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Ministerial Responsibility and the Proposed Lokpal:
Do they go hand in hand?

By

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"..... an Ombudsman can be fitted into almost any form of democratic Constitution. Very few public institutions have this degree of Universality....."
H.W.R. Wade

I am one of those who believe that our ministers like Caesar's wife should be above suspicion. This is very necessary for the sustenance. This is very necessary for the sustenance of Parliamentary democracy. If we wish that democracy should take deep roots in India, if we desire that parliamentary institutions should be the way of life of Indian polity, we shall have to make calculated efforts to circle the goal.

In 1950, the Constitution of India promised a 'Welfare' State.¹ Welfare State means more of State 'activity'. This speaks for more effective means of controlling the activity of the government both within and without the Parliament. Inside the Parliament, ministers are collectively responsible to it. This principle has been enunciated in Article 75 of the Indian Constitution and is based upon the English convention. It means that ministers are, as a body, responsible to Parliament. The principle cannot be better explained than in the words of Lord Morley.²

"As a general rule every important piece of departmental policy is taken to commit the entire cabinet and its members stand or fall together.... The cabinet is a unit - a unit as regards the sovereign, and a unit as regards the legislature. Its views are laid before the Sovereign and

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1. Preamble to the Constitution of India.

2. Constitutional Law, p.322.

before Parliament, as if they were the views of one man."

Besides this, in England, each Minister is also responsible to Parliament and Parliament may sometimes insist on the resignation of an individual minister, rather than the resignation of the entire cabinet. There is no provision in our Constitution for the individual responsibility of ministers to Parliament for Clause 3 of Art.75 reads: "The Council of ministers shall be collectively responsible to the House of People."

Is the present day control exercised by the Parliament sufficient to keep the government within its bounds? No, for the Parliament could control the 19th century government but cannot do so of the 20th. This is because of the present day position of the executive. The executive enjoys an overwhelming position. It cannot be defeated in the House for it has the backing of the absolute majority. It cannot be opposed effectively by an easily ignorable minority. It exercises power in the nature of 'Touch me Not'. In fact, it functions like the 'superpower'. Montesquieu once said:-

"Only power can match power"

And to this J.D.B.Mitchell adds:

"The power of a court is needed to match the power of the government."

This means two things that Parliament has proved to be an impotent body to control the government and some other agency is needed to act as the watchdog of the government activity.

The world in the field of administration has experimented with two systems namely the system of French Administrative Courts known as Conseil d'Etat and the institution of Ombudsman.³ Ombudsman today is a 'household' word.⁴ A new religion, a new enthusiasm - 'Ombudsmania' has been sweeping through

3. Ombudsman is a strange word, foreign too, difficult to pronounce and difficult to understand and still a very powerful friend of the citizen. According to Swedish-English Dictionary, it means 'Solicitor'. According to Danish-English Dictionary, 'Ombud' means 'Public Duty'. In English language publications, Ombudsman has been translated as 'Parliamentary Commissioner'. Basically, an Ombudsman is an appointee of the Parliament.

4. The Ombudsman: The citizen's Defender, H.W.R.Wade in law and the Commonwealth p.3.

the democratic countries.⁵ In India also, it is proposed to have an institution like the Ombudsman known as Lokpal.⁶ In this respect, there is a Constitutional hurdle: Will the proposed Lokpal outrage the 'virginal purity'⁷ of the principle of ministerial responsibility to the Parliament. An effort is being made in this paper to examine this aspect of the problem.

There are some of the view that this will be a serious invasion of the Parliamentary responsibility of the ministers. The Justice Report reported⁸ that a minister is responsible for the efficient administration of his department, and he would find it difficult, if not impossible, to discharge his duty if an independent body, could, as of right, enter his department and investigate allegations of maladministrations without his permission. P.B.Mukharji speaking in the memory of Chimanlal Setalvad said that an Ombudsman is contrary to the basic letter and basic spirit of the Indian Constitution and unless one is prepared to throw the whole Indian Constitution, lock, stock and barrel, overboard, an Ombudsman cannot fit into the Indian Constitution. It will denigrate the Constitution. It will denigrate the Constitution. It will denigrate the Judiciary. It will denigrate Parliament and the State Legislatures.⁹ P.K.Tripathi fears that if the actions of a minister himself (as distinguished from the actions of the departments under him) are brought within the purview of the proposed institution, the institution of responsible

5. Ibid.

6. Lokpal, the Indian name for Ombudsman means Tribune of the people. The Lokpal and Lokayuktas Bill was introduced in the Lok Sabha on May 9, 1968, and was passed on August 20, 1969. It was pending for the consideration of the Rajya Sabha when the Lok Sabha was dissolved in Dec. 1970 and as a consequence the Bill automatically lapsed (Article 107(5)). The Bill was re-introduced in the newly constituted Lok Sabha on 11th August, 1971. Almost two years have passed since then and still it is pending.

