is a compromise between the interests of the nationalizing State and the strict principle of protection for acquired rights.

As to 'value' which offers difficulties even in municipal statutes providing for compensation,²⁹ the following observations may be made:

- (a) It is not the "special value" to the alien that is necessarily the basis of calculation.
- (b) In the determination of the "objective value", it is submitted that the principles outlined in the Harvard Draft of 1961 are basically consistent with results that have prevailed. Article 10 of this Draft provides that one of two standards must be used. The two standards are: (i) the fair market value of the property or the use thereof unaffected by the particular taking or other takings or by

25. Lauterpacht Oppenheim's International Law (1955) at p. 352.

26. See Foighel, op. cit., note 5 at p. 117 ff.

27. Op. cit. note 5 at p. 439 ff.

28. What the alien has expended on the property and the use he has got out of it (See Amerasinghe, in op. cit. note 7 at p. 144) may in a given situation be relevant for determining the substantial proportion of the value on the basis of equity.

29. See e.g. Todd, in 39 C.B.R. (1961) p. 542 at p. 550 ff.

conduct attributable to the State and designed to depress the value of the property in anticipation of the taking; and (ii) in the absence of (i), the fair value of the property or the use thereof.

Calculation on this basis would eliminate problems that may arise from such factors as absence of an open market in the nationalizing State, because it is instituting a monopoly and the artificial depression of the market prior to the nationalization in view of the nationalization³⁰

The situs of the market is not specified. Is the market value in the nearest State with a free economy to be the standard? This standard would not represent the true value of the property in the open market in the nationalizing State. Factors such as import controls and duties in particular States will influence value judged according to these standards. The "fair market value," it is submitted, is the fair market value in the nationalizing State. In the absence of such a market value the second alternative must be resorted to.

The second alternative also requires further definition. It is submitted that fair value is calculable according to the purchase price increased by the value of improvements and decreased by the value of deductions, allowance being made for appreciation and depreciation.

It is to be noted that the standards set in the Harvard Draft are to be used as the basis for the calculations of compensation of which international law requires only a substantial proportion to be paid. It is the measure of the compensation to be paid but is not the sole determinant of the final amount.³¹

(c) It follows that in the "objective value" such intangible assets indirectly lost, such as future profits and contracts which are connected with the enterprises taken over, cannot be included. This is so because a person has no right to expect that he will be permitted to continue in business indefinitely and must, therefore, face the risk of losing his intangible assets as such. It is a more difficult question whether the element representing good-will should be included in the market value. It is arguable that this is part and parcel of what is taken over, that it accrues to the nationalizing State, and, therefore, it is genuinely part of the market value or fair value. Nevertheless, whether such an element exists or not will depend on the circumstances of the case.

(v) Where a person suffers loss as a result of the creation of a State monopoly, there arises the question of compensation for losses incurred by the fact that property may not be taken over but cannot be used in that particular

30. As happened in the case of the French nationalization of the gas and electricity industries.

31. In the case of the oil nationalization in Ceylon, provision was made in **the statute** for compensation according to principles which give prominence to the purchase price with the market value as a residuary principle: see Amerasinghe, op.cit. note 7 at p. 143. However, the Ceylon Government conceded before the Compensation Tribunal that it was relying entirely on the latter principle. Compensation on this basis alone would probably have given the aliens more than international law required Ceylon to pay.

business indefinitely. He must bear the risk of being asked to cease business at any time just as much as he runs the risk of failing in his business. The most he can expect is to be allowed to sell his property in the nationalizing State, or, if he is an alien, to be allowed to remove any material that can be removed from that State. It is even doubtful whether an alien should be compensated for the cost of removal as this is a possibility he must face in assuming the risk of business in a foreign State without the protection of a treaty.³²

(vi) Although the rule as to quantum of compensation gives recognition to the difficulties and needs of the nationalizing State, no particular effect is given to them in the basis of calculation, which is, therefore, not affected by such factors as the previous colonial subjection of the nationalizing State, the character of the nationalized ventures as belonging to the nationality of the previous colonizing State, the capitalist nature of a previous regime or the bankruptcy of the State treasury.

(vii) It is also equitable that the calculation should be made as at the date of nationalization, so that interest will accrue after that date till the actual date of payment.³³

B. The form of compensation

In international law the issue has revolved around whether payment has to be made in the currency of the alien's national State or whether it can be made in some other form. The precedents are not conclusive, but it may be submitted that generally payment must be in convertible currency except in special circumstances.³⁴ In the case of non-nationals such a rule is in accord with the Rule of Law and is clearly applicable. In the case of nationals, however, the considerations are difficult. Since they are indigenous to the society in which the nationalization takes place, it is not necessarily in accord with justice that they should be allowed the right to take the compensation they receive out of the country, however convenient this may be for them. Of the possible forms of payment the following are relevant to the case of nationals;

- (i) Payment in kind;
- (ii) Payment in internal securities;
- (iii) Payment in the currency of the nationalizing State;
- (iv) Payment in convertible currency.

(iv) cannot be insisted on, though it is lawful. On the other hand, form (iii) would certainly be lawful, while (i) would not be lawful. A case may be

32. The Ceylon legislation provides against compensation for this type of loss; see Amerasinghe, *ibid.* at p. 145.

33. See the Ceylon legislation; section 49 and 50 of the Ceylon Petroleum Corporation Act, 1961.

34. Amerasinghe, *loc. cit.* note 7 at p. 146 ff.

made out for (ii) also. They give the national an adequate opportunity of gaining benefit from his money. Of course in the case of (ii) the interest payable must be reasonable in terms of the international investment climate in the nationalizing State.

C. The time of payment

It is not generally accepted in international law that payment of compensation in the case of nationalization must be "prompt" in the sense that it must be paid in a lump sum at the time or before the actual taking of the property. Treaty practice is also not generally consistent with such a proposition. Mexico paid U.S.A. over a period of 4 years and ended payment 9 years after the nationalization. France is being paid by Poland over a period of 15 years, Sweden by Poland over 17 years, Belgium by Hungary over 10 years.³⁵

The failure of aliens to obtain prompt payment testifies to the negative fact that promptitude is not fully accepted as a legal requirement. However, since the compensation is regarded as falling due on the date of nationalization, it should mean that the sum is payable on that date. But the practice of States contradicts this and a suitable explanation must be found for deviating from the proper principle, while at the same time the applicable principle must be defined.

The only satisfactory explanation is that the logical consequences of the original principle are not recognized for practical reasons of social need. Ordinarily, nationalizing States are not in a position to pay immediately. The illogicality must be regarded as a concession to such States in the interests of the ultimate good of international society. It is only in terms of an organic view of international law and society that this exception to logic can be understood. The same exception is consistent with the Rule of Law, whether it is applied to aliens or to nationals.

