A COMMITMENT TO OFFICIAL INTEGRITY

(Background, Rationale and Explanation of Article XIII, *Sandiganbayan* and *Tanodbayan*)

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The 1973 Constitution was framed at a time when an unmistakable scent of crisis was in the air. The 1971 Constitutional Convention was itself ushered in with mixed feelings of hope and misgiving. On the one hand, the political, social and economic conditions in the country had so deteriorated that the more optimistic of our people pinned their last hopes for a peaceful revolution on the Convention which, they supposed, could not have worsened the situation. On the other hand, there were those who believed that the country's ills were so deep-rooted that nothing short of an actual call to arms could bring about the metamorphosis desired, and that, therefore, the Convention could be nothing more nor less than an exercise in futility.

In such an atmosphere, it is only natural that the 1973 Constitution has been much abused along with those who drafted it. The initial lack of direction of the Convention, the sedentary manner in which it first conducted its activities, the "suspicious dispatch" with which constitutional provisions of a controversial character were later approved caused the disillusionment of even the most hopeful, and seemed to justify the earlier skepticism of the others and the arrogance with which they later said, "I told you so". The spate of accusations against the delegates, and the vituperations against the Convention were hurled equally against the product of their effort. Thus, from the outset, the new charter was not fated to merit the encomium of the people, but was destined to be received with suspicion and apprehension brought about by the angry condemnation of the body which drafted it and the forces which shaped it.

But for all this, the 1973 Constitution cannot be made to stand in the pillory. Whatever else may be said of the ignominious manner in which the Convention may have conducted itself, it cannot for one moment be doubted that there is much in the new Charter which deserves approbation. In a word, the new Constitution stands for *reform*.

The new Constitution injects reform in an area which most badly needs it — public service. "Article XIII — ACCOUNTABILITY OF

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PUBLIC OFFICERS" is unique not only because it presents provisions which, together, are a succinct expression of the State's renewed commitment to a more responsive and responsible government, but also because it introduces two complementary agencies whose names and functions can incite one's curiosity and excite one's imagination. What are *Sandiganbayan* and *Tanodbayan*? What do their names mean? What do they stand for? How shall they function? are but a few of the questions for which one naturally seeks an answer.

Within the limits of this paper, this writer aims to answer these and other related questions by briefly looking into the background in the Convention of Article XIII and its six sections. This paper shall be limited, however, to an explanation of the rationale behind, the justifications for, and the origins of Article XIII, *Sandiganbayan* and *Tanodbayan*, and shall deal with the provisions on impeachment only as they relate to the general principle underlying Article XIII.

I

ARTICLE XIII – ACCOUNTABILITY OF PUBLIC OFFICERS

Background in the Convention

On 23 October 1972, the 1971 Constitutional Convention created a 166-Man Special Committee to frame a draft of the new Constitution to be considered by the Convention in Plenary Session. This Special Committee created an *ad hoc* panel which prepared the first "Official Working Draft of the New Constitution," dated 30 October 1972 (hereafter referred to and cited as the Draft of October 30, 1972), based on the various reports of the different organic committees of the Convention, and the proposals already approved by the Convention in Plenary Session. In this draft, the provisions now found in Article XIII of the 1973 Constitution were first included in Articles XIII, II, V, and XV.

Article XIII was entitled "IMPEACHMENT" and contained only three sections.[1]

Article II was entitled "DECLARATION OF PRINCIPLES AND STATE POLICIES". Section 8 thereof provided:

> **Section 8. Public office is a public trust and public servants shall at all times be accountable to the people.[2]**

Article V was entitled "DUTIES AND OBLIGATIONS" and in Section 4 thereof provided:

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[1] Draft of October 30, 1972, pp. 44-45.
[2] Draft of October 30, 1972, p. 3, lines 11-12.

> Section 4. Every public official shall serve the people with the highest degree of responsibility, integrity, loyalty, and efficiency.[3]

In Article XV entitled "GENERAL PROVISIONS", two sections were disagreeably conspicuous — Sections 15 and 16, providing for the creation of an Ombudsman Commission and *Sandigambayan,* respectively.[4] The Ombudsman Commission was not included in the proposed Article XII on "Constitutional Bodies" because it was thought that the details and amplifications of such an office could be better provided for by legislation. On the other hand, *Sandigambayan* could not be included in Article X on "The Judiciary" because the sentiment then prevailed in the Convention that no court other than the Supreme Court should be constitutionally created. Thus, *Sandigambayan* would have been equally out of place in the Judiciary Article as in the Article on General Provisions.

It was a curious arrangement, because the Ombudsman Commission and *Sandigambayan* were found in the same Article with such other provisions as those relating to the Philippine flag, the national seal, the national language, the citizen army and the like. As the last two sections of the Article, Sections 15 and 16 led one to suspect that the Ombudsman Commission and *Sandigambayan* were mere afterthoughts. As a matter of fact they were: the Ombudsman Commission and *Sandigambayan* were incorporated in Article XV merely as a concession to their two main proponents — Delegates Rodolfo D. Robles and Augusto L. Syjuco, Jr., respectively. The concession, however, was short-lived. In the next official draft of the new Constitution, these two sections were deleted.

Amendments to the October 30 draft were filed individually by the Delegates and jointly by the Steering Council and the Panel of Floor Leaders. Among these was Proposed Amendment No. 319 filed on 3 November 1972 by Delegate Syjuco, who proposed to change the coverage and title of Article XIII from "Impeachment" to "ACCOUNTABILITY OF PUBLIC SERVANTS", to include the provisions referring to "responsibility, answerability, and liability of public servants to the people".[5]

The proposal to incorporate these provisions of the October 30 draft, namely, Section 8 of Article II, Section 4 of Article V, Sections 1 to 3 of the original Article XIII, and Sections 15 and 16 of Article XV,

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[3] Draft of October 30, 1972, p. 9, lines 23-25.
[4] Draft of October 30, 1972, p. 56, lines 14-20 & 23-26.
[5] Proposed Amendment No. 319 to the Draft of October 30, 1972, filed by Delegate Augusto L. Syjuco, Jr., 3 November 1972, hereafter cited as Prop. Am. No. 319, p. 1.

in Article XIII as expanded to "Accountability of Public Servants" was justified in this manner:

> In the present Official Working Draft, these provisions are scattered, one being found in Article II on Declaration of Principles and State Policies; one, in Article V on duties and obligations; some, in Article XIII on Impeachment; and still others, in Article XV on General Provisions. Most of these provisions are misplaced where they are. * * * *
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> Besides unity and clarity, putting these provisions together achieves yet another objective. As it is, being scattered all over the body of the proposed Constitution, these provisions relative to official responsibility and accountability lose much of their pith.
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> If grouped under one heading, the force and vigor of these provisions shall neither be diffused nor dissipated but they shall reinforce each other to underscore both the legal and moral compulsion of this Constitutional mandate for and commitment to official integrity.[6]

The October 30 draft was submitted to the Steering Council which, after considering the amendments filed, submitted to the 166-Man Special Committee on 6 November 1972 a second draft entitled the "Revised Official Working Draft of the New Constitution" (hereafter referred to and cited as the Draft of November 6, 1972). In this draft, Article XIII remained entitled "Impeachment"; Section 8 of Article II and Section 4 of Article V were untouched; and Sections 15 and 16 of Article XV, providing for the Ombudsman and *Sandigambayan,* were totally deleted.

Amendments to the November 6 draft were again filed by the individual delegates and considered by the 166-Man Special Committee to which said draft was submitted. Among these was Proposed Amendment No. 261 filed by Delegate Syjuco on 8 November 1972, substantially reiterating the suggestions in his earlier Proposed Amendment No. 319, but also proposing an additional section to read:

> Section 7. In cases of criminal prosecution for graft and corrupt practices or other misconduct in public office only a preponderance of evidence shall be required for conviction.[7]

This proposed section was based on Section 19 of Article IV (Bill of Rights) of the November 6 draft.[8]

Proposed Amendment No. 261 found more favorable reception. In the third draft of the new Constitution, entitled the "Revised Official Working Draft of the New Constitution Incorporating Therein the

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[6] Prop. Am. No. 319, pp. 1-2.

[7] Proposed Amendment No. 261 to Draft of November 6, 1972, filed by Delegate Augusto L. Syjuco, Jr., 8 November 1972, hereafter cited as Prop. Am. No. 261, p. 4.

[8] Draft of November 6, 1972, p. 8, lines 5-7.

Amendments Accepted by the Steering Council and the Panel of Floor Leaders" (hereafter referred to and cited as the Draft of November 15, 1972), adopted by the 166-Man Special Committee on 15 November 1972, Article XIII was now entitled "Accountability of Public Officials".

This new article contained 6 sections. Section 1 was a consolidation of Section 8 of Article II and Section 4 of Article V of the two previous drafts of the Constitution, and was a verbatim reproduction of the proposed Section 1 in Proposed Amendment Nos. 319 and 261. Sections 2, 3, and 4 provided for the process of impeachment and were based substantially on Sections 1, 2, and 3 of Article XIII of the two previous drafts of the Constitution. Sections 5 and 6 provided for the creation of *Sandigambayan* and *Tanodbayan,* respectively.

The proposed Section 7 in Proposed Amendment No. 261 requiring a mere preponderance of evidence for conviction in graft and corruption cases was not adopted. In fact, the very provision on which the proposed section was based was itself deleted from Article IV (Bill of Rights).[9]

In the fourth draft of the new Constitution, submitted by the 166-Man Special Committee on 24 November 1972, and referred to as the "Convention Draft of the New Constitution" (hereafter referred to and cited as the Draft of November 24, 1972), Article XIII became "Accountability of Public Officers". This fourth draft was later replaced by a fifth which was approved on second reading by the Convention in Plenary Session on 27 November 1972, and on third reading on 29 November 1972, and subsequently signed by the delegates on 30 November 1972.

The Rationale Behind Article XIII

A discussion of how Article XIII came to be calls to mind the well-worn saying "necessity is the mother of invention". The Committee on Constitutional Bodies proposed the Ombudsman Commission, and the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts jointly proposed a special anti-graft court to be known as *Sandigambayan.* First included in the October 30 draft of the new Constitution, these two agencies were later deleted in the subsequent draft. Clearly, if they were to be retained in the new Charter, if the urgency of the need for their creation was to be underscored, the philosophical basis for such a need had to be enshrined in the fundamental law. Only Article XIII (then entitled "Impeachment") could provide the locus.

The deletion of the Ombudsman Commission and *Sandigambayan* from the October 30 draft was anticipated. Not only were these two

[9] Draft of November 15, 1972, p. 8, lines 27-29.

agencies out of place in Article XV (General Provisions), but also, the thinking had developed and spread in the Convention that there would be no place in the Constitution for specialized agencies, especially in view of the adoption of the parliamentary system. It was thought that the freedom of action of the law-making body ought not to be confined by too many specialized agencies.

But it was not the creation, *per se*, of the two agencies which was of any value to their sponsors. Rather, it was the constitutionalization of the concept of good government for which they would stand.[10] The Ombudsman Commission and *Sandigambayan* would signify the people's resolve to establish a government which was responsive and responsible. They would manifest the nation's commitment to official integrity. They would proclaim the birth of a new breed of public servants.

Sandigambayan and the Ombudsman Commission were deleted because the approach was all wrong. In explaining the rationale behind Article XIII, Delegate Syjuco, upon whose Proposed Amendment No. 261 it was primarily based, had this to say:

> [The] mechanistic idea we had of government, the idea that government is nothing but a web of departments and commissions, of agencies and offices led us to confuse our priorities. We assumed that the crucial pivot was the creation of *Sandigambayan* and *Tanodbayan* when in fact our main concern was not so much their establishment as the enshrinement in the Constitution of their mission, the mandate to develop, sustain and ensure good government. Not the apparatus but the aspiration, not the how but the why, not the agency but the concept is paramount; for once the concept of good government is constitutionalized, the creation of *Sandigambayan* and *Tanodbayan* would follow as a matter of course.[11]

In the search for a solution, Section 8 of Article II and Section 4 of Article V of the October 30 draft yielded some inspiration. Section 8 provided: "Public office is a public trust and public servants shall at all times be *accountable* to the people."[12] Section 4 stated: "Every public official shall serve the people with the highest degree of responsibility, integrity, loyalty, and efficiency."[13] An examination of the other provisions in Article II and Article IV revealed the fact that the two above-quoted sections were misplaced. In Article II on Declaration of Principles and State Policies, all the other provisions laid down policies to be pursued by the government based on principles established by the State; consequently, the provisions of Article II imposed corresponding duties

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[10] Augusto L. Syjuco, Jr., Sponsorship speech on Article XIII — Accountability of Public Officers, Plenary Session No. 285, 24 November 1972.

[11] *Ibid.*

[12] Draft of October 30, 1972, p. 3, lines 11-12; underscoring supplied.

[13] Draft of October 30, 1972, p. 9, lines 23-25.

on the government, except Section 8 which referred only to public servants. In Article V on Duties and Obligations, the other provisions imposed obligations upon the citizenry in general; only Section 4 was limited to a class of citizens — public officials. Evidently, a consolidation was necessary.

The germ of the concept of Article XIII had been found: it was to be that portion of the fundamental law governing the responsibility and accountability of all those who serve in the name of the people. At this point, the Constitution of Mexico[14] gave a final reassurance. Title IV of the Mexican Constitution is entitled "Regarding the Responsibility of Public Officials" and provides for the removal and accountability of public officials and employees.[15]

The scattered provisions in the October 30 draft of the new Constitution, and Title IV of the Mexican Constitution sparked some questions:

> * * * If the Constitution is a directive to all public officials, why should Article XIII merely dwell on removal by impeachment which concerns only 27 constitutional officers?
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> If our people's clamor for integrity in the entirety of government is so urgent, why not give it due and expressed recognition in the fundamental law of the land?
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> If government needs house-cleaning from roof to cellar, why not accord this task its own niche in the new Constitution?
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> If public servants must be accountable to the people, why not enshrine such accountability in a single unified Article?[16]

Thus was Article XIII conceived.

Section 1: The Underlying Principle

"Public office is a public trust." This principle underlies the entire Article XIII of the new Constitution and provides the philosophical basis for the rest of the provisions. In recommending this categorical statement for inclusion in the new Constitution, the Committee on Duties and Obligations of Citizens and Ethics of Public Officials said:

> In our system of government, one of the unwritten principles which every intendment of law and public policy seeks to woo and guard is that public office is a public trust. Public office is not, strictly speaking, a property right nor a grant or contract or obligation which cannot be impaired, but a public agency or trust. There is no such thing as a vested interest or estate in office or even an

[14] Adopted by the Constitutional Convention in Queretaro, Mexico on 31 January 1971, as amended.

[15] MEXICAN CONST., Title IV, as cited in L. WOLF-PHILLIPS, (ED.), CONSTITUTIONS OF MODERN STATES 158-159 (1968).

[16] Syjuco, Jr., Sponsorship speech on Article XIII, *supra*, note 10.

> absolute right to hold office. Public offices are created for the purpose of effecting the end for which government has been instituted which is the common good, and not for the profit, honor, or private interest of any one man, family, or class of men. (Segovia vs. Noel, 47 Phil. 543; Brown vs. Russell, 43 N.E. 1005; Fergus vs. Russell, 110 N.E. 130; Morfe vs. Mutuc, G.R. No. 20387, Jan. 31, 1968). Because this principle is firmly rooted in our system, placing it in black and white in our constitution or in a statute was not deemed necessary.
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> However, the social, economic, political and moral vicissitudes which our country and people underwent rippled the constancy of our adherence to the principle and now it is more honored in the breach than in its observance. The concept has been prostituted.
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> The trust character of public offices must, therefore, be impressed, positively and categorically, upon public officials. The concept must be ingrained in their system, so to speak. A declaration of that principle in the constitution would, therefore, emphasize and strengthen the concept and would give it vigour and vitality. The written declaration will always serve as a reminder and a warning to public officials. It will remind them of the sacred character of their tasks and it will warn them that violation thereof would be nothing less than a sacrilege.
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> Furthermore, such a written principle would serve as basis or justification for specific constitutional provisions or legislative mandates intended to reinforce the concept by either requiring public officials to perform or comply with certain acts, or imposing upon them certain prohibitions, restrictions or limitations to canalize their actions within the narrow banks of virtue, or prescribing upon them certain ethical or moral standards which would enhance the faith of the citizens in the office and inspire respect for officials.[17]

A natural offshoot of this principle is Section 1's exhortation of responsibility and statement of accountability. Public servants are expected to discharge the trust inherent in their public office with the utmost devotion. And because sovereignty resides in the people and all government authority emanates from them,[18] it is imperative that all public servants should remain accountable to the people at all times.

This accountability only means that all public servants should be answerable to the people, from whom they receive their mandate, for all acts performed in connection with their office. This implies that no man, no matter how high or mighty, should be beyond the reach of the law. That a public servant who has reneged on his duty and breached the people's trust must be removed from office. That every public official or employee must render to the people the service that is due to them. Consequently, this implies too that if a citizen has cause for complaint, he must have speedy recourse to an impartial arbiter

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[17] Committee Report No. 01, Committee on Duties and Obligations of Citizens and Ethics of Public Officials, pp. 3-4, & 7-8.

[18] CONST., art. II, sec. 1.

who would see to it that those who caused his grievance will be made to answer accordingly before the law.

The principle that "public office is a public trust and public servants must remain accountable to the people" invests Article XIII with a cohesive force and provides the logic with which the rest of the provisions naturally follow. Sections 2, 3 and 4 provide for impeachment – the manner of removing the highest constitutional officials of the land who are, therefore, not beyond the reach of the law. Section 5 provides for the creation of *Sandiganbayan* before which all public servants, from the mightiest to the lowliest, may be prosecuted for offenses committed in relation to their office. Finally, Section 6 mandates the creation of *Tanodbayan* which shall provide every citizen with the means to air his grievances and complaints against the public service. In all of these, it is clear that a public office is always inviolable and must be so maintained, and that all public servants are answerable to the people for every breach of the public trust.

In Proposed Amendment Nos. 319 and 261 to the October 30 and November 6 drafts of the Constitution, respectively, Article XIII was first proposed to be entitled "Accountability of Public Servants". This was suggested in order to underscore the fact that, as sovereignty resides in the people and as all government authority emanates from them, every public official or employee is, in a very real sense, a *servant* of the people. This proposal, however, was not adopted by the Convention since the term "public servants" was generally considered too informal and therefore inappropriate for the fundamental law. Instead, Article XIII as expanded was first entitled "Accountability of Public Officials" in the November 15 draft of the Constitution. Ironically, however, Section 1 of Article XIII of this draft still provided that "every *public servant* shall serve with the highest degree of responsibility..."[19] The November 24 draft was more consistent, Article XIII having been entitled "Accountability of Public Officers" and Section 1 providing that "*public officers* and employees shall serve with the highest degree of responsibility..."[20]

The change from "Public Officials" to "Public Officers" in the title of Article XIII may not be as insignificant as it seems. It should be pointed out that while the former has about it connotations of rank not commonly applicable to ordinary employees, the latter has been understood in Philippine law to embrace both employees exercising purely ministerial functions and officers exercising discretionary functions.

[19] Draft of November 15, 1972, p. 50, lines 2-3; underscoring supplied.
[20] Draft of November 24, 1972, p. 64, lines 12-13; underscoring supplied.