7. The expression used by S.K. Aggarwal- in his book: The Proposed Indian Ombudsman. p.13.

8. "Justice" is the English section of the International Commission of Jurists. It submitted a report on: "The citizen and the Administration- The Redress of Grievances" in 1961, Sir John Whyatt in this report proposed that the minister should have the power to veto any proposed investigation by the Parliamentary Commissioner of a complaint against his department

Government in a Parliamentary system will break down and the identity of the Constitution will be impaired.¹⁰

To my mind this opposition was temporary like the brief honeymoon period. I say this on the basis of the experience of other systems and the constitutional position. In Sweden, where the Ombudsman took birth and in Norway, ministers are not within the ambit of Ombudsman. Civil servants in Sweden are not under the control of the ministers; ministers cannot give any direction or order to the civil servants in regard to particular matters. Civil servants are free to take any administrative action they choose according to their own judgment. Ministers can only give general orders or instructions for the implementation of the policy adopted by them. Since, it is the civil servants and not the ministers who run the day to day administration, it was thought wise to keep the ministers away from the Ombudsman's reach. In Norway, although decisions of cabinet are not subject to criticism by the Ombudsman, the acts of individual ministers as the heads of the ministries are liable to be scrutinized by the Ombudsman. The Ombudsman cannot deal with any complaint if the subject to which it pertains "has already been considered by the storting, the odelsting, or the standing committee on Parliamentary Control."¹¹ This clearly indicates that something which becomes a part of the 'Parliamentary' proceedings, it cannot be looked into by the Ombudsman.

(f.n.8.....)

and also recommended that with a view not to disturb the traditional channels of complaint against the actions of the Executive through Parliament, during an initial and testing period, the Parliamentary Commissioner should consider the complaints only on a reference from a Member of either House of Parliament.

9. Justice P.B. Mukharji is the Chief Justice of Calcutta High Court. He delivered Chiman Lal Setalvad memorial Law Lectures at the University of Bombay in the year 1966. These lectures have been compiled in the book- "The Critical Problems of the Indian Constitution." p.178
10. Prof. P.K. Tripathi- Member, Law Commission of India: "The Lokpal: "The Proposed Indian Ombudsman", 9 JILI (1967) p.142-49."
11. Under the Act of 1962, the storting on Nov. 8, 1962, promulgated rules for the Ombudsman's guidance. This bar is provided in Rule 5(3).

On the other hand, ministers are directly within the Jurisdiction of the Ombudsman in Finland and Denmark. In Finland, the Ombudsman is a vital and of the Parliament. The real source of the Ombudsman's authority is Parliament- which elects him, on whose behalf in a way he is acting and to whom he gives a yearly report on his activities. His independence is further emphasised by the fact that Parliament cannot dismiss him during his term of office. Since the Ombudsman is an integral part of the Parliament and not an institution outside the Parliament, the fact of the ministers being within his jurisdiction does not at all class with ministerial responsibility.¹² Denmark has lived under a democratic constitution since 1849. The ministers are responsible to the Folketing (Legislative Assembly) for the efficient administration of their departments. This means that they are responsible for the activities of civil servants and other State employees as well as for their personal acts. Danish Courts have not been afraid of criticising the administration. Nevertheless, it was felt that the existing remedies were not sufficient. The Parliamentary Committee of 1946 recommended in favour of the Ombudsman Institution. It was of the opinion that Ombudsman's supervision over the ministers will create no insurmountable difficulties as to ministerial responsibility. Danish Constitution of 1953 provided for an Ombudsman. And under the Act of 1954, the Ombudsman has powers to supervise all State Administration which means ministers included.¹³ The prediction of the Parliamentary Committee that such control will not interfere with ministerial responsibility has turned out to be true. Miss I.M. Perdersen¹⁴ has pointed out that one of the reasons for this is that the Ombudsman has categorically refused to let himself be used, directly or indirectly, as a tool of the politicians or as a weapon in the hands of the opposition parties in the Folketing. His position was made clear in several test cases put before him during his first year. In one of them, he states his principles in no uncertain terms. The case concerns the right of the

12. Balram K. Gupta: "Constitutional Feasibility of the Institution of Lokpal" (1971) I SCJ p.22.

13. Section 4.

14. Judge of the City Court of Copenhagen, in her essay on 'Denmark's Ombudsman' in Donald C. Rowat's book 'The Ombudsman- Citizens' Defender, p.78.