To formulate the proper rule, it is necessary to make an assessment of the interests of the two parties to the issue. The person whose property is nationalized would like to have the compensation paid immediately, while the nationalizing State has an interest in taking as long as it possibly needs to pay. The solution is to be found in a reconciliation of their interests by compromise. Payment over a "reasonable period" with a "reasonable" arrangement is probably permissible. It is submitted that in no circumstances should the "reasonable period" exceed 10 to 12 years, although in a given case the "reasonable period" resulting from particular circumstances may be less. This limit is arbitrary, but it is based on a rough norm to be extracted from recent treaty practice.³⁶ Also it becomes clear that each case must be considered on its own merits with its many ramifications. The individual's special need must be considered just as much as the nationalizing State's ability to pay will be relevant, albeit

35. Foighel, loc. cit. note 5 at p. 127 ff., Appendix A.

36. Ibid.

within the maximum limit. Whatever the period, the payment will have to be spread proportionately over the reasonable period. Some Draft Conventions accept the view that payment need not be prompt.³⁷

37. See Nwogugu, loc. cit. note 24 at p. 153 and the Harvard Draft (1961) Article 10(4).

WORKING PAPER

on

THE OMBUDSMAN AS A REALITY IN SOUTH-EAST ASIA

by

D. S. Wijewardane *

INTRODUCTION

The purpose of this paper is to examine the relevance of the Scandinavian Institution known as the Ombudsman to citizens of this region, to examine the main features of that Institution, and to see whether, and if so to what extent, it is desirable to transplant this idea. The countries of South-East Asia do not conform to any one pattern either politically, socially, economically or administratively. They are separated by race, religion and culture. These divergencies will naturally be reflected in their Constitutional arrangements and Institutions. This paper, written against the framework of law and experience in Ceylon, does not purport to make any comprehensive survey of considerations that may be relevant to other countries in making their own assessment of the Institution in question. The paper is intended merely to form a base for discussion and for exchange of knowledge, experience and ideas between lawyers in this region.

There are certain factors common to most South-East Asian Countries. Many have been colonies and have recently obtained Independence. They form a large section of the underdeveloped countries of the world. There is a strong and almost impatient desire for as quick development as possible, and, entrepreneurs being limited in comparison to pressure of population, government is called upon to take a predominant initiative. These are countries where ideologies are in the melting pot and striving with one another for survival.

Independence initially results in close identification of the governed and the government. Imperialist rule has been replaced by self government. In the emotional response generated the rights and liberties of the people as against their government itself is more easily overlooked. In the context of an underdeveloped economy there can occur an understandable pride in government acting with decision and vigour. By virtue of their education and position administrators acquire a status and power out of proportion to their numbers or functions.

Nevertheless, the tension is there which in every age and in every society inevitably exists between those that govern and those that are governed. The antagonism to everything western and to all ideas which emanated from those who were once rulers can too easily be exaggerated. The profound influence of these ideas particularly on an educated and volatile middle class

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as exists in Ceylon can be underestimated. It is difficult to imagine any movement for the over-throw of our existing constitutional arrangements based merely on suggestions that it is alien gaining the wholehearted support of the country. Recent experience shows that even groups which cannot be classified as Western oriented are not willing to concede that "liberty" is a monopoly of the West. If the ideal of "liberty" is alien, so also is the idea of excessive and unlimited concentration of authority in the hands of the government. The cold war did not begin in South-East Asia. The Bandung Concept of non-alignment in foreign policy is not without its impact on domestic thinking. The Institution of the Ombudsman may have an advantage of being a creation of a country which has not been an imperialist power in this region. Though underdeveloped as far as economic potential is concerned, the contending forces in a country like Ceylon may yet be sufficiently complex to require thoughts on further checks and balances.

Part I of this Paper will be devoted to examining the different categories into which a citizen's grievance against an administration (functioning with what is generally regarded as a democratic framework) can be classified. Attempt will here be made to see what remedy if any the citizen has in order to air his grievance and obtain redress. The classification of grievances is done for purposes of exposition and in order to try and isolate the particular areas in which an Ombudsman becomes relevant. Part II of this Paper will examine the main features of the concept of the Ombudsman with a comparison between the Scandinavian and New Zealand models. Part III will attempt a brief survey of the arguments in support and against the introduction of that Institution.

PART I.

THE PROBLEM

The Ombudsman is intended to be a weapon in the hands of a citizen with a grievance against the administration. If the grievance is ill-founded, it is intended to dissipate the tension and to bolster the confidence of society in the administration, a confidence so necessary in under-developed countries striving for economic advancement at a rapid rate. At what stage in the citizen's grievance or to what kind of grievance is the Ombudsman relevant? To answer this it is convenient to consider three categories into which grievances against the government fall.

(A) Disagreement with Policy

The citizen may not like a particular governmental policy. His grievance here is that he is prejudiced or adversely affected by that policy. His interests may be damaged by a particular law enacted or about to be enacted in pursuance of government policy. He is opposed to that policy, he dislikes that law. His opposition, it has to be conceded, is legitimate in a democratic structure and deserves consideration.

It is not difficult to see that the remedy here is extra legal, and outside the ambit of administrative law. He may pressurize and he may lobby. He may attempt to persuade the press and win over important groups to espouse his cause. This might result in amendments being considered and conceded. If he acts in time, his interests may be taken into account and compromises effected in the long and careful negotiation in party ranks or minister's office which generally precedes legislation. If individual rights or interests are being peculiarly affected, he might use the benefits of special procedures often contained in Standing Orders of Parliament⁽¹⁾.

(B) Disagreement with the Exercise of a Discretion

The second stage concerns the case where an Act has been passed and decisions are taken in the application of that law by the administration. The administration in the exercise of a discretion makes a decision adverse to the interests of the citizen. The citizen is aggrieved. He, however, makes no charge of maladministration. It is not his contention that the

(1) See Standing Orders of the House of Representatives of Ceylon, Standing Order No 53, which provides for the petitioning the Committee to whom such a Bill is referred. Parties affected may be represented in person or by counsel. Witnesses may be examined and their evidence taken down. See also Standing Order No 52 of the Standing Orders of the Senate of Ceylon

administration has been guilty of 'mala fides' or any 'abuse of power'. It is not a complaint against the administration. His attitude is one of reasonable disagreement with the decision on a given set of facts. The decision though possible, he claims, is not one which he would himself have made. In his opinion the administration has made a wrong decision and he is aggrieved.

The problem has moved away from the limelight of press and parliament, and the citizen is generally without remedy, but his grievance may be genuine. What he is really anxious to have is a re-hearing or a re-consideration. A right of appeal to some independent or impartial body may be an answer. Re-consideration, however genuine, by the administration itself is unlikely to prove adequate. The question arises whether the Courts of law or some other body is the most appropriate forum for this appeal.