For instance, Article 203 of the Revised Penal Code defines a public officer as "any person who, by direct provision of law, popular election or appointment by competent authority, shall perform in said Government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class. . ." Section 2(b) of Republic Act No. 3019 (Anti-Graft and Corrupt Practices Act) similarly provides that the term "public officer" "includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government. . ." In a similar vein, Republic Act No. 1379 (An Act Declaring Forfeiture in Favor of the State any Property Found to have been Unlawfully Acquired By Any Public Officer or Employee and Providing for the Proceedings Therefor) defines "public officer or employee" as "any person holding any public office or employment by virtue of an appointment, election or contract, and any person holding any office or employment, by appointment or contract, in any State owned or controlled corporation or enterprise." It is, of course, pointed out by Section 2 of the Revised Administrative Code (Act No. 2711) that the word "officer" as distinguished from "clerk" or "employee" refers only to "those officials whose duties, not being of a clerical or manual nature, may be considered to involve the exercise of discretion in the performance of the functions of government . . ." Nevertheless, the same section provides that when used in reference to a person having authority to do a particular act or perform a particular function in the exercise of governmental power, the word "officer" includes "any Government employee, agent, or body having authority to do the act or exercise the function in question."

Clearly, therefore, while a government employee cannot be called a "public official", whether in legal or ordinary parlance, he may be safely termed a "public officer" by provision of law.

Moreover, one who holds an "office" is certainly an "officer" but is not necessarily an "official". An "office" has been defined as "a public charge or employment."[21] Consequently, an "officer" has been variously defined as one who "performs the duties of an office,"[22] or "holds, or is an incumbent of an office,"[23] or "is lawfully invested with an office."[24] The term "officer" is therefore more neutral than either "servant" or

[21] 29 WORDS & PHRASES 290 (1940).
[22] *Ibid.*; State v. Dark, 195 La. 139, 196 So. 47 (1940), as cited in 67 C.J.S. 97 (1950).
[23] *Ibid.*
[24] Jeffers v. Wharton, 29 Ala. App. 428, 197 So. 352, 356 (1939), *certiorari* granted 240 Ala. 21, 197 So. 358 (1940), as cited in 67 C.J.S. 97 (1950).

"official" — the first carrying connotations of subservience, and the latter, of rank.

This then is the import of the change from "officials" to "officers" in the title of Article XIII — that the Article is comprehensive, embracing government officials and employees of all ranks.

Sections 2, 3, and 4: Impeachment

A very significant distinction between the provisions on impeachment of the 1935 and 1973 Constitutions is the inclusion in the latter of "graft and corruption" among the grounds for removal of the highest officials of the land. This is further indication of the Convention's concern for morality in public office and is in keeping with Article XIII's commitment to official integrity. The present provisions are also less exacting and make impeachment a more realistic process.

These provisions only followed a natural course. The sentiment had prevailed, long before the Convention was called, that the requirements for impeachment were unrealistic — that impeachment was, in the old charter, no more than a "paper tiger". The Convention, therefore, saw to it that the provisions on impeachment took into consideration the realities of everyday politics and human weaknesses.

In the October 30 draft, Section 2 of Article XIII (Impeachment) provided:

> **Section 2. The National Assembly shall have the exclusive power to initiate, try, and decide all cases of impeachment. It shall consider an impeachment case upon the filing of a verified complaint by at least an absolute majority of all its Members. No official shall be impeached without the concurrence of two-thirds of all the Members thereof.[25]**

This provision indicated that a verified complaint must be filed by at least an absolute majority of all the Members of the National Assembly in order that impeachment may be initiated. This, to say the least, was unreasonable. Verification requires personal knowledge of the subject of the complaint,[26] and is, therefore, difficult enough as it is to secure. It would be asking for too much that an absolute majority of all Members of the Assembly have personal knowledge of the ground upon which the impeachment may be based.

In the November 6 draft, the above section was amended to:

> **Section 2. The National Assembly shall have the exclusive power to initiate, try, and decide all cases of impeachment. It shall consider an impeachment case upon the filing of a verified complaint by at least one-tenth of all its Members. No official shall be impeached**

[25] Draft of October 30, 1972, p. 43, lines 23-28.
[26] See RULES OF COURT, Rule 7, sec. 6.

> without the concurrence of an absolute majority of all the Members thereof.[27]

This provision was an attempt to "liberalize" the stringent requirements for impeachment of the October 30 draft. Here, although a verified complaint still had to be filed in order that impeachment may be initiated, the number of complainants was lowered from "an absolute majority" to only "one-tenth" of all the Members of the Assembly. Likewise, the vote required to convict a person on impeachment was lowered from "two-thirds" to "an absolute majority". These requirements were, of course, a reaction to the howl of protests from different delegates who believed that impeachment requirements should not be made too difficult as to amount to a prohibition.

In the November 15 draft, the Convention came to a compromise:

> Section 3. The National Assembly shall have the exclusive power to initiate, try, and decide all cases of impeachment. Upon the filing of a verified complaint, the National Assembly may initiate impeachment by a vote of at least one-fifth of all its Members. No official shall be convicted without the concurrence of at least two-thirds of all the Members thereof.[28]

In the above, the vote requirements were again raised – from "one-tenth" to "one-fifth" to initiate impeachment, and from "an absolute majority" to "two-thirds" to convict. Another significant difference is the rewording of the second sentence of this section. The logical grammatical interpretation of this sentence as earlier constructed in the two previous drafts was that a verified complaint must be filed by the number of National Assembly Members specified. As worded in the November 15 draft, it was made clear that the one-fifth requirement referred not to the number of Assemblymen who must file the verified complaint but to the number of votes required to initiate impeachment upon the filing of a verified complaint, whether by a Member of the Assembly or by any other person. This was explained in Proposed Amendment No. 261 to the November 6 draft, upon which the above re-wording was based:

> The second sentence of this Section has been reworded to do away with ambiguities in interpretation. As worded in the Revised Draft, it is possible to interpret the second sentence such that a verified complaint must be filed by at least one-tenth of all the members of the National Assembly, which interpretation, it is believed, is not the intent therein.
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> It would be absurd, for instance, to require that one-tenth of all the members of the National Assembly would be required to have sufficient personal knowledge of facts to be able to file a verified complaint. It must be remembered that misstatement of facts in a writing under oath subjects the complainant to liability for perjury.

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[27] Draft of November 6, 1972, p. 39, lines 1-7.
[28] Draft of November 15, 1972, p. 50, lines 12-22.

> The grounds for impeachment are of such nature that very few witnesses, if any, would have direct knowledge of the facts surrounding the offense.
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> Thus, this sentence has been restyled, as indicated above in order to make clear what is believed to be the real intent: that the National Assembly may initiate impeachment upon the filing of a verified complaint provided that at least one-tenth of all the members of the National Assembly vote affirmatively to give due course to such complaint.[29]

On first impression, the action of the Convention above-outlined would seem to indicate an ambivalence in its attitude to impeachment. The requirements in the 1935 Constitution of two-thirds (of the membership of the House) to initiate, and three-fourths (of the membership of the Senate) to convict were first "relaxed" to an absolute majority to initiate and two-thirds to convict. Still being considered too "stringent", these were further "relaxed" to one-tenth to initiate and an absolute majority to convict. These last, the Convention thought, went a bit too far; while impeachment should not be made too difficult as to amount to a prohibition, neither should it be made too easy as to become a weapon in the hands of the party in power. Thus, finally a "compromise" was reached: one-fifth to initiate and two-thirds to convict.

The Convention's action, therefore, indicates, not so much an "ambivalence" as an honest search for the reasonable requirements, the pendulum having swung from one extreme to the other, until it finally rested at that point which struck the happy balance.

SANDIGANBAYAN

Background in the Convention

Sandigambayan was first conceived as an "ombudsman". However, in the process of amendment by the principal author himself, by the other co-authors, by the different organic Committees to which the *Sandigambayan* resolutions were referred, and by the Steering Council, the proposed agency was transformed from that of an "ombudsman" to a specialized anti-graft court.

On 5 August 1971, Delegate Augusto L. Syjuco, Jr. of the first district of Rizal filed CC Resolution No. 1848 "proposing the creation of an independent constitutional tribunal to be known as the *Sandigambayan*, having the exclusive power to impeach, remove or discipline all

[29] Prop. Am. No. 261, p. 2.

public servants."[30] The author labeled his proposed agency as an "ombudsman".

CC Resolution No. 1848-A, dated 9 September 1971, amending CC Resolution No. 1848, proposed *Sandigambayan* as a super administrative disciplinary agency with the power to impeach, remove, suspend or reprimand the appropriate government official or employee. The only function given to *Sandigambayan* partaking of that of an ombudsman was the power to investigate, *motu proprio* or upon complaint, all public servants other than those in the military service. This Resolution was later amended by CC Resolution No. 1848-B (now with 180 co-authors) which did not differ materially from the former.

At this stage in the proceedings of the Convention, the various resolutions filed by the delegates had already been classified and referred to the proper organic Committees for deliberation, consideration and recommendation. The *Sandigambayan* resolutions were referred to the Committees on Law Enforcement and Peace and Order, Administrative and Specialized Courts, and Constitutional Bodies. It was at this point that objections to *Sandigambayan* were received from different quarters. It was said to be too powerful. It was called a "frankenstein". It was accused of violating the fundamental precept that no man should be judge and prosecutor at the same time. Thus, to meet these objections (without necessarily recognizing their validity), especially in the Committee on Law Enforcement and Peace and Order which was principally considering the *Sandigambayan* resolution, the various co-authors of *Sandigambayan* again amended CC Resolution No. 1848-B with CC Resolution No. 1848-C dated 29 December 1971.

CC Resolution No. 1848-C was drastically different from its predecessors in that now it conceived of *Sandigambayan* as a constitutional agency with two divisions — a tribunal and a prosecution division — absorbed under a common umbrella. The tribunal's jurisdiction was divided into original jurisdiction to hear and decide disciplinary cases against various specified categories of important public servants, and appellate jurisdiction over disciplinary cases against minor officials and employees and members of the armed forces.

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[30] Actually, the name first given to the proposed agency was *Tanodbayan*, but the original Res. No. 1848 was informally withdrawn and replaced with another naming the proposed agency *Sandigambayan*. No official record, therefore, exists to show that at this stage in the Convention the name *Tanodbayan* was ever introduced. In a position paper entitled "Sandigambayan and Tanodbayan: Complementary Agencies for an Effective System of Discipline", enclosed with Communication No. 9 (Re: *Sandigambayan*) dated 19 October 1972, Delegate Syjuco first formally suggested the name *Tanodbayan* for the proposed ombudsman. It was only in Proposed Amendment No. 261 to the Draft of November 6, 1972 that the name *Tanodbayan* was first *officially* proposed.

The Committee on Law Enforcement and Peace and Order held executive sessions and committee hearings, some of them jointly with the other two earlier-mentioned Committees. Various speakers were invited to these hearings, among them Senator Sergio Osmeña, Jr., Mayor Ramon D. Bagatsing, and Justice Antonio P. Barredo, who all supported the concept of an administrative disciplinary agency constitutionally created. In the Joint Committee Hearing of the three above-named Committees on 18 November 1971, Justice Barredo cited as a possible model the Court of Industrial Relations where the court relies upon its own CIR prosecutors.

Finally, on 15 March 1972, the Committee on Law Enforcement and Peace and Order submitted to the Steering Council its Committee Report No. 16 proposing the creation of *Sandigambayan* with a tribunal and a prosecution division "which shall be functionally separate from each other".[31] As conceived by the Law Enforcement Committee, *Sandigambayan* was to have the following powers:[32] to initiate and prosecute impeachment cases; to remove, suspend, or reprimand specified categories of national officials and all local elective officials; to investigate, *motu proprio* or upon complaint, acts or omissions of all public servants;[33] to cause the prosecution of or itself directly prosecute administrative cases against civil and military officials and employees not falling within its power to impeach, remove, suspend, or reprimand; and to cause the prosecution of or itself directly prosecute criminal actions arising from misconduct in office against all civil and military officials and employees, and other persons who may be liable therefor.[34] The tribunal was to be composed of a Chairman and eight members.[35] Impeachment was to be initiated only upon a two-thirds vote of all members of the tribunal sitting in banc while all other cases may be heard and decided by one member of the tribunal.[36]

Meanwhile, the Committee on Constitutional Bodies had, on 25 January 1972, approved its proposed Article on the ombudsman. Having opted for the "pure" ombudsman concept, the Committee recommended, in its Committee Report No. 01, the creation of an Ombudsman Commission. The Committee on Administrative and Specialized Courts also

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[31] Prop. Art. on *Sandigambayan*, sec. 2 in Committee Report No. 16 dated 15 March 1972, Committee on Law Enforcement and Peace and Order, hereafter cited as Comm. Rep. No. 16.

[32] Prop. Art. on *Sandigambayan*, sec. 1, Comm. Rep. No. 16.

[33] The Law Enforcement Committee nowhere in its Report called the *Sandigambayan* an ombudsman. But the complaints-handling function is inherent in the office of an ombudsman.

[34] Again, the power to prosecute is a function usually associated with an ombudsman.

[35] Prop. Art. on *Sandigambayan*, sec. 2, Comm. Rep. No. 16.

[36] Prop. Art. on *Sandigambayan*, sec. 4, Comm. Rep. No. 16,

submitted its Committee Report No. 02 proposing the creation of an Anti-Graft Tribunal, a special anti-graft court with the power to hear and decide impeachment cases as well.[37]

The committee reports of the three above-named Committees were submitted for consolidation and harmonization of conflicting and overlapping provisions to the Steering Council which, on 15 June 1972, submitted Steering Council Report No. 21 whereby the prosecution aspect of *Sandigambayan* was consolidated with the Ombudsman Commission, and the adjudication aspect, with the Anti-Graft Tribunal (now called *Sandigambayan*). This new set-up was a radical departure from the original concept of *Sandigambayan,* because in this form, its jurisdiction had been shifted and enlarged from one, purely administrative in character to one, judicial in nature. *Sandigambayan* was then included in the harmonized draft Article on the Judicial Department. However, since at this stage it was given the power to impeach, among others, the Justices of the Supreme Court, *Sandigambayan* was presently withdrawn by common consent of the Committees on Judicial Power, Law Enforcement and Peace and Order, and Administrative and Specialized Courts.[38] It was the intent that the Convention "first decide the necessity for *Sandigambayan* (Anti-Graft Tribunal), the form it would take, the powers it would exercise, and the functions it would perform, before determining the question of its independence."[39] Whether *Sandigambayan* was to become part of the Judiciary or independent of it was meant to be determined after the more important question of its powers and functions had been settled.

Supplemental Report No. 01 to Steering Council Report No. 21, approved by the Steering Council on 14 July 1972, proposed *Sandigambayan* (Anti-Graft Tribunal) for consideration by the Convention in Plenary Session separately from the proposed Article on Judicial Power. In this Supplemental Report, *Sandigambayan* was still to have jurisdiction over impeachment cases, but, now being a court, it also enjoyed criminal and civil jurisdiction over malpractices or misconduct in public office.[40] *Sandigambayan* was to be a tribunal composed of a Chief Magistrate and ten Magistrates.[41] While impeachment cases had to be

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[37] Other related agencies and/or tribunals were also proposed by other Organic Committees, but these need not be discussed herein because these Committees did not take active part in the later development of *Sandigambayan.*

[38] See Supplemental Report No. 01 to Steering Council Report No. 21, 14 July 1972, hereafter cited as Supp. Rep. No. 01, p. 1.

[39] Joint Memorandum of the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts, 22 September 1972, hereafter cited as Joint Memorandum, p. 1.

[40] Prop. Art. on *Sandigambayan,* sec. 2, Supp. Rep. No. 01.

[41] Prop. Art. on *Sandigambayan,* sec. 1, Supp. Rep. No. 01.

heard and decided in banc, other cases were to be decided by one Magistrate.[42] To cover the possibility of *Sandigambayan's* being unable to cope with the volume of work, hearing officers were also provided for.[43]

On 22 September 1972, the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts, the principal committee-authors of *Sandigambayan* in its new form, submitted to the Convention in Plenary Session its Joint Memorandum amending Supplemental Report No. 01. A few significant differences between these last two drafts stand out: The definition of jurisdiction was changed from "malpractices or misconduct in public office" to "graft and corrupt practices or other misconduct in public office as defined by law".[44] The provision on hearing officers was replaced with a section providing that the "National Assembly may, upon recommendation of Sandigambayan, establish or abolish circuit courts under Sandigambayan."[45] The provision that cases other than impeachment were to be decided by one Magistrate was deleted so as to give *Sandigambayan* more elbow room and the "flexibility to adapt to needs and changing conditions".[46]

It was in this form that *Sandigambayan* was formally sponsored on the Convention floor on 18 October 1972.

Sandiganbayan: What the Name Stands For

Two words form the name *"Sandigambayan"*. "Bayan" refers to the "country" or "nation" and, being the first word in our National Anthem, is widely understood. "Sandigan", meaning "support" or "that which one can rely upon or lean on", appears in substantially the same form in our major dialects:

Bicolano	—	Sandigan
Cebuano	—	Sandigan
Ilocano	—	Sangguiran or Pagsangguiran
Ilonggo	—	Sandigan
Leyte	—	Sandigan
Maranaw	—	Paninindeg
Pampango	—	Sandigan
Pangasinan	—	Sandegan

[42] Prop. Art. on *Sandigambayan*, sec. 4, Supp. Rep. No. 01.
[43] Prop. Art. on *Sandigambayan*, sec. 5, Supp. Rep. No. 01.
[44] Prop. Art. on *Sandigambayan*, sec. 2, Joint Memorandum.
[45] Prop. Art. on *Sandigambayan*, sec. 3, Joint Memorandum.
[46] Prop. Art. on *Sandigambayan*, sec. 4, Joint Memorandum; see also par. 4 of explanaiton on sec. 4, p. 3.

Tausog	—	Sangdulan
Waray	—	Sandigan[47]

In CC Resolution No. 1848, where it was first introduced, this name was spelled with an "m" — *Sandigambayan.* This was a derivative of the words "Sandigan ng Bayan" literally meaning "Support of the Nation". "Sandigan ng Bayan" was later compounded to "Sandigang-Bayan" and finally reduced to *"Sandigambayan".* This spelling was consistently adhered to until the penultimate official draft of the new Constitution (the November 24 draft) where for the first time the name was spelled with an "n" — *Sandiganbayan.*

The use of "m" in *"Sandigambayan"* was explained in this manner:

> That the name of this agency is spelled with an "m" — hence, Sandiga*m*bayan — is a result of the application of the rules of phonetics In speech, people are naturally inclined to contract or modify sounds to make for ease and fluidity in delivery. Being practical, we Filipinos are no exception. The sound of "b" on the one hand, and the sounds of "ng" or "n" on the other, are produced at widely divergent areas of the speech mechanism. Thus the rule has been developed through the ages that whenever they come before the sound "b", "ng" or "n" are replaced by the sound of "m". Like "b", the sound of "m" is produced by the closure of one's lips, and therefore transition from one sound to the other is made with more ease and less effort. For instance, "pangbansa" becomes *pambansa;* "dulangbuhay", *dulambuhay;* and "Sandigangbayan", *Sandigambayan.*[48]

Unfortunately, many non-Tagalog delegates in the Convention found it difficult to pronounce *Sandigambayan;* hence, the change to *Sandiganbayan.* This is just as well because in this form, the root word "Sandigan", which, as above-mentioned, is common to our major dialects, is preserved.

Unlike the term "Ombudsman", *"Sandiganbayan"* has not acquired its own legal significance. Alone, it suggests no clue as to the real nature and function of that agency whose creation is mandated in Section 5 Article XIII of the new Constitution. As we have seen earlier, the concept of *Sandiganbayan* went through a radical transformation, from an administrative disciplinary agency to a judicial body with special and limited jurisdiction. The words "special court" which categorically describe *Sandiganbayan* obviate any possible misinterpretation.

While the use of the appellation *"Sandiganbayan"* is of no legal consequence, its significance emerges within the context of Article XIII.

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[47] Communication No. 2 (Re: *Sandigambayan*), 27 September 1971, sent to all co-authors of *Sandigambayan* by Delegate Augusto L. Syjuco, Jr., p. 2; Position Paper to Explain Prop. Am. No. 261 to the Draft of November 6, 1972, issued by Delegate Augusto L. Syjuco, Jr., 15 November 1972, p. 5.

[48] Position Paper to Explain Prop. Am. No. 261, *supra,* note 47, p. 5.