Government to overdraw its account with the National Bank.

The Ombudsman says:

"It must be conceded that there is limit to the powers of a Government to draw upon its account.... to cover expenses granted by the Folketing, but where this limit is to be drawn must depend upon political not legal factors. For this reason, I am not competent to give an opinion on the subject. The rule of ministerial responsibility must afford protection..... against abuses." All these years, Ombudsman has worked inspite of the ministers responsibility to the Folketing.

Reference to the common-law countries experience is very necessary. New Zealand is the first common-law country to experiment with this institution. They preferred to keep the ministers away from Ombudsman's reach as Prof. Mitchell was of the view that the doctrine of sovereignty of Parliament cannot accept any amendment, even in the form of an Ombudsman.¹⁵ In fact, when the proposal for Ombudsman was circulated, it was dubbed as 'SHEER HUMBUG' and 'HALF BAKED'.¹⁶ But the past working of this institution since 1962 has proved it otherwise. No jurisdiction over Ministers has made no difference for the Ombudsman has the right to investigate the recommendation made by the department concerned to the Minister and through such a review he can indirectly express his views on the expediency or propriety of the Minister's decision. If the minister disagrees with the departmental recommendation made to him, and the Ombudsman later holds the recommendation to be justified, then it indirectly amounts to saying that the minister's decision in not accepting the departmental recommendation was not right. On the other hand, if the minister accepts the departmental recommendation, and if the Ombudsman later holds the recommendation to be wrong, then it amounts to saying indirectly that the ministers' decision was also wrong.¹⁷

15. Doubts and Hopes about Lokpal: Parliamentary Studies, March, 1968- p.15.

16. Gellhcru's Ombudsman and others p.91.

17. Jain and Jain's Principles of Administrative Law, p.490.

Same is the view of Professor J.F. Northey.¹⁸ This means that though the ministers are not his field and yet he reviews their decisions without breaking Parliament's control over them.

The British administrative wisdom in this respect is also worth recalling. In sixties when the proposal to appoint a British Ombudsman was being considered, it produced some sturdy opponents. Some said that the proposal would weaken the power of individual Members of Parliament and thus do more to jeopardise individual rights than to protect them. Others said that the office would rapidly become a reduction ad absurdum. It was argued that we would just be creating yet another layer of bureaucracy which would ultimately need its own Ombudsman. That is why, the British White Paper on this point uttered the caution in the following terms:

"In Britain, Parliament is the place for ventilating the grievances of the citizens—by history, tradition and past and present practice. We do not want to create any new institution which would erode the functions of members of Parliament. We shall give members of Parliament a better instrument which they can use in this respect."

The British Parliament enacted the Parliamentary Commissioner Act in 1967 and the first Parliamentary Commissioner was appointed on April 1 (I wonder why on this particular date). Under the Act any member of Public who claims to have sustained injustice is required to make a complaint to a member of the House of Commons who would after examining the complaint refer it to the Parliamentary Commissioner for investigation.¹⁹ This route through the member of House of Commons has been provided to maintain the direct link between the Parliament and the Parliamentary Commissioner for investigation.¹⁹ This route through

18. "New Zealand's Parliament Commissioner" by J.F. Northey in Donald C. Rowat's book titled "The Ombudsman- citizen's Defender", 2nd Ed., 1968, p.136-37.

19. Sec.5 of the Parliamentary Commissioner Act, 1967.

the member of House of Commons has been provided to maintain the direct link between the Parliament and the Parliamentary Commissioner.²⁰ Niall McDermot explained that this procedure stemmed directly from the whole conception of the Commissioner as an officer of Parliament. He envisaged the Commissioner supplementing rather than supplanting Members of Parliament as protectors of the rights of individuals.²¹

Commenting upon British system, Justice P.B. Mukharji has said:²²

"Therefore, the British Commissioner is only a servant of the House of Commons and able to act only at the instance of the members of Parliament, to whom the individual citizens must make their complaints. One only hopes that Indian statesmanship will see the wisdom of these words, of caution before creating this new institution in pursuit of a scandinavian model, irrelevant and detrimental to the principles enshrined in the Indian Constitution."