If there be no recourse to some independent appeal procedure, there is often a temptation in a citizen to misconstrue the nature of his grievance and to make it appear a trespass of his legal rights. He persuades himself and often others to pitch his case higher than it really warranted in an attempt to come within arguable distance of certain legal remedies which, though not appropriate to his case, will enable him to focus attention on his grievance. An artificial attempt is made to come within some legal category such as lack of good faith in order to attract a legal remedy which often involves him in heavy expenditure, from which he obtains no relief, and which implicates the administration in considerable effort and time.

(C) Maladministration or Administrative Fault

This is the most important category, and here the complaint is against an "abuse of power". The administrator is charged with misconstruing or non-compliance with law, of incompetence, mala fides, misconduct, neglect, partiality, bias. The grievance is that the administrator is at 'fault' in the exercise of discretion vested in him.

As long as the fault can be diagnosed and established, the citizen may well be covered by legal remedy. In such a case the difficulty is not the lack but rather the complexity of the principles which come into play.

If the kind of decision which is being attacked can be categorized as quasi-judicial, then the prerogative writs of certiorari and prohibition may aid him. But whether the functions can be so classified is a question which creates difficulty and uncertainty (2). If the duty is quasi-judicial, the grounds of relief are a failure of natural justice, excess of jurisdiction or error on the face of the record. It is easy for a citizen to be unaware of his ground or acquiesce in some breach, and he rarely comes across administrators eager to place their errors on the face of the record. The lesson is soon learnt that the wise administrator is the one who does not place

(2) On the distinction between administrative and judicial acts, see two Articles by H.W.R. Wade Quasi-judicial Background (10 C.L.J. 216), and The Twilight of Natural Justice (67, L.O.R. 103).

much on record. Mandamus is limited to the existence of a public duty and none of these covers the case of the blanket discretion.

The citizen need not bother himself with difficulties created by the distinction between administrative and quasi-judicial acts if the remedy chosen is an action for declaration which is available on the usual grounds (3). It is no less expensive than a writ and will almost certainly take a longer time to be heard and disposed of. In any case, it is doubtful whether an action for declaration will be available in respect of an improper exercise of an administrative discretion not covered by one of the grounds referred to, for example, if no reasons whatsoever have been given for a decision which is apparently in conflict with earlier decisions. An Injunction(4) is often used in connection with the action for declaration and it serves the same purpose as a writ of prohibition in the realm of quasi-judicial decisions.

The Writ of Habeas Corpus, vital as it may become in time of turmoil,⁽¹⁵⁾ is hardly relevant to the more mundane problems of day-to-day administration. Nor is there generally a contractual relationship between the administration and the aggrieved citizen. Liability of the central administration in tort, even if it exists, will not be adequate to redress a citizen aggrieved by the exercise of administrative discretion(6).

Remedies apart, to what extent is there judicial control over the exercise of administrative discretion?

In the first place the Court has always accepted the right to decide whether the jurisdiction to exercise discretion has in fact been conferred. If a discretion has in fact been conferred and it is maliciously exercised, it may be declared inoperative(7) or ground an action in damages(8). Review

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- (3) Failure to perform a duty, contravention of a statutory provision, bad faith, irrelevant considerations, improper purpose, wrong assumption of jurisdiction, failure to observe natural justice.
 - (4) Injunction is not available against the Crown, but see *Buddhadasa v. Nadarajah* (56 N.L.R. p. 537) for Injunction against a Crown servant as an individual.
 - (5) The remedy is available for illegal military defence as well. *R. v. Governor of Wormwood Scrubbs Prison, Ex parte Boydell* (1948) 2 K.B. 193.
 - (6) Ceylon has recently been promised a Crown Proceedings Act, but the Crown is not at the moment liable in tort for acts of its servant. See *Nadarajah v. the Attorney-General* (59 N.L.R. 136). For personal liability of public officers and right of Crown to undertake the defence, see *the Attorney-General v. Russel* (57 N.L.R. p. 364).
 - (7) *Zamir, Declaratory Judgment* (London 1962, p. 179).
 - (8) *David v. Abdul Cader* (65 N.L.R. p. 253).

of the decision even in such a case may be excluded by statute⁽⁹⁾. If the discretion is exercised honestly, must it also be exercised reasonably (i.e. without negligence)? This question has been answered in the negative. "If a man is required in the discharge of a public duty to make a decision which affects by its legal consequences the liberty and property of others and he performs that duty and makes that decision honestly and in good faith, it is in my opinion a principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public and then to leave him in peril by reason of the consequences to others by that decision"(10). In a later judgment(11) Lord Greene M.R. had this to say: -"If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiations. All those matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain and that is that those matters are not within the competence of this Court. It is the competent authority that is selected by Parliament to come to the decision and if that decision is come to in good faith, this Court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister." Even the statutory imposition of standards through a "reasonable grounds to believe" clause has not brought noticeable relief(12). Although the Privy Council has stated in the Nakkuda Ali Case that the Clause "however read, must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power" and has interpreted it as requiring that there must in fact exist a reasonable ground, the applicant in that case was left without redress. "Theoretically it is true to say ... that if a decision on a competent matter is so unreasonable that no authority could ever have come to it then the Court can interfere. That I think is right but that would re-

(9) Smith v. East Elloe Rural District Council (1956) 1 A.E.R. 86.

Where the Act expressly precluded the decision being questioned in "any legal proceeding" and the House of Lords held that it could not therefore be questioned on the ground of bad faith.

(10) Per Lord Moulton in Evertt v. Griffith (1921, A.C.631).

(11) Point of Ayr Collieries Ltd. v. Lloyd George (1943) 2 A.E.R. 546, at p. 547.

(12) Liversidge v. Anderson (1942, A.C. 206) C.F. Nakkuda Alia v. Jayaratne (51, N.L.R. 457 at 461); (1951 A.C. 66).

quire overwhelming proof"(13). No administration will find that test a difficult one to side-step and usually a citizen is unable to obtain any proof at all.

It is well established that in the exercise of an executive discretion there is no obligation to afford a public hearing(14), and bias is not a ground for judicial review(15). Further, the exercise of a discretion cannot be compelled nor does an action lie for damages caused by non-exercise(16).

An authority vested with a discretion is not entitled to fetter it by contract or rules made in advance. Estoppel cannot be used to hinder the exercise of a statutory step. Rules made therefore for the guidance of citizens upon which a citizen is expected to rely and does in fact rely may finally turn out to afford him no relief. The rules may be altered at will or decisions taken by the administration in direct contradiction to them(17).