Public office is a public trust, and it is *Sandiganbayan* which will call to account every public servant for any breach of that trust. In this manner, *Sandiganbayan* may indeed become, as its name implies, "that which the nation can rely upon" to sweep the government clean of those who are unworthy of the people's confidence.

The Rationale Behind Sandiganbayan

"Graft" was once an unsullied word. But even an innocent word such as this could not long remain impervious to the corrosive influence of politics. Thus, today, together with such terms as "corruption" or "corrupt practices", graft has acquired a new distinctively distasteful flavor, but a meaning already well-settled in law.

In the horticultural arts, "grafting" refers to the "operation of placing a portion of one plant (bud or scion) into or on a stem, root or branch of another (stock) in such a way that a union will be formed and the partners will continue to grow."[49] A "graft" is, therefore, "the growth or individual resulting from the union of cion and stock."[50] Figuratively then, "graft" is "an extraneous addition, something inserted in, or incorporated with another thing to which it did not originally belong".[51] Most apropos, therefore, is the use of the term "graft" to refer to the "acquisition of money, position, etc., by dishonest or questionable means, as by actual theft or by taking advantage of a public office or any position of trust or employment to obtain fees, perquisites, profits on contracts, or legislation, pay for work not done or service not performed, etc.".[52]

In law, the term "graft" has received sundry definitions, all of which concur at "want of integrity" as a point of congruence:

> The word "graft" has a well-defined popular meaning at this time. It means the fraudulent obtaining of public money unlawfully by the corruption of public officers. To charge an official with graft is to charge him with want of integrity. Smith v. Pure Oil Co., 128 S.W. 2d 931, 933, 278 Ky. 430.[53]
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> The term "graft" is but another name for dishonesty, corruption, or fraud. Merrimon v. Southern Pav. & Const. Co., 55 S.E. 366, 371, 142 N.C. 539, 8 L.R.A., N.S., 574.[54]
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[49] 10 ENCY. BRITANNICA, 655 (1966).

[50] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1086 (2d ed., 1956).

[51] Gill v. Ruggles, 95 S.C. 90, 78 S.E. 536, 539 (1913), as cited in 38 C.J.S. 974 (1943).

[52] WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra*, note 50 at 1086.

[53] 18A WORDS & PHRASES 344 (1956).

[54] *Ibid.*

> "Graft" means an advantage which one person by reason of his peculiar position of superiority, influence or trust, exacts from another, and also includes the fraudulent obtaining of public money by the corruption of public officials. Razete v. U.S., C.A. Ohio, 199 F. 2d 44, 48.[55]
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> The term is commonly used to designate an advantage which one person by reason of his peculiar position or superior influence or trust acquires from another; a dishonest gain acquired by private or secret practices or corrupt agreement or connivance, especially in positions of trust, as by offering or accepting bribes; the act of any one, especially an official or public employee, by which he procures money surreptitiously by virtue of his office or position; the fraudulent obtaining of public money unlawfully by the corruption of public officers; the receiving of personal gain, without rendering compensatory services, by persons holding positions of trust and confidence; a dishonest transaction with relation to public or official acts. In this sense the term implies sometimes actual theft, corruption, dishonesty, fraud, a steal or swindle; and always want of integrity.[56]

In the Philippines, "graft and corruption" has become institutionalized as a term in law and as a practice in government. Indeed, the term has nearly become synonymous to "government transaction".[57] Thus, the necessity for anti-graft legislation.

The Spanish Penal Code of 1870 as modified in accordance with the recommendations of the Code Commission for Overseas Provinces and which took effect in the Philippines on 14 July 1887[58] devotes an entire title to *"los delitos de los empleados publicos en el ejercicio de sus cargos"*.[59] The Revised Penal Code (Act No. 3815), passed on 8 December 1930 and based largely on the Spanish Penal Code of 1870, again assigns Title VII to "Crimes Committed by Public Officers". R.A. No. 1379 passed on 18 June 1955 declares the forfeiture in favor of the State of any property found to have been unlawfully acquired by any public officer or employee. R.A. No. 3019 (Anti-Graft and Corrupt Practices Act) passed on 17 August 1960 defines in clear and unequivocal terms different acts constituting corrupt practices of public officers, and contains prohibitions against certain acts of private individuals and of relatives of public officers and employees and members of Congress. Various laws, such as the Revised Administrative Code (Act No. 2711, as amended) and the National Internal Revenue Code (Com-

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[55] *Ibid.*

[56] 38 C.J.S. 975 (1943).

[57] Augusto L. Syjuco, Jr., Sponsorship speech on *Sandigambayan*, Plenary Session No. 279, 18 October 1972.

[58] U.S. v. Tamparong, 31 Phil. 321, 323 (1915); People v. Rosal, 49 Phil. 509, 510 (1926); *In re* Shoop, 41 Phil. 213, 226 (1920).

[59] *Titulo VII.*

monwealth Act No. 466, as amended) likewise enumerate long lists of specific acts considered offenses of commission or omission.

Notwithstanding these legislations, our people's faith in the government was dwindling.[60] The government was considered corrupt. Incompetent. Inutile.[61] And at the root of everything that was vicious and contemptible in the government was that cancer — graft and corruption — still growing inward, permeating all levels and gnawing at the very vitals of the state machinery.[62] So much had been lost to graft and corruption, but what could not be measured in terms of gold or silver was the people's loss of faith in their government.[63]

It was no surprise, therefore, that in the 1971 Constitutional Convention, a preoccupation with "graft and corruption" was evident among the delegates. Some 27 resolutions,[64] proposing the establishment of an independent constitutional body with jurisdiction over graft and corrupt practices in the government, were filed by different delegates. Nor were these the only resolutions dealing on graft and corruption in some way. For there was a unanimity among the delegates in the assertion that graft and corruption was rampant:

> **Because of graft in our Government, public officers have become rich overnight through misuse of public funds and contracts highly prejudicial to the Government. (CC Res. No. 090, Delegate Jose N. Nolledo)**
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> **Graft and corruption is rampant especially today and this nefarious practice has greatly eroded the people's faith to (sic) their government (CC Res. No. 327, Delegate Leocadio E. Ignacio)**
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> **The current ferment and violent demand for reforms is justified by rampant graft and corruption * * * (CC Res. No. 452, Delegate Ramon A. Tirol)**
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> **The presence of a strong deterrent to the commission of graft and corruption will protect our government officials and employees in no small measure. (CC Res. No. 569, Delegate Godofredo S. Reyes)**
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> **Hundreds of Public Officials during the past few years have become instant millionaires thru irregularities, graft and corruption to the prejudice of the public treasury. (CC Res. No. 935, Delegate Antonio R. Tupaz)**

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[60] Francisco Sumulong, Sponsorship speech on *Sandigambayan*, Plenary Session No. 279, 18 October 1972.

[61] Syjuco, Jr., Sponsorship speech on *Sandigambayan*, *supra*, note 57.

[62] Jose E. Suarez, Sponsorship speech on *Sandigambayan*, Plenary Session No. 279, 18 October 1972.

[63] Syjuco, Jr., Sponsorship speech on *Sandigambayan*, *supra*, note 57.

[64] Res. Nos. 084, 086, 090, 131, 138, 327, 452, 569, 935, 1144 1848 (and its subsequent amendments). 1916. 2034 2103, 2108, 2109, 2115, 2210, 2288, 2338, 3277, 3402, 3725, 4640, 5451, 5541, 5554.

* * *

No one can deny that graft and corruption has affected all levels of our government in varying degrees of severity. (CC Res. No. 2288, Delegate Elfren R. Sarte)

* * *

The spreading discontent and loss of confidence of the people in the Government stem from blatant arrogance, serious abuses, malfeasance and misfeasance in office, graft and dereliction of duty committed by the so-called servants of the people. (CC Res. No. 2034, Delegate Antonio Y. de Pio)

* * *

Among the torments that the Filipino people have been relentlessly subjected to is the spectacle of wanton and unabated dishonesty in the public service. If erosion of faith in the capacity of government as an instrument of the people's will and benefit must be traced to the roots, graft and corruption must occupy a central position as a cause. For corruption is a multi-faceted phenomenon, both a cause and an effect, a self-stimulating impetus that ultimately results in the breakdown of social order. (CC Res. No. 5451, Delegate Abraham F. Sarmiento)

This then was the primary reason for the constitutionalization of *Sandiganbayan* — that the public service may be purged of the men who have rendered the government corrupt, incompetent, and inutile:

Graft must be stopped quickly, finally, totally, permanently.

To do this requires more than the imposition of Martial Law, for the force of arms can never match the fact of good examples.

To do this requires more than placing good men at the helm of government, for not even the noblest of statesmen can operate in a vacuum of morality and decency.

To do this requires — yes, good examples and yes, good leaders — but most of all, it requires that we in this Convention assembled, establish in our new Constitution a system, an organization, a complex that shall make integrity a mandate for all public officials and good government a commitment of all citizens * * *[65]

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* * * The restoration of morality, decency, and efficiency in the public service can work miracles in strengthening the people's confidence in the governmental machinery and in those who run it. This can be accomplished if we show that earnest efforts are being made to give the country better officials who are worthy of the faith and trust of the masses.* * *[66]

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No one will disagree that corruption is one of the most serious problems confronting our country today. It has affected all levels of society and government. There is practically no government office today that has escaped the breath of scandal. Corruption and wrong-

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[65] Syjuco, Jr., Sponsorship speech on *Sandigambayan, supra*, note 57.
[66] Sumulong, Sponsorship speech on *Sandigambayan, supra*, note 60.

> doing in the public service is the general rule; uprightness and honesty, the exception.
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> * * *
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> In our hands, my friends, is the opportunity to provide our people with what they want and what the country needs. We propose *Sandigambayan*.[67]

This then is *Sandiganbayan* — a special court which shall "direct its attention solely towards the discipline of public servants."[68] With limited and special jurisdiction, *Sandiganbayan* is expected to ensure a speedier and more competent disposition of cases involving graft and corrupt practices and other offenses committed by public servants in relation to their office.

But while *Sandiganbayan* is meant to ameliorate the public service, it is also hoped that it would shed its beneficence in the private sector, if only tangentially:

> * * * [It] will be futile to try to combat criminality in the private sector while criminality in the public service is left unchecked. It is unreasonable to expect uprightness from a people whose leaders are corrupt and conscienceless and can disregard the law which they themselves are expected to enforce.
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> In short, *Sandigambayan* will not only provide discipline in the public service, but it will likewise do much to encourage the observance of the law by private citizens by assuring them that the nation's leaders are upright and responsible and that the law is applied with equal vigor and severity to all.[69]

Sandiganbayan: A Judicial Body

While *Sandiganbayan* is clearly described as a "court", a doubt is raised by the fact of its treatment in Article XIII rather than in the article on the Judiciary. But the doubt is, at best, a mere shadow, easily cleared up by a mere reading of the Constitution.

Within the context of the Constitution, the word "court" could receive no other interpretation but that of a "judicial body". Section 1 of Article X (The Judiciary) provides that the judicial power is vested in the Supreme Court and in "such inferior courts as may be established by law." Clearly, since this provision deals with judicial power, the word "courts" refers to judicial bodies. Consistently, the word "court" defining *Sandiganbayan* should likewise be interpreted to mean that the agency whose creation is mandated in Section 5 of Article XIII is a judicial body.

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[67] Elfren R. Sarte, Sponsorship speech on *Sandigambayan*, Plenary Session No. 279, 18 October 1972.

[68] *Ibid.*

[69] *Ibid.*

If this be not enough, the grant of jurisdiction to *Sandiganbayan* dispels any further possible doubt. Section 5 provides that *Sandiganbayan* shall have jurisdiction over "criminal and civil cases". In this connection, it should be pointed out that the word "case" is, in law, commonly understood as meaning a judicial proceeding for the determination of a controversy between parties where rights are enforced or wrongs are prevented or redressed.[70] The word covers criminal as well as civil proceedings.[71] It is also said that, when applied to legal proceedings, the word "case" imports a state of facts which furnish occasion for the exercise of the jurisdiction of a court of justice.[72] Undeniably then, where a body can take cognizance of "criminal and civil cases", such a body must be judicial in nature.

That *Sandiganbayan* is treated of in Article XIII has been earlier explained, but bears repeating here. As initially conceived, *Sandiganbayan* was an administrative disciplinary agency. In the Steering Council Report No. 21, *Sandiganbayan* was, for the first time, treated as a judicial body, and was included in the proposed harmonized draft Article on the Judicial Department. Here, the intent was clear: *Sandiganbayan* was to be a judicial body like the Supreme Court and all the other inferior courts which were at that stage proposed to be constitutionalized.

Thereafter, *Sandiganbayan* was withdrawn from the proposed Judiciary Article and later sponsored separately on the Convention floor because at that stage, the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts still persisted in the proposal that *Sandiganbayan* be given the power to impeach, which would extend even over Supreme Court Justices. It was therefore found questionable, if not downright incongruous that *Sandiganbayan* be subject to the administrative supervision of, and its judgments and orders be appealable to, the Supreme Court, whose members *Sandiganbayan* itself could remove on impeachment.

In the Steering Council Supplemental Report No. 01 to Steering Council Report No. 21, where *Sandiganbayan* was first proposed for independent sponsorship, it was made clear that "should the Convention not vest with Sandiganbayan impeachment powers then all the provisions pertaining thereto shall be returned to the article on Judicial Depart-

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[70] State Road Department v. Crill, 99 Fla. 1012, 128 So. 412, 415 (1930), as cited in 1 C.J.S. 949 (1936).

[71] U.S. v. Cameron, 5 McCrary 93, 15 F. 794, 795 (1883), as cited in 1 C.J.S. 949 (1936).

[72] Buell v. Dodge, 63 Cal. 553, 554 (1883); Kundolf v. Thalheimer, 12 N.Y. (2 Kern.) 593, 596 (1855); Gibson v. Sidney, 50 Neb. 12, 69 N.W. 314, 315 (1896); Kelley v. Roetzel, 64 Okl. 36, 165 P. 1150 (1917); *In re* Hitchcock's Guardianship, 20 Haw. 553, as cited in 6 WORDS & PHRASES 213, 216 (1940).

ment."[73] Even at this stage, therefore, *Sandiganbayan* was already clearly considered a judicial body, and the issue of whether it was to become part of the Judicial Department or independent of it was contingent merely on the question of whether or not it should be given the power to impeach.

Sandiganbayan was independently sponsored on the floor on 18 October 1972, but the Convention took no formal vote on it. Thus, at this stage, prior to the first official working draft of the new Constitution, the question of *Sandiganbayan's* independence had not yet been decided.

In the October 30 and the subsequent drafts of the Constitution, *Sandiganbayan* was granted only criminal and civil jurisdiction, its earlier-proposed power of impeachment having been withdrawn and granted instead to the National Assembly. It is clear, therefore, that the initial reason for *Sandiganbayan's* temporary withdrawal from the Judicial Department did not then, as it does not now, exist. Without the power of impeachment, *Sandiganbayan* could have been "returned" to the Judiciary Article, as clearly stated in the Steering Council Supplemental Report No. 01, but for the fact that all the other inferior courts which were earlier proposed for constitutionalization had also been deleted from Article X. The Convention could not make an exception for *Sandiganbayan*. It was, therefore, merely for this reason that *Sandiganbayan* was instead provided for first in Article XV in the October 30 draft, and later in Article XIII.

The intent of the Convention is clear: *Sandiganbayan* is a judicial body. Since it cannot be the "one Supreme Court" spoken of in Section 1 of Article X, it must be considered an "inferior court" within the meaning of the same provision. Therefore, *Sandiganbayan* shall be under the administrative supervision of the Supreme Court.[74] The Supreme Court shall also have the power to discipline judges of *Sandiganbayan*, and by a vote of least eight Members, order their dismissal.[75] By provision of Section 5 of Article X, the Supreme Court also has the power to assign temporarily judges of *Sandiganbayan* to other stations as public interest may require provided the temporary assignment lasts no longer than six months without the consent of the judge concerned;[76] to order a change of venue or place of trial by *Sandiganbayan* in order to avoid a miscarriage of justice;[77] and to promulgate rules concerning pleading, practice, and procedure in *Sandiganbayan*.[78]

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[73] Par. No. 2, p. 1.
[74] CONST., art. X, sec. 6.
[75] CONST., art. X, sec. 7.
[76] Subsection 3.
[77] Subsection 4.
[78] Subsection 5.

Jurisdiction

Regarding *Sandiganbayan's* jurisdiction, several queries may be asked which we shall attempt to answer herein: (1) Does *Sandiganbayan's* jurisdiction extend only over public officers and employees? (2) What are the criminal and civil cases involving graft and corrupt practices and other offenses committed by public servants which fall within *Sandiganbayan's* jurisdiction? (3) May the law confer upon *Sandiganbayan* jurisdiction over cases other than those specified in the Constitution? (4) May other courts be conferred with jurisdiction over cases assigned by Article XIII to *Sandiganbayan?* (5) Would it be consonant with the constitutional intent to grant other courts appellate jurisdiction over cases proceeding from *Sandiganbayan?* For that matter, does the grant of jurisdiction in Section 5 of Article XIII deprive the Supreme Court of the power to review decisions and orders of *Sandiganbayan?*

To answer these questions, we shall endeavor to ascertain the constitutional intent by inquiring into the records of the Convention and, where the records are silent or inadequate, by considering generally-accepted and well-established principles in law.

Jurisdiction Over Private Persons —

Graft and corrupt practices and other offenses committed in relation to public office often involve the connivance or assistance of private persons. If *Sandiganbayan* is to be created, would it be necessary to prosecute public servants before *Sandiganbayan,* and private persons who are liable as principals, accomplices or accessories before the ordinary courts?

It should be pointed out that Section 5 of Article XIII is so worded that the jurisdiction granted to *Sandiganbayan* is over the subject matter covered rather than over the persons involved. Not all cases against public officers or employees are within *Sandiganbayan's* competence, but only those involving acts or omissions in relation to a public servant's office. For instance, a government employee cannot be prosecuted before *Sandiganbayan* for parricide. Nor may one file with *Sandiganbayan* an action, against a government official, for specific performance based on a private contract. The test, therefore, is whether an act or omission is committed by a public servant in relation to his office. If it is, the criminal and civil cases involving such act or omission will be cognizable by *Sandiganbayan.* Consequently, all persons liable for such act or omission must be brought before *Sandiganbayan,* whether such persons be public servants or private individuals, and whether the private persons are prosecuted together with the public

servant or alone, as when the liability of a public servant has been extinguished by death. This is adequately supported by Convention records.

The *Sandiganbayan* Report (Committee Report No. 16) of the Committee on Law Enforcement and Peace and Order, and the Anti-Graft Tribunal Report (Committee Report No. 02) of the Committee on Administrative and Specialized Courts were submitted to the Steering Council for consolidation and harmonization. For this purpose, the Steering Council appointed Delegate Ramon A. Diaz, who, on 11 April 1972, submitted his "Proposed Consolidation/Harmonization of Anti-Graft Tribunal and Sandigambayan", in which he states:

> * * * [T]he clause "instituted against elective and appointive public officials and employees" found in the report of the Committee on Administrative and Specialized Courts was omitted in order to pave the way for inclusion in the cases those not in public service but are likewise culpable for the enumerated acts.[79]

The two above-mentioned Committees, in their Joint Memorandum of 22 September 1972, proposed that *Sandiganbayan* should have "exclusive jurisdiction over impeachment cases and over criminal and civil cases involving graft and corrupt practices or other misconduct in public office as defined by law."[80] In sponsoring this proposal, Delegate Elfren R. Sarte, Chairman of the Law Enforcement Committee, explained *Sandiganbayan's* jurisdiction thus:

> * * * Its jurisdiction is limited to civil and criminal cases involving corrupt practices and misconduct in public office. It shall have jurisdiction over private individuals only when they are charged either as principals, accomplices, or accessories in crimes committed by public servants.[81]

In Article XV (General Provisions) of the October 30 draft of the new Constitution, Section 16 provided that *Sandiganbayan* was to have "jurisdiction over criminal and civil cases against public officials and employees in relation to their office." In Proposed Amendment No. 319, this was sought to be amended to "jurisdiction over criminal and civil cases * * * involving graft and corrupt practices or other misconduct in public office." This proposed amendment was explained in this manner:

> As originally worded, Section 16 of Article XV on General Provisions may be misinterpreted to mean that Sandigambayan can have jurisdiction only over public servants. As proposed above, Sandigambayan's jurisdiction clearly includes both public servants and private citizens charged with graft and corrupt practices or other misconduct

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[79] Ramon A. Diaz, Memorandum to the Steering Council, 11 April 1972, pp. 2-3.