It is very difficult to subscribe to this view. Ministerial responsibility is something of an impediment to the development of administrative

20. The Justice report had recommended that for an experimental period of five years complaints should be referred to the Ombudsman only by M.P.'s of both Houses of Parliament. Under the Act, it is a permanent feature and not a temporary one. Another suggestion given was that before starting an investigation, the Parliamentary Commissioner should notify the minister of the department concerned who would be entitled to veto the investigation and the minister should have the right to claim crown's Privilege in respect of documents. This has been discarded by the British Parliament as it has not been provided under the Act.
21. Mr. Niall McDermot was the Member Parliament who replied on behalf of the government with regard to the Bill on Parliamentary Commissioner: 18th Oct., 1966, H.R. Deb. 734, cc. 42-172. Mr. McDermot's speech is cc. 162-73.
22. Supra note 9, p. 177.

law. The doctrine that a minister is responsible in Parliament for all his acts of administration is easily turned into an argument that he ought not to be responsible anywhere else. Administrative Justice demands some regular, efficient and non-political system of investigating individual complaints against the powers that be. This is exactly what ministerial responsibility does not provide.²³ Ombudsman fills up this gap of ministerial responsibility. Ombudsman is Parliamentary Panchayat. It is the spine and substance of Parliamentary life.²⁴ Twentieth Century is the century of common man. Raison d'etre for having Ombudsman is that it helps in the working of Parliamentary democracy being a powerful friend of the common-people. There cannot be greater injustice to Ombudsman than to discard it even without trying it. It is just like hateing 'marriage' without getting married.

The Administrative Reforms Commission of India took note of this constitutional problem when it reported²⁵ that we have given careful thought to the problem of including or excluding ministerial decisions and have come to the conclusion that these should be include within the scope of the investigation of the proposed institution. It added that the ministerial responsibility to Parliament would not be diluted but strengthened by the establishment of this institution, Ministerial responsibility to Parliament would be impaired only if a body outside the Parliament investigates into the actions of the ministers. In this context, a very important question arises as to whether the proposed Lokpal in India will be within the reach of Parliament or beyond? Lokpal will essentially be an officer of Parliament, eyes and ears of Parliament.²⁶ Lokpal cannot be regarded as anything foreign to the Parliamentary form of government.²⁷ To look into this

23. H.W.R.Wade's Administrative Law, 1961 Ed.p.11.

24. Mrs.Takehwari Singha: LSD, April 23,1965 p.10852.

25. The Administrative Reforms Commission on "Problems of Redress of Citizens' Grievances" was appointed by the President on 5th January, 1966. It submitted its interim report on Oct.20,1966. pp.16-17.

26. Parliament and Administration in India, P.K.Tripathi, p.179.

question further, it is necessary to refer to the provisions of the proposed Bill as to how the Lokpal is going to be appointed and how is he going to be removed. Under the proposed Bill²⁸ the President of India shall appoint the Lokpal after consultation with the Chief Justice of India and the Leader of the Opposition in the House of People or if there is no such leader, a person elected in this behalf by the members of the opposition in that House in such manner as the Speaker may direct.²⁹ With regard to removal, it is provided that the Lokpal may be removed subject to Article 311 by the President on the ground of misbehaviour or incapacity and on no other ground. It is further provided that the President shall not remove the Lokpal unless an address by each House of Parliament supported by a majority of the total membership of that House and a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal.³⁰ So both with regard to the appointment and removal, Parliament will be required to play a very vital part. The very pulse of the Lokpal will be in the hands of Parliament. The majority party with its majority will not find it difficult to dispense with the services of a Lokpal who misbehaves in any manner. Prof. Tripathi has suggested that the Lokpal should be directly elected by the Parliament.³¹ This may not be practicable for if there is opposition by the opposition in the Parliament to the ruling party's candidate, it will not be a healthy tradition. It would be much better if the recommendation of the Administrative Reforms Commission is carried out that the President should appoint the Lokpal on the advice of the Prime Minister who in turn would consult the Chief Justice of India and the Leader of the opposition in the Lok Sabha. This will ensure better the confidence of the Parliament in the Lokpal.