Where discretion has been conferred on an authority, the attitude of the Court is that it should not be controlled so long as it is exercised honestly and the prescribed procedure is not fundamentally abused(18). On the whole this is a consistent attitude of the Courts(19). The reasoning behind this attitude has been succinctly stated by Viscount Simon in *Blunt v. Blunt*(20) "where Parliament has invested (an authority) with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances and, where Parliament has not thought fit to define or specify any cases or classes of cases fit for its applica-

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- (13) Per Lord Greene M.R. in *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* (1947) 2 A.E.R. 680. The case is also authority for the view that the Court is entitled to examine a decision made in good faith if extraneous considerations have been taken into account. Proof is however equally difficult.
- (14) *Nakkudali v. Jayaratne* (51, N.L.R. 457); also *Erington v. Minister of Health* (1935, 1 K.B. 249).
- (15) *Franklin and others v. Minister of Town & Country Planning* (1948, A.C. 87).
- (16) *East Sufforik Rivers Catchment Board v. Kent* (1941, A.C. 74).
- (17) See *Reordan v. The War Office* (1959) 3 A.E.R. 552, and *Southend Corporation v. Hodgson Ltd.* (1961) 2 A.E.R. 46.
- (18) G. Ganz, Judicial Control over the Exercise of Executive Discretion (1964 Public Law, p. 361).
- (19) See c.f. Control of Discretion in Elation; Classic Statement by Jessel M.R. in *Tempest v. Lord Gamoyo* (1882) 21 Ch.D. 871.
- (20) (1918 p. 265, at 272) followed by Basnayake C.J. in *Wijewardene v. Lemora* (60 N.L.R. 457).

tion, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised or to place greater fetters ... than the legislature has thought fit to impose".

It is hoped that some indication has now been given that in an "inexhaustible variety of delicate and difficult" situations the citizen is without relief and is entitled to have a legitimate grievance. It is to fill this gap to some limited extent that thoughts have turned to the Ombudsman. It is time then to examine the main features of that Institution. But before doing so, the inadequacy of the existing machinery for investigation of these situations outside the law may be pointed out very briefly. The question procedure in Parliament is defective in that answers are prepared by the very department against whom the complaints have been made and neither the aggrieved citizen nor the Member of Parliament has access to the relevant files. Further, the difficulty of disposing of complicated matters in the space of a couple of questions "rarely resolves the dispute and frequently heightens the atmosphere of controversy"(21). Even if there is an adjournment debate, little relief is obtained because it becomes a tussle between opposition and government. Special Committees of the House are rarely used for the kind of situation under discussion. There is, finally, provision for Commissions of Inquiry under Acts similar to the Commission of Inquiry Act(22) in Ceylon. This method is not only expensive but invariably confined to matters of urgent public importance. Recent experience in Ceylon shows that the government's right to choose personnel has also been abused. Moreover it is not possible for the ordinary citizen to have a Commission appointed. Such appointment is generally the culmination of a prolonged public demand, and the citizen finds difficulty in getting others interested in his grievance which may be of great importance to him though not of public interest.

(21) Whyatt Report Sections 80 - 84; Standing Orders of the House of Representatives Sections 31 - 37 and Section 18.

(22) Legislative Enactments of Ceylon (Cap. 393) Vol. 11 p. 895.
See also Tribunals of Inquiry Act 1921 in England and Keeton Trial by Tribunal (London 1960).

PART II.

MAIN FEATURES OF THE CONCEPT

(A) The Formulae

The idea that there should be an office which may exercise supervision over public officers of state is not new. The censors of ancient Rome exercised a control over the morals of the community and in the list of citizens which it was their duty to draw up they could affix a "nota" or mark of censure against the man's name if they disapproved of his conduct, be it conduct in his private or public capacity. The improper conduct of a Magistrate could thus be the subject of censure. Although there were no restrictions of the grounds on which disapproval was recorded, the censors from time to time published in an edict the principles on which they acted.²³

But in regard to modern development the institution and its impact on recent thinking is traceable to the Scandinavian countries. "Ombudsman" is a Swedish word.²⁴ It is in Sweden that the concept with its modern implication took root and was developed. At the beginning of the 19th century when Sweden formulated a new Constitution for itself, a proposal was made that Parliament should have its own officer to prosecute government servants who acted in contravention of the law. It was felt that this function should not be left in the hands of the administration itself. In the Constitution of 1809 provision was therefore made to appoint an Ombudsman "to supervise the observance of statutes and regulations by Courts and public officers and employees".²⁵ It is useful here to draw attention to a special feature of the Swedish political structure against which the Ombudsman functions. In Sweden the Civil Servants are not subject to the control of the Ministers. They are directly under Boards, with Directors-General at the helm functioning as

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- (23) Jolowicz, Historical Introduction to Roman Law. 2nd Ed. (1952) p. 50 - 53. For a similar development in China see Geoffrey Sawyer, Ombudsman, Melbourne University Press (1964) p.6.
- (24) In Sweden the word denotes 'attorney or representative'. In Denmark and Norway it has the rather different meaning of a 'person charged with a public duty'. The New Zealand Act is entitled Parliamentary Commissioner (Ombudsman) Act 1962 thereby retaining the use of the Scandinavian name but emphasising the connection with the Parliament.
- (25) The Citizen and the Administration - The redress of grievances (Hereafter referred to as the Whyatt Report) Stevens, London, (1961) Sec. 94. The extension of functions of the Ombudsman to cover Military administration was made in 1915.

Independent Commands under law. Ministers concern themselves with policy alone.²⁶ They do not hold themselves collectively or individually responsible for the acts of the administration. In this background it is easier to appreciate the formulation of the Ombudsman's duties in terms of supervising the observance of statutes by Public Officers.

Ministerial responsibility in Denmark is closer to the British pattern. The adoption of the Ombudsman in that country achieves a significance for this reason, and the Danish experiment goes some way towards proving the adaptability of the concept.

Section 55 of the 1953 Danish Constitution made provision for the passing of a Statute to provide for the appointment by Parliament (Folketing) of one or two persons not being members of Parliament to "supervise the civil and military administration of the State". The statute contemplated by Section 55 was passed as Act 203 of 11th June 1954.²⁷ The first "Folketingets Ombudsman" or Parliamentary Commissioner took office in April 1955.

Section 5 of Act 203 outlines the nature of the Parliamentary Commissioner's functions in the following terms: - "The Parliamentary Commissioner shall keep himself informed as to whether the persons mentioned in Section 4 (i.e. Ministers, Civil Servants, and all other persons acting in the service of the State, except Judges),²⁸ commit mistakes or acts of negligence in the performance of their duties". By Section 3 Parliament was empowered to lay down "general rules for the Parliamentary Commissioner's activities", and in pursuance of this section rules were made in 1956.²⁹ Article 3(1) of the 1956 rules is also important in considering the functions of the Parliamentary Commissioner and provides as follows: - "The Parliamentary Commissioner shall keep himself informed as to whether any person within 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".