[80] Prop. Art. on *Sandigambayan*, sec. 2, Joint Memorandum, p. 5.

[81] Sarte, Sponsorship speech on *Sandigambayan*, *supra*, note 67.

> in relation to public office. This, in fact, was the intent of the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts which reported out Sandigambayan, giving it exclusive jurisdiction over ". . . criminal and civil cases involving graft and corrupt practices or other misconduct in public office as defined by law." (Section 2, *Sandigambayan*; page 5 of Memorandum of 22 September 1972 from the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts, transmitting their proposed Article on Sandigambayan to the Convention in plenary session.)[82]

This then is the intent of the Convention: *Sandiganbayan* is meant to have jurisdiction not only over public servants but also over private individuals who may be liable in cases of graft and corrupt practices or other offenses committed by public servants in relation to their office. As now worded, Section 5 of Article XIII should be so construed.

It is, therefore, plain, from the Convention records, if not from the textual provision, that where a private person is to be prosecuted as an accessory, accomplice, or co-principal in cases where a public officer is likewise criminally liable, *Sandiganbayan* would have exclusive jurisdiction over all persons responsible. However, when no offense is committed by a public officer, it is not clear whether *Sandiganbayan* ought to have jurisdiction over the private persons liable. For instance, where a private individual attempts to bribe a government employee who refuses the offer and who therefore commits no offense, should such private individual be brought before *Sandiganbayan* or the ordinary courts?

In this instance, the Convention records are silent. We are, therefore, constrained to resort to textual interpretation, the constitutional provision being ambiguous.

Section 5 of Article XIII is susceptible of two divergent interpretations. On the one hand, it could be maintained that where no public servant is liable, the private person responsible must be brought before the ordinary courts because Section 5 provides that *Sandiganbayan's* jurisdiction is over cases involving offenses *"committed* by public officers and employees". Thus, where no public servant has committed a crime, *Sandiganbayan* can have no jurisdiction.

On the other hand, it is possible to interpret the word "committed" in Section 5 merely as describing the offenses which public servants may perpetrate, rather than requiring an actual commission. In other words, even if an offense is not actually committed, but could have been committed, by a public servant, then *Sandiganbayan* would have

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[82] Prop. Am. No. 319, explanation of proposed amendment no. 6, p. 4.

jurisdiction over the private person who may have attempted to cause a public servant to commit the offense.

The latter interpretation, however, appears to be painfully strained and seems to stretch *Sandiganbayan's* jurisdiction beyond logical limits. *Sandiganbayan* is meant to protect, and redress any unfaithfulness to, the *public trust*. Consequently, if this trust has not been violated, there can be no reason for *Sandiganbayan's* jurisdiction to come into play.

It is submitted that the first view is more logical and more faithful to the concept of *Sandiganbayan* which has been constitutionalized.

Extent of Criminal and Civil Jurisdiction —

Sandiganbayan's jurisdiction covers criminal and civil cases involving "graft and corrupt practices and such other offenses committed by public officers and employees * * * in relation to their office." What is the extent of this jurisdiction?

The word "graft", as we have seen, refers to the dishonest acquisition of public funds or the procurement of personal benefit by public officers or employees who take advantage of their peculiar position, superior influence or trust.[83]

"Corrupt practices" or "corruption" goes hand in hand with "graft". Indeed, "graft and corruption" has become such a common expression that "graft" or "corruption" seems incomplete without the other. The expression, however, is tautological. For the term "corruption" is used interchangeably with graft.[84] But, in a larger sense, the word "corruption" is more embracing, covering "a multitude of delinquencies, great and little."[85] It has been said that an act may be done corruptly although the advantage to be derived from it is not offered by another,[86] or although it is not accompanied by payment or promises of payment of money.[87] "Corruption" then is any act done with intent to gain advantages not consistent with official duty and the rights of others.[88] It is "something against or forbidden by law; moral turpitude or exactly

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[83] See "The Rationale Behind *Sandiganbayan*", *supra*.

[84] Merrimon v. Southern Pav. & Const. Co., 142 N.C. 539, 55 S.E. 366, 371 (1906), 8 L.R.A., N.S. 574 (1906), as cited in 18A WORDS & PHRASES 344 (1956).

[85] Wight v. Rindskopf, 43 Wis. 344, 351 (1877), as cited in 9 WORDS & PHRASES 776 (1940).

[86] Chicago City R. Co. v. Olis, 192 Ill. 514, 516, 61 N.E. 459 (1901), as cited in 20 C.J.S. 240 (1940).

[87] Bosselman v. U.S., C.C.A. N.Y., 239 F. 82, 86 (1917), as cited in 20 C.J.S. 240 (1940).

[88] Anderson, as cited in 9 WORDS & PHRASES 775 (1940).

[the] opposite of honesty involving intentional disregard of law from improper motives."[89]

The expression "graft and corrupt practices" already covers every species of act with improper motives done by a public officer or employee dishonestly or inconsistently with official duty. But the Constitution adds yet "other offenses" committed by public servants in relation to their office. The intention obviously is to make certain that acts or omissions which may not squarely fall within "graft and corrupt practices" would still be within the purview of *Sandiganbayan's* jurisdiction provided such acts or omissions are committed by a public officer or employee in relation to his office.

The word "offenses" in Section 5 of Article XIII is susceptible of diverse interpretations. In its restricted sense, "offense" means simply a crime.[90] Thus, the terms "crime", "offense", and "criminal offense" are synonymous and ordinarily used interchangeably, and include any breach of law established for the protection of the public as distinguished from an enforcement of mere private rights.[91] It is in this sense that the word "offense" is often used in Philippine statutes. Thus, Article 2(1) of the Revised Penal Code, Section 11 of the Anti-Graft and Corrupt Practices Act, Book IV (Penalties) of the Revised Administrative Code, and Section 345 of the National Internal Revenue Code, use the word "offense" or "offenses" to refer to those acts or omissions for which the law prescribes penal sanctions.

On the other hand, in a broader sense, "offense" is used synonymously with "misconduct"[92] to include any willful malfeasance, misfeasance, or nonfeasance in office.[93] In this sense, it does not necessarily imply corruption or criminal intention, for the official doing of a wrongful act, or an official neglect to do an act which ought to have been done, will constitute an "offense" although it is not impelled by corrupt or malicious motive.[94]

In what sense is the word "offenses" used in the Constitution? Does it refer merely to "crimes" committed by public servants? Or is it broad enough to authorize *Sandiganbayan* to take cognizance of civil

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[89] State v. Barnett, Okl. Cr. App., 69 P. 2d 77, 87 (1936), as cited in 9 WORDS & PHRASES 777 (1940).

[90] State v. Rose, 89 Ohio St. 383, 106 N.E. 50, 51 (1914), L.R.A. 1915A, 256 (1914), as cited in 29 WORDS & PHRASES 217 (1940).

[91] State v. West, 42 Minn. 147, 43 N.W. 845, 847, (1889), as cited in 29 WORDS & PHRASES 217 (1940).

[92] Bailey v. Examining and Trial Board of Police Dept. of City of Helena, 45 Mont. 197, 122 P. 572 (1912), as cited in 29 WORDS & PHRASES 220 (1940).

[93] State v. Slover, 113 Mo. 208, 20 S.W. 788 (1892), as cited in 29 WORDS & PHRASES 220 (1940).

[94] MECHEM, PUBLIC OFFICERS, sec. 457 (1883), as cited in 29 WORDS & PHRASES 220 (1940).

actions on tort not amounting to a crime, or special civil actions such as *certiorari*, prohibition and *mandamus* questioning the legality of certain acts of public officers or employees?

In the Joint Memorandum of the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts, transmitting their proposed Article to the Convention in Plenary Session, *Sandiganbayan* was granted jurisdiction over "graft and corrupt practices or other *misconduct* in public office".[95] In his sponsorship speech on *Sandiganbayan*, Delegate Jose E. Suarez, Chairman of the Committee on Administrative and Specialized Courts, cites favorably the principle enunciated in the case of State ex rel. Matson vs. O'Hern, 65 P. 2d 619, 104 Mont. 126 — that the term "misconduct" means "any act which is contrary to justice, honesty, principle, or good morals, if performed by virtue of office or by authority of office." The term "misconduct" then covers any "unlawful behavior or neglect by a public officer, by which the rights of a party have been affected."[96]

Clearly, in the Joint Memorandum above-mentioned, the intent was to grant *Sandiganbayan* ample jurisdiction over all species of acts or omissions committed by public officers and employees in breach of official duty. Was this same intent preserved in the November 15 draft of the new Constitution where the term "other offenses" was, for the first time, used in connection with *Sandiganbayan's* jurisdiction? Or is the shift from "misconduct" to "offenses" in fact indicative of a shift in intention?

In the October 30 draft of the new Constitution, where, it will be remembered, *Sandiganbayan* was first provided for in the Article on General Provisions, it was made clear that "[t]he entire concept in the Article on Sandigambayan is contained in Article XV, Section 16, page 56, Draft."[97] If this is an index of the Convention's intent, it suggests that the extent of *Sandiganbayan's* jurisdiction as embodied in the Joint Committee draft was preserved in the October 30 draft of the new Constitution. Section 5 of the new Article XIII of the November 15 draft, where *Sandiganbayan* was first returned after its deletion in the November 6 draft, was therefore but a restatement and amplification of Section 16 of the October 30 draft. Logically, then, the word "offenses" first used in the November 15 draft and now found in Section 5 of Article XIII should be interpreted as synonymous to the term "mis-

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[95] Prop. Art. on *Sandigambayan*, sec. 2, Joint Memorandum.

[96] Miller v. Roby, 9 Neb. 471, 4 N.W. 65, 66 (1880), as cited in Suarez, Sponsorship speech on *Sandigambayan*, *supra*, note 62.

[97] Prop. Art. on *Sandigambayan* (Anti-Graft Tribunal), appended to Draft of October 30, 1972, footnote no. 2.

conduct" in the draft Article proposed in the Joint Memorandum of *Sandiganbayan's* two principal committee-authors.

If the word "offenses" in Section 5 is to be interpreted in its restricted sense, then *Sandiganbayan* would enjoy an extremely limited jurisdiction covering only prosecutions for, and civil actions based on, crimes committed by public officers and employees in relation to their office. It seems, however, that the constitutional intent is to create a court before which *all* questions regarding acts or omissions committed by public servants in betrayal of the public trust may be brought. The object was to *segregate* all questions regarding public servants' acts not only to simplify the problem of jurisdiction but also to ensure a speedier disposition of cases of such nature. Indeed, if any significance is to be attached to the use of the word "offenses", it should be this: that if the framers meant to limit the jurisdiction of *Sandiganbayan* solely to crimes, then logically, the word "crimes" itself, being more precise, would have been the appropriate choice.

In any case, the Constitution also implies that the extent of *Sandiganbayan's* jurisdiction is, within limits, subject to legislative interpretation. Section 5 provides that *Sandiganbayan* shall have jurisdiction over graft and corrupt practices and other offenses committed by public officers and employees in relation to their office "as may be determined by law". Thus, while *Sandiganbayan's* jurisdiction should be interpreted strictly, *Sandiganbayan* being a "special" court,[98] against competence over cases totally unrelated to public office (*e.g.*, murder, theft, estafa, action for specific performance based on a private contract), it should be construed liberally in favor of a grant of authority over cases involving acts or omissions of public officers and employees contravening the principle of inviolability of a public office.

With the word "offenses" thus interpreted in its broader sense, *Sandiganbayan's* jurisdiction should cover: (1) prosecution for crimes committed by public officers and employees in relation to their office; (2) civil actions on such crimes; and (3) civil actions involving other acts or omissions committed by public officers and employees in relation to their office which, though not amounting to a crime, afford private persons a cause of action for damages or other relief.

Under the first category would fall prosecutions for, among others, crimes penalized in Articles 204-245 under Title VII of the Revised Penal Code; acts or omissions of public officers and employees punished under Book IV (Penalties) of the Revised Administrative Code; graft and corrupt practices defined under the Anti-Graft and Corrupt Practices

[98] See "Limited Jurisdiction", *infra*.

Act; Articles 345, 347, 348 and 349 of the National Internal Revenue Code; and "gift-giving" and similar practices prohibited by Presidential Decree No. 46.[99]

The second category would include, *inter alia,* forfeiture cases provided for in R.A. No. 1379; and other civil actions initiated by private persons for crimes committed by public officers and employees in relation to their office.

Under the third category would fall such actions as those based on violations of the rights guaranteed in Articles 32 and 34 of the Civil Code (*i.e.,* obstruction of certain fundamental rights and liberties, and failure to render aid in case of danger to life or property), and on Articles 19, 20, 21 and 2176 of the Civil Code provided the acts or omissions complained of are committed by public officers and employees in relation to their office. In these instances, whether or not the acts or omissions are also specifically punished by penal laws is immaterial, the Civil Code expressly recognizing the aggrieved person's right of action for damages.

Whether or not *Sandiganbayan* should have jurisdiction over civil actions questioning the legality or propriety of acts or omissions committed, or decisions made, by public officers or employees in the performance of their duties is a penumbral question requiring some serious reflection. For instance, would *Sandiganbayan* have jurisdiction over a special civil action of *mandamus* praying for the issuance of an order compelling the Registrar of Deeds to record a particular instrument?

The clue, it seems, is in the term "offenses". As earlier-pointed out, the word "offense" in its broad sense signifies a "misconduct". Thus, the basis of the action must be an "offense" or "misconduct". Where an action merely questions the interpretation or implementation of a particular law or regulation, *Sandiganbayan* cannot assume jurisdiction. On the other hand, where the action is predicated on such grounds as arbitrariness, unfairness, or possibly, failure to comply with a clear legislative mandate, the act, omission or decision may, in that sense, amount to an "offense" falling within *Sandiganbayan's* jurisdiction. In other words, unless the action can be based on tort, *Sandiganbayan* is competent to act only when the set of facts alleged establishes a willful malfeasance, misfeasance, or non-feasance in office.

Limited Jurisdiction —

We have attempted to define the extent of *Sandiganbayan's* jurisdiction as provided in Section 5 of Article XIII. The Constitution, however, does not categorically state that *Sandiganbayan's* jurisdiction

[99] Dated 10 November 1972.

is to be confined only to such cases as are contemplated by this constitutional provision. May the law-making body then confer upon *Sandiganbayan* authority over cases other than those falling within the purview of Section 5's grant of jurisdiction?

In this connection, the word "special" descriptive of the court to be known as *Sandiganbayan* is of particular significance. This word imports that the court to be created is one of limited jurisdiction. Courts of special or limited jurisdiction are those which may take cognizance only of a few specified matters.[100] When a court is "special", its jurisdiction is confined to particular causes.[101] Clothed with special powers for a special purpose, they have no authority beyond the areas specified by law.[102] In other words, the jurisdiction of a "special" court can be exercised only within the limitations and under the circumstances prescribed by law.[103]

It is for this reason that when the Court of First Instance acts as a cadastral court, its powers are interpreted strictly. Its jurisdiction being special and limited in this instance, it cannot exercise powers which have not expressly been granted by law.[104]

Sandiganbayan was constitutionalized for a special purpose — to provide a court which shall devote itself exclusively to the maintenance of discipline in the public service. Indeed, there can be no reason for the constitutionalization of a court with jurisdiction over graft and corrupt practices and other offenses committed by public servants in relation to their office where such a court can also be vested with jurisdiction over other kinds of actions. In such a case, the court to be created would not be much different from the existing courts which at present take cognizance not only of the matters now envisioned to fall within *Sandiganbayan's* jurisdiction but other matters as well.

That *Sandiganbayan* is meant to exercise limited jurisdiction is borne out by the records of the Convention. The innumerable resolutions filed proposing the creation of a special court, tribunal, agency or body with jurisdiction over graft and corruption cases are an expression of the consensus that such a body to be created must be dedicated solely to the area of discipline in the public service. In his sponsorship speech on *Sandiganbayan,* Delegate Elfren R. Sarte, Chairman of the Committee on Law Enforcement and Peace and Order, one of the two

[100] State v. Daniels, 66 Mo. 192, as cited in 21 C.J.S. 19 (1940).
[101] Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., 109 Pa. Super. 571, 167 A. 636, 638 (1933), as cited in 21 C.J.S. 33 (1940).
[102] Den v. Hammel, 18 N.J. Law 73, as cited in 21 C.J.S. 19 (1940).
[103] Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., *supra*, note 101.
[104] Haw Pia v. Cruz, 73 Phil. 634 (1942).

principal committee-authors of *Sandiganbayan,* had this to say of the proposed court:

> The distinctive feature of *Sandigambayan,* as a system of discipline in public office, is specialization. Presently, cases against public servants are brought before courts which are burdened, in fact overburdened not only with cases of this nature but with other kinds of cases as well. *Sandigambayan,* however, shall direct its attention solely towards the discipline of public servants.* * *

The issue of *Sandiganbayan's* limited jurisdiction was taken up by the Judicial Code Committee, created by Acting Chief Justice Querube C. Makalintal per Administrative Order No. 69, dated 5 October 1973. The Committee, which was formed "to go over the draft of the proposed Judicial Code prepared by the U.P. Law Center, and to revise the same or make such changes therein as it may deem proper, and thereafter to submit the final draft to the Supreme Court for approval", invited Delegates Sarte, Suarez and Syjuco on 28 January 1974 for their explanations, observations and suggestions on the provisions on *Sandiganbayan* in the proposed Code. In his Memorandum, dated 2 February 1974, to Mr. Justice Fred Ruiz Castro, Chairman of the Code Committee, Delegate Syjuco reiterated the stand of Delegate Sarte as above-quoted that "Sandiganbayan's jurisdiction is meant to be special and limited."[105] In his Memorandum, dated December 11, 1973, to the Code Committee, Judge Constante A. Ancheta of the Circuit Criminal Court of the 5th Judicial District likewise observed that whereas *Sandiganbayan* "was intended to take cognizance only of GRAFT CASES, both Criminal and Civil, and Crimes committed by Public Officers," the *Sandiganbayan* courts in the proposed Judicial Code enjoyed jurisdiction over other cases.[106]

From the records of the Convention, and from *Sandiganbayan's* clear description as a "special court", there can be no doubt that if *Sandiganbayan* were to be vested with jurisdiction over cases other than those contemplated in the Constitution, it would not be, it cannot be, that "special court" envisioned in Section 5 of Article XIII. Jurisdiction conferred on a court by constitutional provision is exclusive in the sense that the grant thereof precludes the legislature from conferring additional jurisdiction upon such court.[107]

Exclusive Jurisdiction —

The new Constitution provides that *Sandiganbayan* is to have such jurisdiction as is provided for in Section 5 of Article XIII. Nowhere

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[105] At p. 5.
[106] At p. 1.
[107] Rieser v. Ward, 193 Ky. 368, 236 S.W. 255 (1922), as cited in 21 C.J.S. 189 (1940).

is it provided, however, *that Sandiganbayan's* jurisdiction is to be exclusive of all other courts. May the National Assembly then grant other courts concurrent jurisdiction over cases cognizable by *Sandiganbayan*?