27. Dr. M.P. Jain's article Ombudsman- A Technique of Parliament and Administration in India p.117.

28. The Lokpal and Lokayuktas Bill No.111 of 1971.

29. Section 3 of the Proposed Bill.

30. Section 6.

31. Parliament and Administration in India- p.181.

Another factor which cannot be overlooked is that the Lokpal or the Ombudsman has only recommendatory powers. Donald C. Rowat while pointing out the three essential features of the Ombudsman system has said that the Ombudsman has the power to investigate, criticise and publicize but not to reverse administrative action.³² In Sweden, the Ombudsman has been given the power to initiate criminal proceedings. In Denmark, he can demand that the criminal proceedings be started. In Norway and New Zealand, he can recommend criminal proceedings. In England, he is to make a report to the Parliament. In India, the Lokpal will be making a report to the President. His teeth are not being made sharp enough. If the Lokpal is satisfied with the action taken or proposed to be taken on his recommendations or findings, he shall close the case but where he is not so satisfied and if he considers that the case so deserves, he may make a special report upon the case to the President who would place it before the Parliament.³³ All this suggests that Lokpal will have no power to upset the decisions but only to comment upon them. Professor Tripathi makes his strong opposition for the Lokpal when he says that a little reflection will show that an inquiry and a report by a Lokpal to Parliament can generate an explosive situation which, in combination with other factors may blow off a popularly elected government merely because it differed with the Lokpal on a matter of policy.³⁴ A strong opposition is the backbone of democracy - It is the strength of democracy. It is in fact a part of democracy without which democracy will be orphan. True, it is that the report of the Lokpal would be another weapon in the armoury of the opposition but then after all what is wrong

32. Preface to 2nd Edition of 'The Ombudsman - citizen's Defender' p. XXIV.

33. Section 12.

34. Journal of Indian Law Institute, Vol.9, 1967 p. 135.

with it? Lokpal will be merely feeding the Parliament with the desired information so that the matter may be dealt with at length. This would make it possible for the Parliament to be effective in its supervisory role. This would help in keeping the Government alert and each action will be a calculated one. Has anybody ever suggested that the Crichton Down enquiry of 1954 in England was inconsistent with ministerial responsibility? Is not the inquiry held by Lord Denning into the Profumo affair a classic example of how the Lokpal would work in practice? Has anyone ever pointed out that the Das Commission's looking into the affairs of the Panjab Kairon Ministry was violative of ministerial responsibility? Often Commissions are appointed under the Commission of Inquiries Act, 1952 to inquire into the actions of various Ministers. 35 These Commissions do not impinge upon the principle of ministerial responsibility because of the nature of functions these Commissions perform. Chief Justice S.R. Das has said that the only power the Commission has is to inquire and make a report and embody therein its recommendations. The Commission has no power of adjudication in the sense of passing an order which may be enforced proprio vigore.³⁶ The commission is a fact finding body meant only to instruct the mind of the government without producing any document of Judicial nature.³⁷ The Commissions cannot deliver judgements, cannot evolve law. Exactly same is

35. To give a few examples: Chagla Commission was appointed to inquire into Mundhra deals, Ayyangar Commission to inquire into the allegations of corruption against Prime Minister of Jammu and Kashmir, Bakshi Ghulam Mohammed, Khanna Commission to inquire into the charges against Chief Ministers Sri Biju Patnaik, Sri Biren Mitra, Sri Tripathy.
36. R.K. Dalmia v. Justice Tendolkar, A.I.R.1958 S.C. 538 at p. 546.
37. Allen Berry and Co. v. Vivian Bose, A.I.R. 1960 Punj. 86.

the nature of functions of the proposed Lokpal. The purpose of Lokpal is to provide regular machinery for investigating grievances against administration in a discreet and informed way by contrast with the formality and publicity of adhoc inquiries. In fact the Lokpal would help to make ministerial responsibility more effective. He would penetrate the screen which ministers interpose between members of Parliament and government departments. The responsibility would remain the same as at present, neither more nor less.

No one suggests that the functions of the comptroller and Auditor-General conflict with ministerial responsibility. He has a far wider net work of agents in the departments than the Lokpal would ever have. His function is to supply factual information for the consumption of the Parliament. The Lokpal's functions would essentially be similar. The only difference being that they would extend to administrative standards generally and not merely to expenditure. Both are fault-finding authorities though operating in different fields. Lokpal will function like the auditor-general of human relations accounts.

Chief Justice Sarkar says that it is of public importance that public men failing in their duty should be called upon to face the consequences. It is certainly a matter of importance to the public that lapses on the part of the ministers should be exposed.³⁸ If we wish to save democracy and inject a clear political life, Lokpal is the answer to this.

The British Section of the International Commission of Jurists opines: "It is difficult to see what is in the minds of those who make an objection out of ministerial responsibility. If they feel that a minister must have exclusive responsibility for investigating errors in his department, the answer is that the doctrine has never required this....."

It is a decade now that the talk of Lokpal began in India. Probably this is the only example where it has taken so much of time to take birth. Any delay in this matter will prove to be perilous and hazardous to our Parliamentary democracy. Sooner The Better!

38. A.I.R. 1967 S.C. 122