The other important text on the modern Ombudsman is the New Zealand

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- (26) The Swedish approach to the distinction between policy and the administration may require careful scrutiny which is not possible here.
- (27) For Act No. 203 of 11th June 1954 see Stephan Hurwitz, Danish Parliamentary Commissioner for Civil and Military Administration (1958, Public Law, 236) - Annex 1 at p. 245.
- (28) See Section 1.
- (29) For the rules or directives of 22nd March 1956, See Hurwitz, Loc. cit. Annexes at p. 248.

Parliamentary Commissioner (Ombudsman) Act 1962.³⁰ Section 11 provides that "The principle function of the Commissioner shall be to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity in or by any of the departments or organizations named in the Schedule to this Act, or by any officer, employee, or member thereof in the exercise of any power or function conferred on him by any enactment."

(B) The Jurisdiction or Competence of an Ombudsman.

In analysing the scope of an Ombudsman's functions consideration may be given firstly to the nature of the administrative Act which attracts his jurisdiction and secondly to the persons or organisations over which he exercises jurisdiction.

The difficulty in specifying the nature or quality of acts or decisions which attract jurisdiction may be appreciated when the divergent formulae given above are considered in more detail.³¹ What constitutes the "non-observance" of a statute? May not the answer to this range from the contravention of the narrowest technicality to any act allegedly not in sympathy with the purpose of an act? Could the exercise of an executive discretion ever be effectively dealt with merely in terms of the construction of a statute? The Danish statute is more elaborate and competence is

(30) A copy of the Act has not been available at time of writing. Full text of the Bill has been reproduced in the Whyatt Report. Appendix 'B' at p. 90. Extracts of Sections 11(1), 11(5), 11(6), 14(1), 14(2) of the Act are given in the Reports of The Ombudsman (Sir Guy Powles) for the years ended 31st March 1964 and 31st March 1965, presented to the House of Representatives pursuant to Section 25 of the Act. Other than for these extracts the text of the Bill is used for purposes of this paper.

(31) The Norwegian Act was not available at the time of writing but the main provision of the Bill before the Norwegian Parliament in 1960 as reproduced in the Whyatt Report at Section 130 is as follows:
"It is the duty of the Ombudsman, as the delegate of the Parliament and in the manner stipulated in this Act and in the rules issued by the Parliament, to endeavour to ensure that the public administration does not commit any injustice against any citizen ... Any person who considers that public administrative authorities have treated him unjustly may appeal to the Ombudsman"

attracted by the administration committing a "mistake" or an "act of negligence". The wording of Directive Article (3) indicates that the pursuing of an "unlawful end" or the taking of "arbitrary and unreasonable decisions" is illustrative of the kind of mistake or negligence which, if an administrator is guilty of, the Ombudsman might examine. In contrast the New Zealand approach is simpler. The Ombudsman is empowered to investigate "any decision, act or omission relating to the 'administration' and affecting a person in his personal capacity."

In spite of the width and scope of the jurisdiction initially conferred, the technique of the New Zealand legislation is to control the limits of the Commissioner's jurisdiction by means of specific provisions. The schedule which deals with the persons or departments over which the Ombudsman exercises jurisdiction is an enumeration and there can be no room for argument.³² An important limitation is contained in Section 11 (5)(a) where the criteria used to impose the limitation is not the nature or quality of the act which is in question but the remedy available to the citizen. Section 11 (5)(a) is as follows: - "Any decision, recommendation act or omission in respect of which there is, under the provisions of any enactment, a right of appeal or objection or a right to apply for review on the merits of the case to any court or to any tribunal constituted by or under any enactment, whether or not that right of appeal or objection or application has been exercised in the particular case and whether or not any time prescribed for the exercise of that right has expired."³³

Attention may here be drawn in general terms to an important difference between the background in which the Scandinavian and New Zealand Ombudsman function. Both in Sweden and in Denmark it appears that any administrative act may be questioned in Court. "Any one aggrieved by an administrative decision whether on a question of law or fact may test the matter in Court."³⁴ If so, the Ombudsman is supplementary to the jurisdiction of the Court. It is yet another instrument in the hands of the aggrieved citizen.

For New Zealand, following as it does the framework of the English administrative law, the proposition is much too widely stated.³⁵ The

(32) The power to amend schedule by Order in Council is reserved by Section 27 of the Bill thereby creating some flexibility.

(33) By Section 11(5) (b) and (c) investigation over decisions etc. made by trustees or in the conduct of Crown, legal business is precluded. Jurisdiction is also excluded in certain matters affecting military administration. See Section 11(6) of the Act.

(34) Whyatt Report, Section 113.

(35) See Part I(C) of this paper.

approach of the New Zealand Act is to fill a gap. That the Parliamentary Commissioner is not to exercise a jurisdiction concurrent with that of the Courts is further underlined by provisions of Section 14, where it is provided that if, having entered upon an investigation of any complaint within his jurisdiction, it appears to the Parliamentary Commissioner that there exists an "adequate" remedy or right of appeal other than the right to petition Parliament, whether such remedy is available under law or by virtue of existing administrative practice, the Parliamentary Commissioner may in his discretion refuse to investigate the matter further. This is only one of the wide discretions conferred on him³⁶ and the question of who controls the Ombudsman's exercise of discretion may arise.

The other aspects of the Parliamentary Commissioner's jurisdiction is the consideration of the persons and organisations over which he is to exercise his jurisdiction. The Swedish Ombudsman is perhaps the boldest in this respect. His jurisdiction extends not merely to civil and military administration, but covers the conduct of Judges and clergy.³⁷

The tradition of the Swedish Clergy and the organisation and the structure of the established Church might lend itself to supervision by a Parliamentary Commissioner. Indeed, it may well be questioned why a religious order in particular should object to the imposition of standards. However, this is a field in which due regard must be had to the traditions of a religion and its relation to society. It is difficult to envisage the Buddhists Sangha, e.g. with its inveterate antagonism to state interference or imposition of rules other than their own (vinaya), agreeing to be supervised by a Parliamentary Commissioner. It is arguable that a creature of Parliament should restrict himself to the supervision of temporal power. It may also be suggested that it is incongruous to create a competence over religious orders when the power of the Ombudsman does not enter the field of private relations or concern itself with problems of the private as opposed to the public sector. It is not clear whether the jurisdiction of the Ombudsman extends to cover the activities of State Corporations. It may not be beyond the realm of possibility for the private sector to take over the idea of an Ombudsman and found an Institution with a view to promoting greater

(36) Section 14(1)(b) of the Act vests the discretion to refuse the investigation of a matter though within his jurisdiction if "having regard to all the circumstances of the case any further investigation is unnecessary".

(37) Re. the established Lutheran Church. Clergy of the established Church is treated as part of the Civil Service. The Danish Commissioner also has similar competence over the "Civil Servants of the Established Church ... except in matters which directly or indirectly involve the tenets or preaching of the Church." See Directive Article (3).

industrial harmony.