It will be remembered that *Sandiganbayan* was first conceived as an administrative disciplinary agency. In this form, from the first draft to the twenty-sixth draft (the proposed Article on *Sandigambayan* in Committee Report No. 16 of the Committee on Law Enforcement and Peace and Order), *Sandiganbayan's* jurisdiction was either exclusive on all matters within its competence or exclusive on some and concurrent on others. After the Law Enforcement Committee draft, *Sandiganbayan* took a shift from an administrative disciplinary agency to a judicial body. From the first exploratory draft (Draft No. 27) of *Sandiganbayan* as a court, until the forty-fifth draft (in Proposed Amendment No. 261 to the November 6 draft of the new Constitution), *Sandiganbayan's* jurisdiction was always defined as "exclusive".

Of the various official drafts of the new Constitution, only the October 30 draft provided that *Sandiganbayan's* jurisdiction was "exclusive". In all subsequent drafts, the word "exclusive" never again defined *Sandiganbayan's* jurisdiction. However, that the word "exclusive" does not now define *Sandiganbayan's* jurisdiction does not negate the intent of the framers of the new Constitution. As earlier pointed out, the purpose behind *Sandiganbayan* is to segregate all actions involving offenses committed by public servants in relation to their office and to entrust all such actions to a specialized agency which shall devote its time exclusively to the adjudication of such cases.

When Section 1 of Article VIII vests the legislative power upon the National Assembly, the provision can be no less specific than that the National Assembly alone has the authority to make laws. In the same vein, when Section 1 of Article VII declares the President of the Philippines as the symbolic head of state, it means no less than that it is the President, and no other, who shall be the symbolic head of state. Upon the same reasoning, when Section 5 of Article XIII vests upon *Sandiganbayan* jurisdiction over the matters specified, it can mean no less than that it is *Sandiganbayan* alone which can have competence over such matters.

It has been held that jurisdiction conferred upon a court by constitutional provision is exclusive in that it precludes the legislature from conferring all or a part of such court's jurisdiction upon other courts,[108]

[108] Lading v. City of Duluth, 153 Minn. 464, 190 N.W. 981 (1939); Decker v. Canzoneri, 256 App. Div. 68, 9 N.Y.S. 2d 210 (1939), as cited in 21 C.J.S. 189 (1940).

Thus, unless the Constitution itself provides for other courts,[109] the specification therein of courts which may exercise judicial power operates as a limitation of the legislature's power to create other courts.[110]

Although Section 5 of Article XIII does not provide that *Sandiganbayan's* jurisdiction shall be exclusive of all other courts, in keeping with the constitutional intent, it should be construed to mean a grant of exclusive jurisdiction.

Appeals from Sandiganbayan –

If, as maintained, *Sandiganbayan's* jurisdiction is exclusive of all other courts, it follows that no court should be given appellate jurisdiction over cases proceeding from *Sandiganbayan*. For instance, it would be contrary to the constitutional mandate to provide that *Sandiganbayan's* judgments and orders shall be appealable to the Court of First Instance or the Court of Appeals. Such a provision not only will, in effect, allow other courts to encroach upon areas which are meant to be *Sandiganbayan's* exclusive province, but will also create the strange situation of a statutory court having appellate jurisdiction over a constitutional court.

However, Section 5's grant of jurisdiction to *Sandiganbayan* must be reconciled with the express provisions of Sections 1 and 5 of Article X. Section 1 provides that the National Assembly "may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section five hereof." Clearly then, as provided in Section 5(2), the Supreme Court may review and revise, reverse, modify, or affirm on appeal or *certiorari* final judgments and decrees of *Sandiganbayan* in:

> **(a) All cases in which the constitutionality or validity of any treaty, executive agreement, law, ordinance, or executive order or regulation is in question.**
>
> **(b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.**
>
> **(c) All cases in which the jurisdiction of any inferior court is in issue.**
>
> **(d) All criminal cases in which the penalty imposed is death or life imprisonment.**
>
> **(e) All cases in which only an error or question of law is involved.**

Unless the case falls within any of those enumerated in Subsection (2) of Section 5 of Article X, the findings, orders and decisions of

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[109] Gerlach v. Moore, 243 Pa. 603, 90 A. 399 (1914), as cited in 21 C.J.S. 189 (1940).

[110] Quenstedt v. Wilson, 113 Md. 11, 194 A. 354 (1937); Humphreys v. Walls, 169 Md. 292, 181 A. 735 (1935); Day v. State, 162 Md. 221, 159 A. 602 (1932), as cited in 21 C.J.S. 189 (1940).

Sandiganbayan should be final and unappealable. Consequently, as a general rule, findings of fact of *Sandiganbayan* should be final.

This stand is consistent with the intent of the framers of the Constitution. In the draft Article on *Sandiganbayan* proposed by the Committees on Law Enforcement and Peace and Order, and Administrative and Specialized Courts in their Joint Memorandum, and in all previous drafts of *Sandiganbayan* as a court, decisions, judgments and orders of this special court were always provided for as being final on questions of fact and appealable to the Supreme Court only on questions of law.

Form and Composition

The Constitution does not specify the form in which *Sandiganbayan* shall be created. Again, we may look into the background of the proposal in the Convention for indications.

Prior to attempts at condensation for its inclusion in the official working drafts of the new Constitution, *Sandiganbayan* was always conceived as a tribunal, its composition varying from 9 to 25 members. In Committee Report No. 16 of the Committee on Law Enforcement and Peace and Order, where *Sandiganbayan* was still conceived as an administrative disciplinary agency, the *Sandiganbayan* tribunal was to be composed of a Chairman and eight members.[111] In the Steering Council's Supplemental Report No. 01 to Steering Council Report No. 21, *Sandiganbayan,* now an Anti-Graft Tribunal, was to be composed of a Chief Magistrate and ten Magistrates.[112] In the Joint Memorandum of the two principal committee-authors, *Sandiganbayan* was likewise to be made up of a Chief Magistrate and ten Magistrates.[113]

When the 166-Man Special Committee was created to prepare the official working draft of the new Constitution, attempts were begun to condense the proposed *Sandiganbayan* Article into one section. At this stage, it was generally agreed that the section on *Sandiganbayan* should not be so detailed as to restrict the hands of the law-making body beyond necessity. Thus, the form and composition of *Sandiganbayan* was purposely left for the National Assembly to decide.

In this area, therefore, the National Assembly enjoys a free hand. If *Sandiganbayan* should be constituted as a tribunal, the National Assembly may adopt the proposal of the two principal committee-authors in their Joint Memorandum — whereby the *Sandiganbayan* tribunal would function either in banc or through its individual Mem-

[111] Sec. 2.
[112] Sec. 1.
[113] Sec. 1.

bers or through circuit courts which act as its arms. Or the National Assembly may opt for the Steering Council's proposal in its Supplemental Report No. 01 to Steering Council Report No. 21 — where hearing officers would aid the *Sandiganbayan* tribunal in the discharge of its functions. Another possibility is the proposal in CC Resolution No. 1848-C, very much like the set-up in the Court of Appeals, where the *Sandiganbayan* tribunal, composed of nineteen Members, would function in divisions of three Members each.

Though it is clear that *Sandiganbayan* was always conceived as a tribunal, the National Assembly is under no compulsion to adopt this form. The National Assembly may choose to ignore these various convention proposals and, instead, pattern *Sandiganbayan* after the Courts of First Instance, presided over by one judge and enjoying fixed territorial jurisdictions. The Circuit Criminal Courts system is another possible model, the various *Sandiganbayan* judges being authorized to hold sessions anywhere within their respective districts. In these instances, each of the courts to be set up may be considered branches or arms of *Sandiganbayan,* so that *Sandiganbayan* would be viewed as a system of courts or a court with several authorized branches and judges.

In the Convention's deliberations on *Sandiganbayan,* the matter of form was always a secondary consideration. What was paramount was the constitutionalization of the fundamental concept of a special court, with limited jurisdiction exclusive of all other courts, to take cognizance of all criminal and civil cases involving graft and corrupt practices and other offenses committed in relation to public office. Whatever be the form in which *Sandiganbayan* would be created, this basic concept must be preserved.

III

TANODBAYAN

In recent years, government administrators all over the world were swept off in the snowballing excitement over a "new institution". The ferment slowly but decidedly swelled to a crescendo, infecting almost everyone whose mission it was to better public administration. The object of excitement was the ombudsman, and the rage was called "ombudsmania".

In the Philippines, "ombudsmania" swept in at a most propitious hour — at the time when the people were reshaping the fundamental law of the land. The Filipinos were one in demanding reforms; in the area of public administration, the ombudsman seemed to be the answer. Today, the ombudsman has been institutionalized in the 1973 Constitu-

tion, together with a resurgence of hope that at last the government would be brought "closer to the people".

The new Constitution provides for the creation of "an office of the Ombudsman, to be known as *Tanodbayan*". To date, however, such an office has not been established. In this chapter, we shall endeavor to answer some of the questions that would inevitably be asked in order to implement the mandate in Section 6 of Article XIII.

Background in the Convention

Some 27 resolutions[114] proposing an ombudsman or similar agency were filed in the 1971 Constitutional Convention. All of these were referred to the Committee on Constitutional Bodies, some having been referred to other organic committees as well.

The Committee on Constitutional Bodies, after studying these 27 resolutions, submitted on 3 February 1972 its Committee Report No. 01 proposing the creation of an office to be known as the "Ombudsman Commission". The Committee's proposed Article on the ombudsman, approved on 25 January 1972 and contained in its first Committee Report, was based primarily on CC Resolution No. 1690,[115] principally authored by Delegate Rodolfo D. Robles of the first district of Quezon Province. On 15 March 1972, the Committee on Law Enforcement and Peace and Order likewise submitted its Committee Report No. 16 proposing the creation of *Sandigambayan,* a constitutional disciplinary agency which was to partake of the nature of an ombudsman. These overlapping Committee Reports were harmonized by the Steering Council which, in its Steering Council Report No. 21, dated 15 June 1972, consolidated *Sandigambayan's* investigation-prosecution function with the Ombudsman Commission.

In the October 30 draft of the new Constitution, upon the instance of Delegate Robles, the creation of the Ombudsman Commission was mandated in Section 15 of Article XV (General Provisions). This provision was based principally upon the proposed Article on the Ombudsman Commission in Committee Report No. 01 of the Committee on Constitutional Bodies. Section 15 of Article XV provided:

> Section 15. The National Assembly shall create an Ombudsman Commission which shall receive complaints, investigate the same, make proper recommendations and in appropriate cases file and prosecute the necessary administrative, civil or criminal charges against public

[114] CC Resolution Nos. 074, 131, 327, 452, 525, 590, 721. 815, 898, 1365, 1690, 1776, 1809, 1848-C, 1918, 2034, 2923, 3257, 3277, 3347, 3710, 4640, 5016, 5113, 5198, 5319, and 5453.

[115] See Committee Report No. 01, Committee on Constitutional Bodies, 3 February 1972, hereafter cited as Comm. Rep. No. 01.

officials and employees, except Members of Parliament, before the competent court or body.

As earlier explained,[115a] Proposed Amendment No. 319 to the October 30 draft filed by Delegate Augusto L. Syjuco, Jr. proposed to change the coverage and title of Article XIII from "Impeachment" to "Accountability of Public Servants", incorporating therein, *inter alia,* the above-quoted Section 15 of Article XV. Syjuco proposed the deletion of the phrase "except Members of Parliament" from the ombudsman provision, upon the justification that "[n]o man, however high or mighty, must be above the law".[115b] However, in the November 6 draft of the new Constitution, Section 15 itself was deleted. Although Proposed Amendment No. 319 was not favorably acted upon by the Convention, the exception proposed to be deleted never again appeared in the ombudsman provision of the subsequent drafts of the new Constitution.

Proposed Amendment No. 261 to the November 6 draft filed by Delegate Syjuco sought to reinstate the ombudsman in the enlarged Article XIII, and for the first time officially proposed a new name for the ombudsman — *Tanodbayan.*[115c] Thus, in the November 15 draft of the new Constitution, the ombudsman re-appeared in Section 6 of Article XIII. Based substantially on the proposed section in Proposed Amendment No. 261, Section 6 provided:

> Section 6. The National Assembly shall create an office of the ombudsman to be known as Tanodbayan which shall, in appropriate instances, receive complaints relative to public office, government-owned or controlled corporations, investigate the same, make proper recommendations, and in case of failure of justice as defined by law, file and prosecute the appropriate administrative, civil, or criminal case before the competent court or body.

In his position paper dated 19 October 1972, Syjuco emphasized what seem to be the basic distinctions between the ombudsman concept as proposed in Committee Report No. 16 (and later embodied in the October 30 draft of the new Constitution) and his proposed *Tanodbayan, i.e.,* that: "First, while the Ombudsman Commission in effect may investigate any and all complaints, acts or omissions, TANODBAYAN may receive and investigate complaints *only in appropriate instances.* Second, while the Ombudsman Commission enjoys unlimited discretion in the exercise of the power to prosecute, TANODBAYAN may prosecute *only in case of failure of justice as defined by law.*"[115d]

[115a] See discussion on Article XIII (Background in the Convention), *supra.*

[115b] Prop. Am. No. 319, p. 5.

[115c] See footnote 30, *supra.*

[115d] Position Paper entitled "Sandigambayan and Tanodbayan: Complementary Agencies for an Effective System of Discipline", issued by Delegate Augusto L. Syjuco, Jr., enclosed with Communication No. 9 (Re: *Sandigambayan*), 19 October 1972, p. 3.

Except for the deletion of the phrase "in appropriate instances" found in the draft of November 15, Section 6 of Article XIII did not change substantially in any of the subsequent drafts of the Constitution.

Tanodbayan: Significance of the Name

"Tanodbayan" is a Tagalog word coined from *"tanod ng bayan"*. Literally, *"tanod"* means "guard". Unlike *"sandigan"*, the word *"tanod"*, of Chinese origin, is not duplicated or reproduced in the other Philippine dialects. Nevertheless, within the context of Article XIII, the name *"Tanodbayan"* is significant.

Tanodbayan's function is in keeping with the principle established in Article XIII that public office is a public trust. Every citizen is entitled to honest and efficient service from the government. And when he feels aggrieved by the action or inaction of a public servant, he must have recourse to an impartial "outsider" who would ascertain if he has cause for complaint, and, in the affirmative, would see to it that his grievance is redressed. This impartial "outsider" would be *Tanodbayan*. It is *Tanodbayan* which will "rap the knuckles" of the erring public servant to remind him that he must be faithful to the public trust inherent in his office and that he will be called to account for every breach of that trust.

Tanodbayan — the "Guard of the Nation" — will thus become the people's watchdog, to help make the government more responsible and responsive to the people's needs, to see that the government is not "administered by buck-passers and clockwatchers, by bunglers and grafters, by civil servants who are civil only to the mighty and servants only to the moneyed".[116]

But while the name *"Tanodbayan"* is descriptive, in a general sense, of the functions of this office, it fails to convey accurately the legal concept of an ombudsman. *Tanodbayan* is an ombudsman. But what is an "ombudsman"? For this, we must turn back the pages of history.

The Ombudsman: Historical Background

Although the ombudsman institution touched our shores only very recently, it has come to us thoroughly refined through 165 years of existence in Sweden. Thus we see that the ombudsman is a "new institution" only because in the Philippines an experiment of this sort in public administration has not hitherto been undertaken.

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[116] Syjuco, Jr., Sponsorship speech on Article XIII, *supra*, note 10.

Sweden is generally credited with having originated the ombudsman. However, similarities between the ombudsman and other earlier institutions have also been pointed out. The *tribuni plebis* of ancient Rome, the *Justiciate* of the medieval kingdom of Aragon, the censors of the 17th century American colonies, and even the Control Yuan of China during the Han Dynasty in 206 B.C. have been cited as possible origins of the ombudsman. The similarities, however, are no positive proof that the ombudsman is not a Swedish original. Walter Gellhorn, among many other writers, believes that "the nineteenth-century Swedes who created their ombudsman were probably not antiquarians, nor have the later creators of ombudsmen looked further than Sweden for inspiration."[117]

Origin of the Name

The word "ombudsman" is traced back to the primitive legal order of the Germanic tribes. Under this system, a lawbreaker could be punished in either of two ways: first, he could be convicted and declared an outlaw, thus becoming fair game for anyone who may be minded to "carry out the judgment" by killing him; or, second, a fine could be imposed upon the offender. To carry out the second alternative, the intervention of a third party was necessary in order to avoid a confrontation between the feuding families of the offender and the offended. This neutral third person was employed to collect the fine from the offender for delivery to the offended. Thus, the collector came to be called the "OM-BUDS-MAN" – "OM" being "about"; and "BUD" being the "messenger collecting the fine".[118]

But the word "ombudsman" has come to us through the Swedish language. The Swedish word "ombud" refers to a person who acts as agent or representative of another person.[119] Thus, in the earlier years of development of the institution, the word "ombudsman" exclusively referred to the official who was the King's, and later Parliament's representative, and from whom the institution as we know it now evolved. Today, the word "ombudsman" also refers to the position or office occupied by such a person, or to the agency including the entire administrative staff, or to the institution itself.[120]

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[117] W. GELLHORN, OMBUDSMEN AND OTHERS 194, fn. 1 (1967).

[118] R. D. ROBLES, THE OMBUDSMAN 7-8 (1972).

[119] A. Bexelius, *The Ombudsman for Civil Affairs* in D.C. ROWAT, (ED.), THE OMBUDSMAN: CITIZEN'S DEFENDER 24, fn. 2 (2d ed., 1968).

[120] In this article, the meaning of the word becomes clear from the context in which it is used.

The Ombudsman in Sweden

The earliest Swedish predecessor of the Ombudsman existed as early as the 16th century.[121] Thus, the so-called Crown Provost supervised the public prosecutors and was the King's chief prosecutor.[122] In 1713, King Charles XII issued an Order of Chancery creating the office of a supreme representative of the Crown, called the Supreme Procurator (*Hogste Ombudsmannen*), to exercise general supervision over government officials in order to ensure that laws and regulations were complied with and that public servants discharged their duties properly.[123] In 1719, through another Order, the King, without changing its function, changed the name of the office to Chancellor of Justice (*Justitiekansler,* in Sweden abbreviated to JK). To date, the office is still known by that name.

After King Charles XII's death, political power shifted to the Four Estates (the predecessor of the *Riksdag* or Parliament). Thus, from 1766 to 1772, the JK was appointed by the Estates. It was during this period that the JK was appointed the representative of Parliament.

In 1772, King Gustavus III stage a *coup d' etat,* again wresting political power from the Estates and for the Crown. The royal prerogative having been reasserted, the JK again became a Crown appointee. During these years, the JK also served as a Councillor (Minister) of the King and acquired a position similar to that of the Minister of Justice.[124]

In 1809, the Swedish Constitution was promulgated, marking the re-emergence of the Swedish legislature in the political see-saw. In their desire to prevent a one-sided wielding of power as had happened in the past, the Swedes sought to balance the power of the King and the Four Estates. The executive power was left to the King and Council; the legislative power was entrusted jointly to the King in Council and the Estates; and judicial power remained in independent courts. Supervision over public administration was to be exercised by two officers: the JK, on behalf of the Crown, and the newly-created *Justitieombudsman* (in Sweden, referred to as JO) on behalf of the Four Estates (later of the *Riksdag* which succeeded the Four Estates in 1866).[125]

The JO is now known as the Ombudsman for Civil Affairs. Since the creation of the office in 1809, the JO originally exercised general supervision over all public servants, but in 1915, when the office of the

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[121] T.J. AARON, THE CONTROL OF POLICE DISCRETION: THE DANISH EXPERIENCE 5 (1966).

[122] S. Rudholm, *The Chancellor of Justice* in ROWAT (ED.), *op. cit. supra,* note 119 at 17.

[123] *Ibid.*; Bexelius, *op. cit. supra,* note 119 at 24.

[124] Rudholm, *op. cit. supra,* note 122 at 17-18; Bexelius, *op. cit. supra,* note 119 at 24.

[125] Rudholm, *op. cit. supra,* note 122 at 18.

Militieombudsman (in Sweden, referred to as the MO) was created, supervision over military officials was withdrawn from the JO and transferred to the MO.[126]

Through the JO, the Riksdag exercises far-reaching control over government activities. The Swedish Constitution provides:

> Art. 96. The Riksdag shall appoint at least two citizens of known legal ability and outstanding integrity to act as Ombudsmen to supervise in the capacity of representatives of the Riksdag, according to instructions issued by the Riksdag, the observance of the laws and statutes as applied in all matters by all public officials and employees; and they shall institute proceedings before the competent courts against those who, in the execution of their official duties, have through partiality, favoritism or other cause committed any unlawful act or neglected to perform their official duties properly. The Ombudsmen shall be subject in all respects to the same responsibility and obligation as are prescribed for public prosecutors by general civil and criminal laws and the laws of procedure.[127]

Like the JK, the JO supervises the observance of the laws by all public servants – including judges, government officials, and all other civil servants. However, outside of his competence are the JK, the MO and the Cabinet members or ministers. The Members of the Council of State may only be prosecuted by the JO upon the specific authorization of the *Riksdag's* Committee on the Constitution.[128] By contrast, Members of the Supreme Court or of the Supreme Administrative Court may be prosecuted by the JO in accordance with an express provision of the Constitution.[129] Corollary to his inability to proceed against ministers, the JO cannot review a judgment of the King in Council upon an appeal from an administrative decision; but this does not prevent him from dealing with such matters before they are elevated to the Council, since the Swedish Ombudsman is not restricted by the requirement of "exhaustion of all administrative remedies".[130] Nor can the JO deal with matters involving government corporations in economic operations for which conventional government procedure is thought unsuitable.[131]

Although the Ombudsman is appointed and removed by the *Riksdag*,[132] and is required to submit an annual report to it,[133] he is, in reality, independent not only of the government which he oversees but

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[126] H. Henkow, *The Ombudsman for Military Affairs* in ROWAT, (ED.), *op. cit. supra*, note 119 at 51-52.

[127] 3 A.J. PEASLEE, CONSTITUTIONS OF NATIONS 866-7 (D.P. Xydis Rev. 3rd ed., 1968).

[128] SWEDISH CONST., art. 106, in PEASLEE, *op. cit. supra*, note 127 at 869.

[129] SWEDISH CONST., art. 101, in PEASLEE, *op. cit. supra*, note 127 at 867-8.

[130] GELLHORN, *op. cit. supra*, note 117 at 207.

[131] *Ibid.*

[132] SWEDISH CONST., art. 96, in PEASLEE, *op. cit. supra*, note 127 at 866-7.

[133] SWEDISH CONST., art. 100, in PEASLEE, *op. cit. supra*, note 127 at 867.

also even of the *Riksdag* itself. He decides the subjects of his inquiry and receives no instructions from anyone. Members of Parliament do not try to influence him in any way; he decides for himself the action to be taken on a matter under investigation. Usually chosen from the rank of court justices, he himself chooses his own staff.[134]

To those of us who are exposed only to a system of accountability to a higher official, the ombudsman institution may seem like a dangerous experiment in independence; it may be considered a threat to the civil liberties not only of public servants but of private citizens as well. However, the ombudsman institution must be understood within the context of the Swedish system of government where each public official is answerable only to the law and his own conscience, rather than to an administrative superior. Thus, for instance, Ministers do not bear the responsibility for acts of agencies and bodies structurally subordinate to them. Central administrative boards which bear the responsibility of implementing and enforcing statutes and government policies in a limited field are expected to cooperate with each other in matters over which their powers overlap, but they cannot be compelled to do so. Subordinates within these boards can ignore the thinking of their superiors and apply the law as they see fit. This system of individual responsibility is true also of the judicial system. Thus, a judge of an inferior court is not bound by the decisions of a higher tribunal; he may apply the law as he thinks right, for he alone is responsible for the correctness of his decisions.[135]

It is in this light that we see the importance of an officer to oversee public administration. Where an officer or employee is responsible, not to a higher official, but to the law, the necessity of constant reminders of official duty cannot be overestimated. The success of this system of administration derives largely from the tradition of excellence in the public service which the Swedes are known for.[136] And it is within the confines of a responsible and efficient public service that the ombudsman institution can be best appreciated.

The Ombudsman in Finland

Though not actually a part of the Scandinavian Peninsula, Finland shares with Sweden a common historical heritage. A part of Sweden for six centuries (since the thirteenth century),[137] Finland was ceded to Russia in 1809. But the outmoded terms of the Swedish Constitutional

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[134] Bexelius, *op. cit. supra*, note 119 at 25-26.
[135] GELLHORN, *op. cit. supra*, note 117 at 195-199.
[136] *Id.* at 199-200.
[137] Rudholm, *op. cit. supra*, note 122 at 17.

Acts of 1772 and 1789 were carried over to the new Grand Duchy of Finland, and provided the framework of government until a century later when Finnish national independence was attained.[138]

Under Russian rule, Finland enjoyed the special status of Grand Duchy, with its own laws, church, and autonomous administration. Thus, having inherited Swedish constitutional law, the Finns continued the office of the Chancellor of Justice; however, the name of the office was changed to Procurator, likewise the name of a similar officer in Russia.[139]

In 1919, after attaining independence, Finland adopted a Constitution in which the title of Procurator was changed back to its original "Chancellor of Justice". But more important than this was the creation in the 1919 Constitution of the new office of a Parliamentary Ombudsman in the tradition of the Swedish institution.[140]

Unlike their Swedish counterparts whose functions overlap in a narrower field — judicial administration — the Finnish Chancellor and Ombudsman perform functions which overlap in almost every point.[141] Otherwise, they carry out their functions in much the same way as the Swedish JK and JO.

The Ombudsmand in Denmark

One hundred and forty-six years after the appearance of the Swedish ombudsman, and thirty-six years after the Finnish version was first created, Denmark established its own office of the Parliamentary Commissioner — the *Folketingets Ombudsmand.* It was in 1953 that the Danish Constitution was amended to authorize "the appointment by the Folketing of one or two persons, who shall not be Members of the Folketing, to control the civil and military administration of the state."[142]

In general, all persons acting in the service of the State, including Ministers, are within the *Ombudsmand's* jurisdiction. The *Folketing* itself is not within the *Ombudsmand's* power of supervision, but a member of the *Folketing,* when acting in another capacity, such as a member of the Government's Agricultural Land Board, is not exempted from the *Ombudsmand's* powers. Over Ministers, the *Ombudsmand* exercises supervision in questions of administration but not those involving political issues. The Courts are outside of the *Ombudsmand's* com-

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138 GELLHORN, *op. cit. supra,* note 117 at 49.
139 *Ibid.*
140 *Id.* at 50.
141 *Id.* at 64-65.
142 DANISH CONST., Part V, 55 in PEASLEE, *op. cit. supra,* note 127 at 261; see also I.M. Pedersen, *Denmark's Ombudsmand* in ROWAT, (ED), *op. cit. supra,* note 119 at 77.

petence because, unlike Sweden and Finland, Denmark has no tradition of administrative supervision by the legislature over the courts. Civil servants employed by the Danish Lutheran Church, though not a State Church, are also within the *Ombudsmand's* competence except in matters involving the tenets and preachings of the Church. Likewise, the *Ombudsmand* has also been held competent to deal with civil servants employed by such corporations as the Scandinavian Airlines System which are private corporations but in which the government holds shares. Originally, the *Ombudsmand* was prohibited from dealing with matters regarding local administration. However, in April, 1962, the *Folketing* authorized him to investigate matters involving local administration where an appeal to a government authority may be had. Nevertheless, local legislatures are not subject to the *Ombudsmand's* supervisory powers unless the municipal council's act involves a violation of essential legal interests.[143]

Like the Swedish and Finnish models, the Danish *Ombudsmand* is free from legislative control. Although a representative of the *Folketing*, the *Ombudsmand* cannot be ordered to take up a case or to take any course of action, except that he is required to submit an annual report to the legislative body.[144]

The Ombudsmann in Norway

The office of the Military Ombudsman was created in Norway in 1952, 143 years after the promulgation of the Swedish Constitution of 1809. Adapted to the needs of the Norwegian military system, the Military Ombudsman is now the top point of the representative system in the armed forces.[145]

The representative system of complaints has been existing in the Norwegian armed forces since 1912. Provisions in the defense force's regulations authorized the rank and file to choose representatives who could take up for discussion with their superiors the problems of the ordinary soldier. Through the years, this system of representation has developed, so that now a representative committee exists for each military detachment of more than 35 men.[146]

The Military Ombudsman Office which was established was an *Ombudsmann* Board composed of a Chairman and 6 members elected by the *Storting* (Parliament) to a term of four years. The *Ombudsmann*

[143] Pedersen, *op. cit. supra*, note 142 at 82-84.
[144] *Id.* at 82.
[145] A. Ruud, *The Military Ombudsman and His Board* in ROWAT, (ED), *op. cit. supra*, note 119 at 111-112.
[146] *Ibid.*

is empowered to require information from the officers concerned on matters submitted to the Board provided security considerations are not involved.[147]

Ten years after the creation of the *Ombudsmann* Board, the *Ombudsmann* for Civil Affairs was created. On 22 June 1962, the *Storting* passed the act creating the *Stortingets Ombudsmann*.[148] In November, 1962, it adopted the Instructions governing the *Ombudsmann's* activities. As a delegate of the legislature, the *Ombudsmann* is elected by the *Storting* which is also authorized to remove him from office.[149]

Unlike the other ombudsman schemes, the Norwegian version sacrifices much of the *Ombudsmann's* political independence. In the Instructions adopted by the *Storting*, it is provided that the *Ombudsmann* "shall give his opinion" on cases submitted to the *Storting* or the *Odelsting* and which are referred to him. Clearly then, the Norwegian *Ombudsmann* can be compelled to take up a case, thus giving the *Storting* the power to control his field of activity. The *Ombudsmann's* "opinion" which is submitted to the *Storting* may be ignored or even repudiated by the *Storting*,[150] thus lowering the prestige of the *Ombudsmann's* office and neutralizing much of the persuasive effect of his opinions in other cases.

Generally, the *Ombudsmann's* jurisdiction covers the activities of administrative agencies and offices of the government, including all branches of the public service, in matters affecting the exercise of governmental as well as proprietary functions. Technically, the armed forces fall within the *Ombudsmann's* competence, but activity in this field is not of great significance because of the existence of the *Ombudsmann* Board.[151]

The *Storting* and its chambers are beyond the *Ombudsmann's* powers. Likewise, the *Ombudsmann* has no power over the courts, the exclusion covering not only the latter's judicial but also their administrative functions. In matters involving deprivation of personal liberty, the *Ombudsmann* is specially empowered to inquire into acts or omissions of municipal organs. In other matters, he exercises discretion as to the necessity of extending his investigations to municipal actions.[152]

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147 Ruud, *op. cit. supra*, note 145 at 114.

148 GELLHORN, *op. cit. supra*, note 117 at 158.

149 A. Os, *The Ombudsman for Civil Affairs* in ROWAT, (ED), *op. cit. supra*, note 119 at 95-98.

150 *Id.* at 99.

151 Os, *op. cit. supra*, note 149 at 99-100.

152 *Ibid.*

Spread of the Ombudsman Idea

In 1955, only Sweden, Finland and Denmark had a general ombudsman plan. Since then, probably due to the steady flow of information from these countries regarding the success of the ombudsman institution, its popularity has risen and is steadily rising still.

In 1957, West Germany set up an Ombudsman for the armed forces. In 1962, New Zealand created the office of the Parliamentary Commissioner; in spite of the new name of this office, the man appointed to it is still generally known as the Ombudsman. In Great Britain, the first Parliamentary Commissioner took office on 1 April 1967. In the new state of Guyana, the first Ombudsman was appointed on the eve of its independence in May, 1966. In Mauritius, the constitution which took effect in 1967 also provided for the office of an Ombudsman. By 1967, Canada had two provincial Ombudsmen — in Alberta and New Brunswick — in operation, and several other proposals were under consideration. In the United States, Nassau County in New York appointed a Public Prosecutor on 31 May 1966; in Hawaii, the Ombudsman Bill became law on 24 June 1967. In addition, by 1961, the State Comptroller of Israel, an officer of the legislature with no authority to control the administration but with broad powers to audit financial propriety, general legality, efficiency and morality, had taken on the complaints-handling function of an Ombudsman.[153]

Ombudsman proposals have been widely received and discussed all over the world — on the national or federal, provincial or state, and local, levels. To date, the following countries have established an ombudsman institution on the national level: Sweden, Finland, Denmark, Norway, Great Britain, West Germany, New Zealand, Guyana, Mauritius, New Zealand, Tanzania, Northern Ireland, Israel, Switzerland, Fiji, Ghana, Greece, Indonesia, Iran, Republic of Vietnam, Taiwan, Sudan, Bulgaria, Japan, North Korea, Poland, Romania, Russia, Singapore, Yugoslavia, and Hungary.[154] On the provincial or state level, an office of the Ombudsman has been established in: New Brunswick, Quebec, Alberta, Manitoba, and Nova Scotia of Canada; and Hawaii, Nebraska, Iowa, Oregon, South Carolina, Illinois and New Mexico of the United States.[155] On the local level, there are offices of the Ombudsman in Jerusalem, Tel Aviv, Zurich, Newark, New Jersey, City of Dayton, Ohio, Montgomery County, Dayton School Board, King County, Nassau County

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[153] ROWAT, (ED.), *op. cit. supra*, note 119 at vii-xxiv.
[154] ROBLES, *op. cit. supra*, note 118 at 8.
[155] *Id.* at 9.

and Seattle, Washington.[156] The Albert Shire Council of Gold, Queensland, New Zealand has also created an office of the Ombudsman.[157]

Proposals for the adoption of the Ombudsman are also pending consideration in several other countries such as Australia, Belgium, Hongkong, India, Jamaica, the Netherlands, Papua, Trinidad, Uganda, Zambia, Malaysia, Iceland, Austria, Italy and the United States. The interest in this institution has caught so much fire, in fact, that even the United Nations seems to have caught the "Ombudsman bug".[158]

The Philippine Experience

Several quasi-ombudsman institutions have been created in the Philippines by executive fiat. Among these are the Integrity Board[159] of President Elpidio Quirino; the Presidential Complaint and Action Commission,[160] and the Presidential Complaints and Action Committee[161] of President Ramon Magsaysay; the Presidential Committee on Administration Performance Efficiency,[162] and the Presidential Anti-Graft Committee[163] of President Carlos P. Garcia; the Presidential Committee on Administration Performance Efficiency,[164] and the Presidential Anti-Graft Committee[165] of President Diosdado Macapagal; and the Presidential Agency on Reforms and Government Operations (PARGO)[166] of President Ferdinand E. Marcos.

Finally, on 4 August 1969, R.A. No. 6028 was passed, creating the office of the Citizen's Counselor, the first true ombudsman in the Philippine scene. The law, however, was never implemented. Perhaps it was partly for this reason that the need was seen to constitutionalize the office of an ombudsman.

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[156] *Ibid.*

[157] ROWAT, (ED), *op. cit. supra*, note 119 at xvi.

[158] ROBLES, *op. cit. supra*, note 118 at 9-10.

[159] Created by Exec. Order No. 318, s. 1950, 46 O.G. 1944 (May, 1950), as amended by Exec. Order No. 344, s. 1950, 46 O.G. 4075 (Sept., 1950), Exec. Order No. 358, s. 1950, 46 O.G. 5279 (Nov., 1950), Exec. Order No. 401, s. 1951, 47 O.G. 20 (Jan., 1951), Exec. Order No. 439, s. 1951, 47 O.G. 2251 (May, 1951), Exec. Order No. 501, s. 1952, 48 O.G. 1679 (May, 1952), and Exec. Order No. 523, s. 1952, 48 O.G. 3130 (Aug., 1952); abolished by Exec. Order No. 4, s. 1954, 50 O.G. 3 (Jan., 1954).

[160] Created by Exec. Order No. 1, s. 1953, 49 O.G. 5262 (Dec., 1953); superseded by Presidential Complaints and Action Committee, Exec. Order No. 19, s. 1954, 50 O.G. 960 (March, 1954).

[161] Created by Exec. Order No. 19, s. 1954, 50 O.G. 959 (March, 1954).

[162] Created by Exec. Order No. 306, s. 1958, 54 O.G. 4683 (July, 1958), as amended by Exec. Order No. 382, s. 1960, 56 O.G. 2351 (March, 1960); abolished by Exec. Order No. 456, s. 1961, 58 O.G. 173 (Jan., 1962).

[163] Created by Exec. Order No. 378, s. 1960, 56 O.G. 915 (Feb., 1960); abolished by Exec. Order No. 457, s. 1961, 58 O.G. 174 (Jan., 1962).

[164] Created by Exec. Order No. 1, s. 1961, 58 O.G. 171 (Jan., 1962).

[165] Created by Exec. Order No. 4, s. 1962, 58 O.G. 1045 (Feb., 1962).

[166] Created by Exec. Order No. 4, s. 1966, 62 O.G. 1161 (Feb., 1966).

The Ombudsman Concept

In order to carry out the mandate of the Constitution, it is imperative that we get a good grasp of the concept of the ombudsman as it has come to us. It is only by knowing the manner in which the institution has worked in other countries that we, in turn, can faithfully implement the constitutional mandate for its creation in our country. This does not mean, however, that the ombudsman we are to create ought to be the exact replica of any one of the foreign models. It is sufficient that we understand and preserve the essential characteristics and features of an ombudsman; for the rest, adaptation to peculiar Philippine conditions and experiences, and to local attitudes and traditions must be made.

As we go along, we shall try as much as possible to point out the different areas in which innovations have been introduced, and the various means by which later ombudsman models have been adapted by other countries to their own needs.

Definition

The "ombudsman concept", according to Gellhorn, is very simple: it means only that a citizen aggrieved by an official's action or inaction should be able to state his grievance to an influential functionary, empowered to investigate and to express conclusions.[167] In other words, an Ombudsman is one to whom a citizen may run for redress of his grievances against public administration.

The above definition may be misleading, and should not bring about the conclusion that every complaint or appeal officer is an "Ombudsman". Indeed, Rowat warns that the growing popularity of the ombudsman institution has often made one forget that the original ombudsman systems possess a unique combination of essential characteristics, missing any of which the so-called "ombudsman" ceases to be one. Rowat sums these up in the following, by far the most succinct definition of the "ombudsman":

> * * * [H]e is an independent and politically neutral officer of the legislature, usually provided for in the constitution, who receives and investigates complaints from the public against administrative action, and who has the power to criticize and publicize, but not to reverse, such action.[168]

The above definition is amplified by the 32nd American Assembly (1967) of Columbia University which defines the Ombudsman as "an independent, high level officer, who receives complaints, who pursues

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[167] GELLHORN, *op. cit. supra*, note 117 at 93.

[168] D. C. Rowat, *The Spread of the Ombudsman Idea* in S.V. ANDERSON, (ED.), OMBUDSMEN FOR AMERICAN GOVERNMENT? 36 (1968).

inquiries into the matters involved, and who makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic public reports. His remedial weapons are persuasion, criticism and publicity. He cannot, as a matter of law, reverse administrative action."[169]

Essential Characteristics

The different ombudsman institutions existing at present may be traced to a common beginning, but the development of each of them has been peculiar to the conditions of each country which adopted it. Thus, the details, amplifications and embellishments of the ombudsman's powers, functions and jurisdictions, differ from country to country. Nevertheless, through all these institutions runs a common strain which, through the years, has developed into the basic concept of the ombudsman.