The relationship of the Ombudsman to the Judiciary raises interesting questions. Section 1 of the Danish Act³⁸ provides that the "Judges shall in the conduct of their office be entirely outside the jurisdiction of the Parliamentary Commissioner". This is on the basis of preserving inviolate the independence of the Judiciary.³⁹ The idea of an office exercising power over the Judiciary is alien also to the common law tradition. But the independence of the Judiciary is as much valued in Sweden as in New Zealand and yet the Swedish Ombudsman exercises jurisdiction over Judges. The difference however may be more apparent than real. In Sweden the distinction has been made between complaints against decisions of Judges and complaints against the conduct of Judges. The Ombudsman is only concerned with the latter. It will be seen that a similar distinction could be made on the wording of the Danish Act which refers to the immunity of Judges in the conduct of their office. However, no such distinction appears to have been made.

The initial objection against the inclusion of local governments within the competence of the Ombudsman was due to the reluctance against impinging on local autonomy. But as we have seen, local government officers carrying out duties of the same kind as public officers in the central government have been brought within the ambit of the competence of the Ombudsman, but his competence does not extend to the deliberative and legislative process of local government.

If any question of interpretation of the jurisdiction of the Ombudsman arises, this matter can be decided by Court. But except on the question of jurisdiction, judicial review of any proceeding before the Ombudsman has been shut out.⁴⁰ Jurisdiction may give the Courts a wider hold than at first sight appears likely. However, it is questionable whether greater judicial control is desirable.

One of the more notorious provisions that have come into modern statutes has been that an executive decision shall be final and shall not be challenged, reviewed, quashed or called in question in any legal proceedings.⁴¹ This clause has often been a most effective source of grievance. Specific statutory provision in the charter of the Ombudsman will almost certainly be necessary to empower him to investigate in the teeth of such provision.⁴²

(38) Act 203 of 11th June 1954 - See also Section 4.

(39) Stephan Hurawitz, Loc. cit. p. 257.

(40) New Zealand Bill Section 20.

(41) See e.g. Smith v. East Alloe Rurer District Council and others. (1956) 1 A.E.R. 855.

(42) See Section 11(3) of the New Zealand Bill.

(c) Powers and Duties - Practice and Procedure.

The question of Competence raises the matters in respect of which or persons in respect of whom the Ombudsman may act, whilst the question of powers and duties relate to what he must or may do, given that the complaint and the person in respect of whom it is made are in fact within his jurisdiction.

The primary duty of the Ombudsman is to investigate a grievance. This may be in consequence of a complaint⁴³ or on his own initiative.⁴⁴ As to the latter, it would appear that whilst in Sweden it is not uncommon,⁴⁵ in Denmark the procedure has been rarely followed, and has been used only in a few instances when the press has brought a matter concerning the administration before the public.⁴⁶

Complaints may be made by civil servants against other civil servants and the Danish experience is that rather a large class of cases comes from government servants of lower grades who are dissatisfied with their conditions of service.⁴⁷

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- (43) Complaint must be in writing - See New Zealand Bill Sec. 13, Danish Act 203. and 6. Both Acts create a 12 month period of limitation. But whilst the Danish Act appears to make it imperative to lodge the complaint within 12 months from the date on which the subject matter of complaint was committed, the New Zealand Act places a discretion on the Commissioner and also states that the period runs from time the subject matter of the complaint came to the knowledge of the complainant.
- (44) Danish Act 203 of 11th June 1954 Sec. 6. As far as the New Zealand Parliamentary Commissioner (Ombudsman) Bill by Section 11(1) made specific provision for his acting on his own initiative. The Act however omits those words, but the wording of Section 11 in its final form is wide enough to permit him to initiate an investigation.
- (45) The Swedish Ombudsman 1959 investigated a total of 1003 cases of which 780 were on complaints received and 223 initiated by himself.
- (46) Hurwitz, Loc. cit. p. 240.
- (47) See Danish Act 203 of 11th June 1954 Section 7(3) and Directive Art. 9. If a civil servant, the matter shall be referred to a disciplinary investigation under the Civil Service Act and the Commissioner will discontinue investigations and transmit the case. It has not been possible to discover the use of this procedure.

What the exact locus standi required of the complainant is is not very clear. The New Zealand Act puts the matter in a flexible manner. By Section 14(2)(c) the Parliamentary Commissioner is given the discretion not to investigate a matter if the complainant has not a "sufficient personal interests in the subject matter of the complaint."

Sections 11(2) of The New Zealand Bill provides for a reference of a matter to the Commissioner by any Committee of the House of Representatives which has itself been petitioned. Where reference is so made, the Commissioner is under a duty to investigate and cannot exercise the discretion to discontinue the investigations vested in him by Section 14. But these provisions do not authorise the investigation of any matter outside the jurisdiction of the Commissioner and does not enable a Committee of Parliament to place the Commissioner in possession of a matter over which the Courts or any administrative tribunal has jurisdiction.

What is the nature of the investigations conducted by the Ombudsman? The underlying considerations and principles show that it is a mixture of the inquisitorial and the judicial, but purports to be impartial, informal and inexpensive.

Once the Ombudsman has an investigation in hand, the procedure adopted is one of probing the administration until all the facts are in his possession. He is entitled to call for the documents and relevant departmental files. And all persons subject to his jurisdiction are under a duty to give information and produce the necessary records.

Departmental files include the outward and inward correspondence (including correspondence with outer departments and outside bodies) and any reports relating to the subject matter being investigated, but does not include the internal minutes of the department.

The right of access to government files will appear a revolutionary change in the context of certain, if not most, legal systems. But in its original application to the Swedish Ombudsman there was nothing novel or revolutionary in it. Rules introduced into the Swedish Constitution in 1766 gave all official documents of State a public character. Every citizen was entitled as of right to have access to public documents subject only to certain specific exceptions. One of the four Acts which comprise the Swedish Constitution is the Freedom of the Press Act of 5th April 1949. Chapter II Article 1 of this Act makes provision for access to official documents, subject to certain limitations, in the following terms: "To further free interchange of opinion and general enlightenment, every Swedish citizen shall have free access to official documents in the manner specified below. This right shall be subject only to such restrictions as are required out of considerations for the security of the realm and its relations with foreign powers or in connection with official activities for inspection, control, or other supervision or for the prevention and prosecution of crime or to protect the legitimate economic interest of the State, communities and individuals or out of consideration for the maintenance of privacy, security of the person, decency and moralities!"⁴⁸

(48) See Nils Herlitz, Publicity of Official Documents in Sweden (1958) Public Law, p. 50.