Rowat requires the concurrence of the following basic and essential characteristics so that an institution may rightly be called an "ombudsman":

1) The Ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the Constitution, who supervises the administration;
2) He deals with specific complaints from the public against administrative injustice and maladministration; and
3) He has the power to investigate, criticize, and publicize, but not to reverse, administrative action.[170]

The foregoing may be further broken down into the following features readily associated with the ombudsman institution:

1) Agent of the legislature,
2) Impartiality and political independence,
3) Accessibility and expeditiousness of proceedings,
4) Investigatory power,
5) Power to criticize and publicize, and
6) Absence of revisory jurisdiction.[171]

According to David C. Cummins, if any of these characteristics is missing, the essence of the ombudsman is destroyed and the proposed scheme would be essentially a duplication of an existing governmental institution.[172]

1) *Agent of the legislature* — The ombudsman is an agent or representative of the legislature, and not of the executive. It is through the ombudsman that the legislature sees to it that its policies are effec-

[169] Cited in ROBLES, *op. cit. supra*, note 118 at 1.
[170] ROWAT, (ED), *op. cit. supra*, note 119 at xxiv.
[171] ROBLES, *op. cit. supra*, note 118 at 3-5; Rowat, *op. cit. supra*, note 168 at 9-10.
[172] Cited in ROBLES, *op. cit. supra*, note 118 at 5.

tively carried out. The ombudsman is, therefore, one of the legislature's checks on the executive. As we have seen, this characteristic is a result of the interplay of political forces in Sweden where the institution began. Power politics gave rise to two offices — that of the Crown's representative, the JK, and that of the Parliament's representative, the JO.

Since the ombudsman is basically aimed at seeing to the observance of the law, it is primarily directed at the executive, and sometimes, at the judicial, branches of government. It is thus easy to see why the ombudsman ought to be an agent of the legislature — it must be an "outsider" to the bureaucracy which it is to criticize.

2) *Impartiality and political independence* — Although traditionally an agent of the legislature, the ombudsman must in fact be independent not only of the government but also of the law-making body. An institution which is to serve as the critic of public administration must be insulated from partisan politics. Otherwise, the ombudsman may become a tool of oppression in the hands of the party in power, and may be used to inflict political retribution on, to destroy the image of, or to weed out from the government, those who do not share the same political persuasion.

Besides being independent from political forces, the ombudsman must likewise be free from other influences. It must be neutral and impartial, subject only to the demands of fairness and justice. Otherwise, if the integrity of the person appointed Ombudsman is not untarnished, his recommendations, which are at best of persuasive effect and which achieve their purpose largely through the force of public opinion, would remain unheeded. The ombudsman must enjoy the faith and confidence of the public servants and must receive public support. Otherwise, its role as critic and fiscalizer will remain unfulfilled.

Of the foreign models, the Ombudsmen of Sweden, Finland and Denmark enjoy sufficient independence from parliamentary control. The history of Sweden justifies this independence. Having evolved as the Parliament's means of supervision over the King's government, the Swedish Ombudsman enjoys a tradition of freedom. Sharing with Sweden a common history until 1809, Finland preserved this tradition of independence of the Ombudsman from parliamentary control. Denmark followed suit, possibly because the success of the Ombudsman in Sweden and Finland indicated a perpetuation of the tradition.

Norway, on the other hand, as earlier pointed out, deprived its own Ombudsman of much of the independence enjoyed by his Swedish, Finnish and Danish counterparts. The Norwegian Ombudsman can be compelled by the *Storting* to take up a specific case. This, while un-

thinkable in Sweden or Finland, has been accepted as necessary in Norway. Possibly, Norway does not enjoy the same tradition of excellence in the public service of which Sweden is proud, nor the Finnish habit of legal precision,[173] ingrained by years of stubborn insistence on the observance of the Grand Duchy's laws during the Russian "occupation" and of resolute opposition to Russian domination.

3) *Accessibility and expeditiousness of proceedings* — Since the ombudsman deals largely with complaints from the common man or average citizen, it must be accessible. The ombudsman operates at the consumer-level of government. It is at this level that the average citizen normally deals with the public administration. No big-time million-dollar transactions. No momentous life-or-death proceedings. Rather, the bulk of the ombudsman's work has involved ordinary run-of-the-mill transactions, seemingly picayune but of grave consequence to the ordinary man. A citizen's impression of his government derives from his ordinary experiences with it. It is usually at the lowest rung of public service that he experiences his first contact with the bureaucracy, and it is at this level that he finds primary cause for his disaffection with the entire governmental machinery. Thus, the ombudsman must be present — ready to give an ear and, when proper, to "rap the knuckles" of those who err.

The ombudsman's procedure must be simple, for if one has to go through a maze of technicalities, the average citizen would simply shrug his shoulders and bottle up his grievance. As a rule, proceedings by the different ombudsman institutions abroad are simple, informal, direct, speedy, and inexpensive. Usually, no fee at all is paid.

4) *Investigatory power* — The ombudsman cannot function without the power to investigate, either on its own motion or upon the filing of a complaint. Though most of its investigations are initiated by complaint, the importance of its power to investigate *motu proprio* should not be underestimated. It is reported that, from the experience of the Ombudsmen abroad, many of the most important cases requiring a prosecution or a change in administrative practice or law arise in this manner.[174]

The Ombudsmen of Sweden and Finland enjoy a wider range of freedom in the conduct of their investigations. In Sweden, the Ombudsman may investigate on his own motion or upon complaint. As a rule, upon receipt of a complaint, he requests an explanation from the official concerned.[175] The public servants are generally bound to afford the

[173] GELLHORN, *op. cit. supra*, note 117 at 50.
[174] Rowat, *op. cit. supra*, note 168 at 10.
[175] Bexelius, *op. cit. supra*, note 119 at 28.

Ombudsman lawful assistance.[176] When explanations are deemed insufficient, the JO may himself conduct an investigation or request one by the agency concerned or by the police. In case expert opinion is necessary, other governmental authorities are also requested to render assistance.[177] If prosecution is necessary, the public prosecutors, when requested to do so, aid the Ombudsman in the bringing of actions.[178]

The Finnish Ombudsman conducts inquiries and investigations in much the same way as the Swedish JO. On the Danish Ombudsman, on the other hand, several restrictions are imposed: he is under a specific duty, whenever secrecy is necessary, to keep confidential information obtained through investigations and inquiries. Since the amendment of the *Ombudsmand* Act in 1959, the Danish Ombudsman is likewise prevented from taking up a case where a right of appeal to a higher administrative body could still be had. However, where it is the conduct of subordinate authorities and not the administrative decision itself which is being questioned, the requirement of exhaustion of administrative remedies is dispensed with. The Danish Ombudsman is also obliged to include in his reports to the *Folketing* the defense of a respondent whenever the case is included in such report. This requirement is meant for the protection of public officials and employees.[179]

In order that the Ombudsman may begin to act on a complaint, Norwegian law imposes even more rigorous requirements. The complaint must be signed and filed within one year after the event or action complained of took place. Beyond one year, the Norwegian Ombudsman is not obliged to take up a case, although nothing will legally prevent him from doing so if he should desire. The complaint must also be filed by a person who is affected by the matter complained of. In other words, the complainant must have a substantial interest in the object of the investigation to be conducted. As a general rule, exhaustion of administrative remedies is also required of the Norwegian Ombudsman unless he finds special reasons for waiving this requirement. For instance, he may accept a case when appeal to the King is the only other remedy available because then such appeal would actually be elevated to the Cabinet which is beyond his jurisdiction.[180] The Ombudsman must also give the official complained against an opportunity to rectify his error if any, unless submitting the complaint to the administrator or agency concerned would thwart an enlightenment of the case. He must inform the complainant of the results of his investigation, but the extent of

[176] SWEDISH CONST., art. 99, in PEASLEE, *op. cit. supra*, note 127 at 867.
[177] Bexelius, *op. cit. supra*, note 119 at 28-29.
[178] SWEDISH CONST., art. 99, in PEASLEE, *op. cit. supra*, note 127 at 867.
[179] Pedersen, *op. cit. supra*, note 142 at 82-84.
[180] Os, *op. cit. supra*, note 149 at 101-102.

information to be divulged is left to his sound discretion. He enjoys the power to demand information and the production of documents and records, and in case of refusal, he may apply to the courts for aid. He is bound to secrecy, unless he considers the release of information necessary for the performance of his duty in a particular case.[181]

Some innovations in the Norwegian ombudsman scheme are designed for the protection of the public administration and the public in general. For instance, although authorized to initiate his own investigations, the Ombudsman may not undertake inspections at random, but only in relation to a particular case under investigation. When a complaint has no basis, and in other instances when secrecy is justified, neither the name of the complainant nor of the public servant complained against is to be mentioned in the annual report which he submits to the *Storting*. Nor can this report contain trade, business or official secrets.[182]

5) *Power to criticize and publicize* — In a strictly legal sense, the ombudsman cannot compel obedience to its orders or compliance with its recommendations. It cannot order an administrator to take a particular course of action, or a court to change its decision. Through the years, however, with public opinion behind this institution, the ombudsman has succeeded in getting things done.

In Sweden, when fault is found with the official complained against, or even when no law or rule has been violated, if the suggestion will help improve the public administration, the JO issues "reminders" or "recommendations" to the agency or official concerned.[183] If the suggestions remain unheeded and the official may be made liable in court, the JO may prosecute either by himself or through the aid of public prosecutors.[184] In the annual report required of him, the Swedish JO is also expected to "call attention to defects in the laws and statutes and make suggestions for their improvement."[185]

As in Sweden, the Finnish Ombudsman may also issue admonitions and recommendations, and prosecute where admonition is insufficient. He also has the power and duty to recommend to Parliament means by which conflicting or defective laws may be corrected.[186]

In Denmark, the Ombudsman has specific remedies available:[187]

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[181] *Id.* at 102-104.
[182] *Id.* at 104.
[183] Bexelius, *op. cit. supra*, note 119 at 25.
[184] SWEDISH CONST., arts. 96 and 99, in PEASLEE, *op. cit. supra*. note 127 at 866-7.
[185] SWEDISH CONST., art. 100, in PEASLEE, *op. cit. supra*, note 127 at 867.
[186] P. Kastari, *The Chancellor of Justice and the Ombudsman* in ROWAT, (ED), *op. cit. supra*, note 119 at 62-63.
[187] Pedersen, *op. cit. supra*, note 142 at 81.

(a) If he finds that a Minister or a former Minister ought to be held responsible under civil or criminal law he may submit a recommendation to this effect to the Folketing.

(b) If he is of the opinion that any other person within his jurisdiction ought to be held responsible for a criminal offence he may order the prosecuting authority to institute a preliminary investigation or to prosecute such a person before the courts.

(c) If he considers there are sufficient grounds for instituting disciplinary proceedings he may order the competent administrative authorities to start such proceedings against civil servants.

(d) He may state his views on the matter to the person whom the complaint concerns.

Of these, the most commonly resorted to is the power to state views on the matter under investigation to the public servant involved. In fact, none of the other remedies has, so far, been resorted to.[188]

Like the Swedish, Finnish and Danish Ombudsmen, the Norwegian Ombudsman is empowered to issue reminders and admonitions, to render opinions, and in appropriate instances, to order prosecution or himself to prosecute. However, like the Danish Ombudsman, his power to criticize is circumscribed: he may not criticize the exercise of discretionary powers unless it is clearly unreasonable or otherwise clearly in conflict with fair administrative practice.[189]

The power to publicize has been exercised in varying degrees. In Sweden and Finland, there are no restrictions, other than the Ombudsman's sound discretion, on the power to report on his activities, whether to Parliament or to the public in general. In both countries, the annual report helps in the dissemination of information on the activities of the Ombudsman.[190] In Sweden, in fact, it is believed that the annual report is probably the JO's best means of influencing the application of laws.[191] In Denmark and Norway, on the other hand, the Ombudsman's power to publicize is restricted. The Danish Ombudsman is generally bound to secrecy.[192] The Norwegian Ombudsman is also obliged to keep information confidential; in fact, in certain instances he is prohibited from disclosing the names of the complainant and the official complained against. Nor can the Norwegian Ombudsman's report contain trade, business or official secrets.[193]

Thus, we see that in Denmark and Norway, where the Ombudsman institution is relatively new, the legislators have been wary of too much

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[188] *Ibid.*

[189] Os, *op. cit. supra*, note 149 at 102-109.

[190] Bexelius, *op. cit. supra*, note 119 at 25; Kastari, *op. cit. supra*, note 186 at 72.

[191] Bexelius, *op. cit. supra*, note 119 at 25.

[192] Pedersen, *op. cit. supra*, note 142 at 83-84.

[193] Os, *op. cit. supra*, note 149 at 104.

power, which could become subject to abuse in the hands of the Ombudsman. Where an institution has not grown with the system of government but is transplanted from a foreign shore, adaptations such as those made by Denmark and Norway are often inevitable.

In any case, whether the power to criticize and publicize is exercised with more or less latitude, it is clear that the power is an essential feature of an ombudsman system: the soundness of its decisions and the public support generated will bolster the persuasiveness of the ombudsman's recommendations.

6) *Absence of revisory jurisdiction* — This is a characteristic which baffles those who are unfamiliar with the ombudsman system and the context within which the institution has evolved. It seems nearly impossible to expect an official to perform his function effectively when he has the power neither to order a particular course of action nor to reverse an administrative or judicial decision. How does the Ombudsman "enforce" his decisions?

The answer can perhaps be traced to man's nature. Inherently social, he seeks commendation rather than disapproval, harmony rather than dissent. Knowing that an external critic is poised to remark upon instances of maladministration, public servants often take more care than they ordinarily would. Thus, it is reported that before the Ombudsmen have even so much as begun to think of their recommendations at the close of investigations, "administrative bodies have often voluntarily withdrawn from positions that had been complained against."[194]

The Ombudsman also has in his favor the weapons of reason and public opinion. The prestige attached to the office of the Ombudsman and the respect for the integrity and capacity of the men appointed to the post add to the persuasiveness of the Ombudsman's recommendations.

Although the precise limits of the Ombudsman's power to criticize differ from country to country, in general it may be said that the Ombudsman concerns himself, not with the content of administrative or judicial decisions but with the manner in which these are made. Hence, it is administrative or judicial conduct which is subject to the Ombudsman's criticism.

Sometimes, a case may require no more than explaining to the complainant how a decision was arrived at. This may be done by the Ombudsman himself, or by the official concerned upon the Ombudsman's "request". Or, a government official or employee may be "requested" to apologize to a complainant for a discourteous conduct, together with a reminder that, to avoid similar incidents, he should

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[194] GELLHORN, *op. cit. supra*, note 117 at 437.

be more polite in the future. If a citizen is aggrieved by an inefficient or inadequate system, the Ombudsman may "recommend" the revision of the system itself. In all these instances, the Ombudsman's criticisms and recommendations may be ignored. However, the success of the ombudsman institution in the Scandinavian countries, and the fact that it has withstood the test of nearly two centuries are an indication that generally the Ombudsman's "recommendations" are taken seriously and often complied with.

If the Ombudsman's suggestions are ignored, he may still resort to public opinion. Though rules on the extent of publicity allowed vary from country to country, generally, the Ombudsman may resort to the mass media and other means of publication in order to achieve his purpose.

Finally, of course, if reason and public opinion are inadequate, the Ombudsman has the power to prosecute, though the extent of this power may again vary. This power, according to Gellhorn, is used sparingly and with caution, for in most instances, a "reminder" is sufficient:

> Because punishment for a past mistake is a rather antiquated way of encouraging sound administration, ombudsmen have for many years tended to lessen their reliance on penal sanctions and have instead developed the practice of "giving reminders" to erring officials. * * * When admonishing, the Ombudsman does much more than simply rap the knuckles of an inattentive official. Rather, he prepares a reasoned opinion that, like the opinion of an American appellate court, may have considerable educational force. Behind the admonitory lecture lurks a thinly veiled threat to prosecute if the admonition be ignored.[195]

Thus, although the Ombudsman cannot compel a reversal or revision of administrative or judicial action or decision, he has at his disposal various means of achieving his ends. This is only as it should be, for if the Ombudsman were to be given the power to reverse or revise administrative or judicial decisions, the entire administrative and judicial machinery might be unsettled by one man.

Functions of the Ombudsman

As agent of the legislature, the ombudsman performs functions which are aimed at achieving a more efficient public administration. It is through the ombudsman that the legislature determines whether its policies are being implemented.

Complaints handler — The ombudsman's main function is to receive complaints from citizens aggrieved by administrative action or inaction.

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[195] *Id.* at 206 (discussing the Swedish Ombudsman).

That the complaint procedure is basic to the institution is supported by the fact that the size of an ombudsman's staff is often determined by the load of complaints ordinarily received.[196]

Through these complaints and the investigations subsequently conducted, the ombudsman helps the citizen, discovers the erring public servants who may be meted out the appropriate "penalties", (*e.g.*, a simple "reminder" in case of small mistakes, or a prosecution in case of more serious offenses involving violations of law), and determines the means by which the efficiency of government offices may be improved.

Critic and overseer of public administration — Through the ombudsman's investigations, either on its own initiative or upon complaint, the proper and faithful implementation of the laws is indirectly supervised. It is said that improvement in the public administration stems partly from the ombudsman's recommendations and partly from its mere existence, which prompts administrators to take more care. The fact alone that there *is* an ombudsman reminds an administrator or employee to discharge his duties faithfully because he knows that the ombudsman, though invisible, is there to watch his performance and to see that the law is administered efficiently and with an even hand. In Denmark, it is said:

> **The Ombudsman's work has indubitably had a tonic effect upon public administration. A number of administrators frankly acknowledge that laziness has diminished because during the past decade an outsider has been in a position to criticize. Work methods have in some instances been rationalized at the behest of superior officials, impressed by the Ombudsman's suggestions concerning other organizations. Moreover, staffs that had like aging humans become too "set in their ways" have sometimes been liberated from their bondage by the Ombudsman's fresh approach. * * * "The Ombudsman, coming from the outside, sometimes sees things that are perfectly obvious, but that we have stopped noticing because they are constantly before our eyes."[197]**

And in Sweden, administrators' remarks point to the salutary effect that the ombudsman institution has had on public administration:

> **Others have independently confirmed that an even remotely possible future inspection by the Ombudsman does influence present behavior, especially in matters involving detention of the person. "How do you think the Ombudsman would like *that*?" a superior was quoted as having barked at a junior whose recommended action was being rejected. Discussing a colleague's proposal to make an arrest on somewhat inconclusive evidence, an official said: "I told him I wouldn't want to have such a case in my files if the Ombudsman were to come**

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[196] W. B. Gwyn, *Transferring the Ombudsman* in ANDERSON, (ED), *op. cit. supra*, note 168 at 39.

[197] GELLHORN, *op. cit. supra*, note 117 at 36-37.

> around to look at them, and that was the end of that." A young prosecutor acknowledged being conscious of saying to himself with considerable frequency: "I must be careful with this case, because it is just the kind the Ombudsman looks for." * * * A prison governor who had not experienced an inspection for nearly ten years said: "Often when I'm making a decision, I ask myself, How would the Ombudsman decide things? It has a good effect on me."
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> * * * [M]any officials do regard the Ombudsman as a vigilant watchman — even though, in all probability, the watchman will not complete his rounds within the next decade. Some of them, one suspects, are really consulting only their own inner conscience, to which they have attached the Ombudsman's title.[198]

Critic of the law — An officer of the legislature, the ombudsman generally reports to it and submits legislative proposals on how to improve public administration. This is a significant function: through complaints received and investigations conducted, the ombudsman learns of the effectiveness of a law, discovers the areas where reforms are called for, and, having seen how the existing system actually works, recommends means of achieving these reforms.