Documents which are not prescribed as secret must upon requests and without cost be made available for inspection at the place where they are kept. Citizens are entitled to a copy on the payment of a fee. It will therefore be seen that for "Sweden the power of the Ombudsman to demand access to State Documents was little more than the extended collective right of every private citizen". The principle was extended in Sweden to the extent that the Ombudsman can see any document.⁴⁹

The legal background in most countries is quite different.⁵⁰ In Ceylon, for example, in relation to Court proceedings, Sections 123 and 124 of the Evidence Ordinance⁵¹ provide as follows: -

123. No one shall be permitted to produce any unpublished official records relating to any affairs of State or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold **such** permission as he thinks fit, subject, however, to the control of the Minister.

124. No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

In relation to the Ombudsman, it is for each country to give its mind specifically to the extent to which it will empower the Ombudsman to look into State documents. The traditional outlook in this matter is that difficult questions of public policy are involved. But the Swedish experiment may, it is hoped, after careful study provide a basis for a bolder attitude.

The New Zealand approach is one of compromise. Whilst placing a duty on the administration to give all necessary information and records to the Commissioner, the Bill nevertheless gives to every person the same privileges in relation to the giving of information and the production of documents as a witness would be entitled to in Court.⁵² Further, and without prejudice to this qualification on the giving of information, provision is made for the Attorney-General to certify certain classes of information as 'prejudicial' to "the security, defence, or international relations, or the investigation or detection of offences". Upon such certification the Commissioner shall not require the giving of such

(49) L.J. Blom - Cooper, An Ombudsman for Britain (1960) Public Law 145.

(50) See Duncan v. Camell Laird & Co. Ltd. (1942) 1 A.E.R. 587.

(51) Evidence Ordinance (Cap. 14) Legislative Enactments of Ceylon 1956, Ed. Vol. 1 p. 197. See also Coomaraswamy, Law of Evidence, 1955, at p. 405.

(52) Commissions of Inquiry Act, (Cap. 393) Legislative Enactment of Ceylon (1956) Ed. Vol. XI, p. 395.

information or the production of those records. This compromise is weighted against the right of access to documents. However, although the Swedish and the New Zealand systems start from two different points, it will be seen that the group of exceptions have much in common and a careful comparative study will be necessary before finally deciding whether the differences are as great as at first sight they appear to be.

The power of the Ombudsman to initiate an investigation has already been referred to.⁵³ The right of inspection may be considered a closely allied power. Both in Sweden and Denmark the Ombudsman has used this technique. Sometimes inspections are announced in advance e.g. where the inspection is of a prison and it is intended to give the prisoners an opportunity of making representations to the Commissioner. The inspection however may be made at very short notice and the Ombudsman may go through a series of sample files. Although these inspections can only be made in respect of the administration, and not in respect of private property, yet it is questionable whether the possibility of abuse does not create certain doubts about vesting the Ombudsman with such a power as this. Attention may also be drawn to certain other features of the investigation. Under Section 7(3) of the Danish Act the complaint shall as soon as possible be communicated to the person concerned "unless this is absolutely incompatible with the investigation of the matter". The New Zealand Bill by Section 15(2) provides that the investigation shall be conducted in private. No person has a right to be heard before the Commissioner and it follows therefore that there is no right of legal representation.

One of the qualities which has created excitement about the institution of the Ombudsman is the impartiality and integrity with which he has acted in the countries in which he has so far operated. The recent creation in Denmark and New Zealand appear from the information available to have had the good fortune of having men of the highest calibre to hold office. No doubt a great measure of the success of this institution depends on this factor. Rules relating to the appointment, dismissal, remuneration and duration of office are also designed to insure the independence of the office.⁵⁴ The lack of formality not only makes the procedure which the Ombudsman adopts inexpensive, but creates a spirit of goodwill vis-a-vis the administration. As a consequence the Ombudsman has come to be treated as a negotiator, and through negotiations to have many matters corrected without the need for a full inquiry. In Denmark law reform has been placed under his control and he gets the ear of government and the co-operation of the administration as regards urgent reforms.

(53) See Part II (C) of this paper at page 15 above.

(54) See the Danish Act, Sections 1 and 12; The New Zealand Bill, Sections 1 to 10.

PART III

C O N C L U S I O N

Grievances against the administration are often based only on apparent injustice. Once a matter is impartially and objectively examined and the considerations which motivated the decision explained in some greater detail to the aggrieved citizen, much of his sense of grievance can be removed and confidence created in the administration itself. The flogging of a hard case is often due to ignorance and suspicion. The establishment of adequate procedures for investigation will help to remove this and it would be wrong to assume that the administrative service will necessarily treat the idea of an Ombudsman with hostility.

The Ombudsman is particularly significant to the poor citizen. "The man of substance can deal with the situation. He is near to the establishment; he enjoys the status or possesses the influence which will ensure him the ear of those in authority. He can afford to pursue such legal remedies as may be available. He knows his way around. But too often the little man, the ordinary humble citizen, is incapable of asserting himself." (55)

The Ombudsman takes into account the changed character of a Parliament in the 20th Century. It recognises the complexity of modern Government and the pressure on Parliamentary time. Countries of this region can ill afford to create an image of Parliament as a place where all individual grievances may be aired at length. The emphasis on the enacting and implementation of development and welfare legislation is essential if the challenge in these countries is to be met through the democratic process. Without this emphasis the democratic machinery will fail to deliver the goods and the alternative is the fiat of a dictator.

It is unnecessary to summarise the considerations which favour the establishment of an Ombudsman as these are implicit in this Paper. But it is very necessary to examine some doubts that arise in relation to the institution.

The Ombudsman is the creation of yet another administrative body to deal with problems created by an already overloaded administration. It represents the abandonment of legal control in favour of administrative controls. It constitutes a half-hearted attempt to postpone the real solution, which is the imposition of legal standards through the creation of new legal remedies sufficiently flexible to tackle problems of modern administration. "We are at a stage when patching will no longer suffice. We are at a stage when we want to return to law even if it be to modern and efficient law." (56) What is required for the citizen caught in the web of modern administration is a proper system of public law. (57)

55) Shawcross, In the Preface to the Whyatt Report, page xii.

56) J.D.B. Mitchell, The Ombudsman Fallacy (1962) Public Law, page 24 at page 28.

57) On the lines e.g. of the Conseil d'Etat. See Hamson, Executive Discretion and Judicial Control (The Hamlyn Lectures Sixth Series), Stevens, London, 1954, especially at pages 148-149).

The danger of creating more bureaucracy to supervise the bureaucracy, and the possibility of abuse recalls the experience of the Russian Rabkrin, known also as the Commissariat of Workers and Peasants Inspectorate, over which Stalin presided from 1919 to 1922 when he became General Secretary of the party. The Rabkrin was a creation by Lenin to control and supervise the administration. It was meant to be "the stern and enlightened auditor of the governmental machine and of the morals of the Civil Service. It was expected to expose the abuses of power and red tape and to eliminate inefficiency and corruption within the Soviet Civil Service. Acting through teams of Workers and Peasants, it had the power to enter the offices of any government department and to inspect without notice the work of that department. Stalin turned the inspectorate into his private police and used this machinery to discredit and transfer administrators opposed to him and to entrench his own followers. (58)

What safeguards are there against the possibility of such abuse of the institution of the Ombudsman? Especially when no assumption of democratic stability can be made, how can countries of this region prevent the institution being made into an engine of dictatorship? Certain features of the institution as it exists even in Scandinavia and New Zealand can act as a brake. The most important of these is that the Ombudsman is not given the right to reverse any administrative decision or to make any administrative order in respect of the matter being investigated. His function is merely to investigate and report. Not only are the Courts entitled to adjudicate upon the limits of his jurisdiction, but the suggestion may be considered whether and to what extent the findings of the Ombudsman should be subject to judicial review.. "Quis custodiet ipsos custodes?" is equally applicable to the Ombudsman as to other branches of the administration. The answer to this cannot be given by naming any one institution but rather in improving the system of checks and balances which should exist in a democratic structure.

The close relationship of the Ombudsman to a free press is essential if abuse is to be prevented. Here too subtle balances are at work. Whilst the press is aided by the work of the Ombudsman in that it obtains information of administrative abuse more speedily and effectively than it could if every case had to be probed by the press, the Ombudsman himself is open to criticism and censure. Publicity provides the Ombudsman with an effective sanction for his findings which would otherwise be lacking.

These considerations lead to another difficulty. It is claimed that, whilst the institution may function successfully in countries with a comparatively small population and stable conditions, in societies where the Ombudsman is likely to be inundated with complaints it ought not to be established. As has been rightly pointed out, this is to stand logic on its head. But the difficulty presented is genuine and need not be so crudely formulated. The question is rather whether an Ombudsman can survive in a heavily populated and grievance-ridden society. For the success of this office it seems essential that it should be held by one person in whom Parliament and the Public can have confidence. The whole purpose is lost if it is turned into yet another governmental department with anonymous civil servants. Not only is the purpose lost, but there can be danger in such a development.

58) Isaac Deutscher, The Prophet Unarmed (Trotsky, 1921-1929), Oxford University Press (1959), pages 47-48. Also, by the same author, Stalin, A Political Biography, O.U.P. London (1961) pages 230-231.

PROGRAMME FOR THE CELEBRATION OF 1968
AS THE INTERNATIONAL YEAR OF HUMAN RIGHTS

A) IN CEYLON AND B) IN THE SOUTH-EAST ASIAN REGION

The principal matters that arise for the consideration of the Special Committee to be appointed to discuss ways and means of giving effect to the United Nations Programme for the celebration of 1968 as the International Year of Human Rights are set out in the proposal for a World Campaign for Human Rights made by the Secretary-General of the International Commission of Jurists on Human Rights Day, December 10, 1965.

This proposal, which should assist the Special Committee in its deliberations, is set out below:

"A WORLD CAMPAIGN FOR HUMAN RIGHTS"

Proposal by the Secretary-General of the International
Commission of Jurists on Human Rights Day, December 10, 1965

By adopting the Universal Declaration of Human Rights on December 10, 1948, the General Assembly of the United Nations affirmed that the foundation of freedom, justice and peace in the world was the recognition of the inherent dignity and the equal rights of all members of the human **family**. It proclaimed the advent of an era in which human beings shall enjoy freedom of speech and belief and freedom from fear and want. Today, on the Anniversary of this historical instrument, it is our duty to take steps to secure greater respect for and observance of its provisions throughout the world.

The Declaration considers it vital that Human Rights should be protected by the Rule of Law if "man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression". The International Commission of Jurists is dedicated to the support and advancement of the Rule of Law, of which Human Rights and their effective recognition and protection form an essential part. Indeed, the Rule of Law, as defined by the International Commission of Jurists, is a dynamic concept to be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish the social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may find full expression. Its effective realisation thus requires the elaboration and acceptance of practical methods of implementing Human Rights throughout the world.

The International Commission of Jurists therefore welcomes the Resolution adopted on July 28, 1965, by the Economic and Social Council of the United Nations at its 39th Session, setting out its programme for the celebration of the year 1968 as the International Year for Human

Rights. The Resolution invites all international organisations interested in Human Rights to co-operate in this programme with a view to making it a success.

To mark the twentieth anniversary of the founding of the United Nations, the Secretary-General of the United Nations, U Thant, issued a message in October 1965 and stressed:

If there was a time in the history of man when he ought to find it intolerable to live with the risk of war - which indeed is a risk of annihilation - and when he had the means to dispel it and to promote instead the well-being of humanity in every corner of the earth, that time is now.

He also called on governments, organisations and individuals alike to seize every opportunity and undertake every kind of positive effort to promote the peace and the well-being of mankind.

In response to these calls the International Commission of Jurists proposes to launch, in collaboration with other non-governmental organisations interested in Human Rights, a "World Campaign for Human Rights", and to consult with such organisations with a view to setting up a co-ordinating committee for the purpose. The International Commission of Jurists is convinced that such joint action on the part of the non-governmental organisations concerned, will enable each of them to make a more effective contribution to the success of the International Year for Human Rights than could be achieved by a series of individual programmes of activity. In furtherance of the "World Campaign for Human Rights", the International Commission of Jurists will encourage its National Sections to take the initiative in forming national action committees in their respective countries.

Having regard to the interim programme for the International Year for Human Rights adopted by ECOSOC and to its own objectives, the International Commission of Jurists suggests the following programme for the "World Campaign for Human Rights":

1. NATIONAL LEVEL

- (a) Organisation of local seminars and meetings;
- (b) Survey of the status of Human Rights in each country;
- (c) Promotion, where appropriate, of the acceptance of the Ombudsman concept;
- (d) Promotion of the ratification of relevant international conventions.

2. REGIONAL LEVEL

Exploration of the possibilities of securing the adoption of Regional Conventions on Human Rights and the establishment of Courts of Human Rights.

3. GLOBAL LEVEL

- (a) Promotion of international covenants both on political and civil rights and on economic, social and cultural rights;
- (b) Furtherance of the proposal for the establishment of a United Nations High Commissioner for Human Rights.

"In its own sphere and within the framework of the "World Campaign for Human Rights" the International Commission of Jurists is already planning a number of activities as part of its contribution to Human Rights Year, 1968. These will include a work on the protection of human rights through the application of the Rule of Law, special articles in its publications and regional conferences and seminars.

The troubled world of today calls for new ideas and methods to eliminate the spectre of global destruction and assure liberty and justice for all. Accordingly, a special effort is now needed to give greater reality to the Universal Declaration of Human Rights. As Secretary-General of the International Commission of Jurists, I appeal to all those who cherish the ideals which it embodies to join in the "World Campaign for Human Rights" and to make 1968 - the International Year for Human Rights - a new landmark in our common endeavour.

Seán MacBride
Secretary-General