Protector of the innocent — This function of the ombudsman is as important as any other. Where no fault is found, the Ombudsman explains the findings to the complainant and the innocent administrator is saved from suspicions, ill-feelings and otherwise endless rumors of wrong doing.[199] In other words, a decision favorable to the administrator or employee sets the public mind at rest. In some cases, the ombudsman may even be an insulator against a hostile public. For instance, Gellhorn reports this case in Sweden:

> In 1963 a child was atrociously murdered in Stockholm by a "sex maniac". The murderer killed again in similar circumstances before he was apprehended. The police were severely and frequently criticized in letters printed in the newspapers. Then the police master requested the Ombudsman to ascertain whether the police had been negligent or otherwise censurable. The newspapers, apprised of this, immediately ceased their agitation, leaving the police department in peace while the Ombudsman looked into the matter.
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> More than a year later the Ombudsman issued a 120-page report. He did find deficiencies in the organization of the detective work at the time and he criticized several police officers by name for not having adequately reported information they had received; their pieces might have fitted into a whole so that the main outlines of the picture could have been perceived more quickly by their superiors. But no cause for prosecution or further action was found, nor were any general recommendations made since the police department had already taken steps to improve its efficiency.[200]

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198 *Id.* at 226-227.
199 *Id.* at 250.
200 *Id.*, fn. 68 at 250-251.

Thus, while the Ombudsman mainly functions as a critic of administrative fault, he may also serve well to strengthen the public faith in government.

Jurisdiction

The public servants and the matters within the ombudsman's competence are as varied as the countries which have adopted the institution.

Persons within the ombudsman's jurisdiction — The persons subject to the ombudsman's powers are determined by the political and historical experience of, and the exigencies of the conditions in, a particular country.

In Sweden, the JO has jurisdiction over all public servants and employees[201] except the JK, the MO, and the Cabinet Ministers.[202] On the other hand, he could investigate and proceed against court officers, including the Members of the Supreme Court and of the Supreme Administrative Court.[203] In the beginning, the Swedish JO's jurisdiction extended only over matters of national administration. In 1957, this was enlarged to cover matters of local administration except those involving local elective officials. Matters still appealable within the local administrative machinery or still subject to correction by the local legislature are not considered unless liberty is endangered or abuse of powers is evident.[204]

In Finland, the Ombudsman is empowered to prosecute a Chancellor who has been impeached,[205] while the latter has no explicit authority to proceed against the former.[206] But the Ombudsman cannot "interfere with the activities of the Chancellor", as specifically provided for by Parliament, while the Chancellor is not prohibited from inquiring into the former's activities.[207] Like the Swedish model, the Finnish Ombudsman cannot deal with Ministers and Members of Parliament, but may inquire into the activities of judicial officers.[208]

In Denmark, the Ombudsman may proceed against, and inquire into the activities of, members of the *Folketing* when acting in other capacities, such as a member of the Government's Agricultural Land

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[201] SWEDISH CONST., art. 96, in PEASLEE, *op. cit. supra*, note 127 at 866-7.
[202] SWEDISH CONST., art. 106, in PEASLEE, *op. cit. supra*, note 127 at 869.
[203] SWEDISH CONST., art. 101, in PEASLEE, *op cit. supra*, note 127 at 867-8.
[204] GELLHORN, *op. cit. supra*, note 117 at 207; Bexelius, *op. cit. supra*, note 119 at 28.
[205] Parliamentary Directives, sec. 4 in GELLHORN, *op. cit. supra*, note 117 at 52.
[206] GELLHORN, *op. cit. supra*, note 117 at 52.
[207] *Id.*, fn. 35 at 65.
[208] FINNISH CONST., art. 49, in PEASLEE, *op. cit. supra*, note 127 at 279; see also GELLHORN, *op. cit. supra*, note 117 at 51.

Board. He may also exercise supervision over Ministers when dealing with questions of administration, but not with political issues. He may likewise investigate the activities of certain non-governmental institutions and organizations, such as the Danish Lutheran Church and private corporations in which the government holds equity interests. But the Danish Ombudsman may not proceed against or investigate officers of the courts. Nor may he deal with persons in the service of local governments except where an appeal to a central government authority may be had. Nevertheless, although local legislators and legislatures are generally outside of his competence, he may inquire into municipal council's decisions involving a violation of essential legal interests.[209]

In Norway, both the members of *Storting* and its chambers, and the officers of the courts are outside of the Ombudsman's jurisdiction. On matters of strictly municipal administration, he enjoys the discretion to investigate or refuse.[210]

The foregoing differences have been brought about by the divergent historical experiences and legal traditions of these countries. In Sweden and Finland, the supremacy of the legislative body is unquestioned; the Swedes relied upon the Four Estates to guard against royal abuses, while the Finns depended on their Parliament to resist the encroachments of their Russian oppressors. This tradition of legislative supremacy is not shared by Denmark. It is thus understandable that while Sweden and Finland have withdrawn members of their legislature from the Ombudsman's powers, Denmark has seen fit to allow investigations by the Ombudsman of members of the *Folketing* in certain instances. On the other hand, the Swedish and Finnish courts have always been subject to the supervision of the Chancellor of Justice, while the independence of the courts has always been jealously guarded in Denmark. It is, therefore, not surprising that while the Swedish and Finnish Ombudsmen merely perpetuated the tradition of executive and legislative supervision over the courts, the exercise of judicial power is a forbidden area to the Danish Ombudsman. Norway, which exempts members of the *Storting* and of the courts from the Ombudsman's jurisdiction, sees the need to preserve the independence of these coordinate branches of government.

The success of the ombudsman in the short period of its existence in Denmark and Norway is eloquent proof of the fact that an institution, though tested by time and experience, need not be copied exactly, but may be adapted to the conditions in a country and the attitudes of its people.

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[209] Pedersen, *op. cit. supra*, note 142 at 82-84.
[210] Os, *op. cit. supra*, note 149 at 99-100.

Subject matter of Inquiry — The scope of the Ombudsman's powers also varies from country to country. In Sweden, the Ombudsman is constitutionally authorized "to supervise * * * the observance of the laws and statutes as applied in all matters by all public officials and employees * * *"[211] In Finland, the Ombudsman "shall supervise the observance of the laws in the proceedings of courts and other authorities."[212] In Denmark, the Ombudsman for civil affairs shall "control the civil and military administration of the State."[213] In Norway, the Ombudsman is empowered to inquire into the activities of the administrative agencies and offices of the government.[214]

The main distinction between the earlier Swedish and Finnish originals on the one hand, and the later Danish and Norwegian models is not apparent from the foregoing general statements of power and duty. However, a study of these ombudsman schemes discloses the difference that while the Swedish and Finnish Ombudsmen can inquire into and criticize even the administrative or judicial decision itself,[215] the Danish and Norwegian Ombudsmen generally cannot criticize the wisdom or content of an administrative decision but only the fairness of the procedure by which the decision was made.[216] When the act complained of involves an exercise of discretionary powers, the Norwegian and Danish Ombudsmen may not criticize it unless it is unreasonable or arbitrary.[217]

Within the limited or unlimited area subject to the Ombudsman's inquiry, he may investigate such types of action or inaction as:[218]

1. Injustice
2. Failure to carry out legislative intent
3. Unreasonable delay
4. Administrative error
5. Abuse of discretion
6. Lack of courtesy
7. Simple clerical error
8. Oppression
9. Oversight
10. Negligence
11. Inadequate investigation
12. Unfair policy

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[211] SWEDISH CONST., art. 96, in PEASLEE, *op. cit. supra*, note 127 at 866-7.

[212] FINNISH CONST., art. 49, in PEASLEE, *op. cit. supra*, note 127 at 279; see also GELLHORN, *op. cit. supra*, note 117 at 51.

[213] DANISH CONST., Part V, 55, in PEASLEE, *op. cit. supra*, note 127 at 261; see also Pedersen, *op. cit. supra*, note 142 at 77.

[214] Os, *op. cit. supra*, note 149 at 99-100.

[215] GELLHORN, *op. cit. supra*, note 117 at 238-239.

[216] Rowat, *op. cit. supra*, note 168 at 16-17.

[217] Os, *op. cit. supra*, note 149 at 102-109; Pedersen, *op. cit. supra*, note 142 at 84-91.

[218] ROBLES, *op. cit. supra*, note 118 at 6.

13. Partiality
14. Failure to communicate
15. Rudeness
16. Maladministration
17. Unreasonableness
18. Arbitrariness
19. Unfairness
20. Arrogance
21. Inefficiency
22. Violation of law or regulation
23. Abuse of authority
24. Discrimination
25. Disability to act
26. Errors, mistakes, carelessness
27. Disagreement with discretionary decisions
28. Inconsistency with general course of an agency's function
29. Mistakes in law, or arbitrariness in ascertainment of facts
30. Actions based on irrelevant considerations
31. Actions unclearly or inadequately explained, when reasons should have been revealed.
32. All other acts of injustice that frequently the governors inflict upon the governed intentionally or unintentionally.

Powers and Procedure

As earlier stated elsewhere in this paper, the Ombudsman's procedure is simple, informal, direct, speedy, and inexpensive. With but a modicum of power, he fulfills his functions because he enjoys the support of the public in general.

Investigations initiated motu proprio — Generally, the Ombudsman may investigate either on his own motion or upon complaint. In Sweden and Finland, his power to investigate *motu proprio* is hardly circumscribed. Thus, although most of his investigations are initiated by complaint,[219] many of the most important cases requiring a prosecution or a change in administrative practice or law arise through investigations conducted by the Ombudsman on his own initiative.[220] In the newer Ombudsman schemes, however, his authority to initiate investigations by himself is limited.[221] In Norway, for instance, the Ombudsman cannot undertake inspections at random, but only in relation to a particular case under investigation.[222]

The Ombudsman may conduct investigations on his own initiative either periodically in accordance with a regular schedule, or at random. These random inspections may be brought about when he sees "smoke

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219 Gwyn, *op. cit. supra*, note 196 at 39.
220 Rowat, *op. cit. supra*, note 168 at 10.
221 *Id.* at 16.
222 Os, *op. cit. supra*, note 149 at 104.

in the chimney". The "smoke" may take the form of his own personal experience, an informal complaint, an unidentified phone call, a criticism in the newspapers, or even an unverified rumor.

Investigations initiated by complaint — In the earlier Swedish and Finnish models, the Ombudsman may take up a case upon any form of complaint. In Norway, the complaint must be in writing, signed by the complainant, filed within a year from the time of the act or omission complained of, and filed by a person with a substantial interest in the subject matter thereof.[223]

Procedure upon receipt of complaint — After a complaint has been received, the Ombudsman determines whether, on its face, such complaint is supported by sufficient grounds. In Norway and Denmark, exhaustion of administrative remedies is first required as a general rule.[224] In Sweden, on the other hand, the Ombudsman is not restricted by this requirement.[225]

If a complaint is not dismissed immediately, it may be referred to the official or agency concerned in any of many informal means: the Ombudsman may write to "his friend, the Commissioner" to ask for an explanation of an act complained of; or he may lift the phone to ask for details of a particular transaction; or he may casually drop by at the office of a department head in order personally to clear some doubts raised by a complaint. When the explanation does not sufficiently account for or justify the act or omission complained of, the Ombudsman may himself conduct an investigation, or ask the official or agency concerned to inquire into the matter. When necessary, the aid of other government agencies, such as the police, may be invoked.[226]

Cooperation between the Ombudsman and the public administrators is essential. In Sweden, the "King's officials in general are bound to afford the Ombudsmen lawful assistance * * *"[227] Thus, the Swedish Ombudsman is assured the assistance of public officials and employees. In Finland, likewise, cooperation with the Ombudsman is part of the tradition in the system of public administration.[228] In Denmark, the government agencies and public servants are under a duty to provide the Ombudsman with information and documents. Although it has not been formally decided whether administrators are bound to submit their

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[223] *Id.* at 101-102.

[224] Pedersen, *op. cit. supra*, note 142 at 82-84; Os, *op. cit. supra*, note 149 at 101-102.

[225] GELLHORN, *op. cit. supra*, note 117 at 207.

[226] Bexelius, *op. cit. supra*, note 119 at 28-29; Pedersen, *op. cit. supra*, note 142 at 82-84; Os, *op. cit. supra*, note 149 at 102-103.

[227] SWEDISH CONST., art. 99, in PEASLEE *on. cit. supra*, note 127 at 867.

[228] Kastari, *op. cit. supra*, note 186 at 72-74.

internal minutes, the Danish public officials generally cooperate.[229] In Norway, information and documents are demandable by the Ombudsman who may, in case of wrongful refusal, apply to the courts for assistance. However, internal working papers or records are not subject to the Norwegian Ombudsman's inspection. Thus, only official records and documents may be examined, including those which a government official or employee is required to use by statute or regulations, and those generally used in accordance with established practice, unless they are kept merely for internal purposes.[230]

Remedies — After adequate investigation, the Ombudsman has several options open to him. If the complaint is unfounded after all, it will be dismissed. He explains to the complainant why the act or omission complained of is justified. Sometimes, however, even when no fault is found in the official or employee complained against, the Ombudsman may recommend means of improving the system. At other times, even when a decision complained of suffers from no administrative or legal imperfection, the Ombudsman may seek to persuade the administrator concerned to change such decision in order to prevent needless hardship to the complainant.[231]

When the complaint is justified, the Ombudsman points out the error to the administrator and recommends means of rectifying it and of preventing future recurrences of the same nature. The means recommended depends on the kind and gravity of the "offense". In case of insignificant faults, an apology by the administrator to the complainant may suffice. Sometimes, the reversal of a decision, when still possible, is suggested. At other times, the payment of compensation is advised when this is the only means by which the complainant's rights may be vindicated.[232]

Since the Ombudsman has no power to compel obedience to his "recommendations", the possibility exists that these would be ignored. In this event, the Ombudsman may resort to public opinion or an appeal to higher administrative or legislative authorities.[233] In Sweden and Finland, the Ombudsman is subject to no restrictions in resorting to publicity. Nevertheless, publicity is resorted to only when necessary.[234] In Denmark and Norway, however, the Ombudsman is generally bound to keep information confidential, thus limiting the right to publicize.[235]

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229 Pedersen, *op. cit. supra*, note 142 at 82-84.
230 Os, *op. cit. supra*, note 149 at 102-103.
231 Gwyn, *op. cit. supra*, note 196 at 39-40.
232 *Id.* at 40.
233 *Ibid.*
234 Rowat, *op. cit. supra*, note 168 at 16.
235 Pedersen, *op. cit. supra*, note 142 at 82-84; Os, *op. cit. supra*, note 149 at 104.

Nevertheless, the Danish and Norwegian Ombudsmen enjoy sufficient discretion to determine when publicity may be proper,[236] except in specific instances which are expressly determined by law as confidential. For example, in Norway, when a complaint is found to be without basis, neither the name of the complainant nor of the public servant involved may be divulged. Nor may trade, business or official secrets be disclosed.[237]

Finally, the Ombudsman may make use of his "power in reserve" – the right to prosecute. Swedish law allows prosecution for a wide scope of conduct. Chapter 20, Section 4 of the Swedish Penal Code authorizes prosecution of an official who commits a breach of duty when, through negligence, imprudence or unskillfulness he fails to act in the manner required by law or by the nature of his office.[238] However, as earlier pointed out, this power is used sparingly because in most instances a simple "reminder" is sufficient to achieve the desired end.[239] The Swedish Ombudsman may himself prosecute or order the prosecution of the erring official by the regular prosecutors. The Swedish Constitution provides that "all public prosecutors shall aid them in the bringing of actions when requested to do so."[240] As in Sweden, the Finnish Ombudsman may himself prosecute or order the prosecution of offenses.[241] In Denmark and Norway, on the other hand, the Ombudsman does not himself prosecute but may only order the prosecution of the offending official by the regular prosecutors.[242]

The foregoing remedies are not exclusive. Any one or a combination of any of these remedies is available to the Ombudsman. Nor are these remedies successive. However, as a general rule, and in consonance with good administrative practice, the official or agency complained against must first be given a chance to correct his or its "mistake". In Norway, a case must first be submitted to the administrator concerned unless, under the circumstances, this would preclude a full examination of the facts.[243] In Sweden and Finland, the reference to the official concerned is merely a matter of practice.[244]

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[236] *Ibid.*

[237] Os, *op. cit. supra*, note 149 at 104.

[238] GELLHORN, *op. cit. supra*, note 117 at 201.

[239] *Id.* at 206.

[240] SWEDISH CONST., art. 99, in PEASLEE, *op. cit. supra*, note 127 at 867.

[241] Kastari, *op. cit. supra*, note 186 at 66-67.

[242] Pederson, *op. cit. supra*, note 142 at 81; Os, *op. cit. supra*, note 149 at 102-109.

[243] Os, *op. cit. supra*, note 149 at 102-103.

[244] Bexelius, *op. cit. supra*, note 119 at 28; Kastari, *op. cit. supra*, note 186 at 66-67.

Qualifications

The Ombudsman performs the functions of a critic, a fiscalizer, a watchman, and an adviser. Having no power to compel enforcement of his decisions and recommendations, he must enjoy some means of inviting administrators and employees to toe the line through "gentle persuasion". While the Ombudsman is aided by public opinion secured through publicity, and by the power to prosecute, the persuasiveness of his decisions proceeds largely from the prestige of the office. As one Swedish parliamentary leader put it, "The man we select does not lend distinction to the office; the office distinguishes him".[245]

Nevertheless, certain requisite qualifications are indicated by the nature of the Ombudsman's office and functions.

The personal attributes of the man who is to be a fiscalizer of public administration, a guardian of official morality, and a critic of official conduct must be beyond reproach. For no matter how prestigious his office may be, appointment as an Ombudsman will not bestow respectability upon a man who is otherwise of questionable integrity. The public and the government administrators must have faith in the Ombudsman; otherwise, he may bring the office into disrepute and destroy its potency as an instrument of reform.

Not only must the Ombudsman be, to began with, respectable; he must also be non-political and impartial. Unless he can demonstrate that his actions are not susceptible to political pressure, he would always be suspected of being a tool of the party in power. So, too, he must show by his conduct that he is an impartial critic, swayed neither by public opinion nor personal considerations. Only by being objective in his investigations and unprejudiced in his decisions can he maintain the public's confidence.

Legal ability, though not indispensable, is also a good requirement. If the Ombudsman is of known legal ability, his decisions are likely to have more persuasive effect. After all, a man who is to criticize the application of the law of the land must himself be conversant with law. The Swedish Ombudsman must be a citizen of "known legal ability and outstanding integrity".[246] In Finland, the Ombudsman must be "a person distinguished in law".[247] In Denmark, he "must have legal education".[248] In Norway, he must "have the qualifications demanded for a judge of the Supreme Court".[249] Al-

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[245] GELLHORN, *op. cit. supra*, note 117 at 423.

[246] SWEDISH CONST., art. 96, in PEASLEE, *op. cit. supra*, note 127 at 866-7.

[247] FINNISH CONST., art. 49, in PEASLEE, *op. cit. supra*, note 127 at 279; see also GELLHORN, *op. cit. supra*, note 117 at 422-423.

[248] GELLHORN, *op. cit. supra*, note 117 at 422.

[249] *Id.* at 423.

though some countries like New Zealand, Yugoslavia and Japan do not require any educational or occupational background for their Ombudsmen,[250] a preference for lawyers is understandable. Indeed, in the area of qualifications, the most common denominator among the Ombudsmen of the world is legal ability.

While competence in the fields of law and administration is desirable, infallibility is not too vital. An Ombudsman errs like others, and provided he can own his mistakes with grace without antagonizing the public administrators, an occasional error need not detract from his effectiveness. In fact, administrators, it is said, are likely to have more respect for an Ombudsman who can admit his mistakes. Gellhorn reports this case in Sweden:

> * * * Acting upon a private complaint during his first month in office, the Ombudsman had said that a court official had improperly attached the complainant's property in order to secure the payment of personal taxes. Conformably with the Ombudsman's advice, the impounded property was returned to its owner. Later a Supreme Court judge convinced his friend the Ombudsman that he had misinterpreted the applicable statute. Meanwhile, the tax debtor had dissipated the previously attached property and had been unable to pay his taxes in full, so that the public treasury was the loser. The Ombudsman bravely acknowledged his own error by reporting it to Parliament and, at the same time, paid out of his personal funds the amount of the lost revenue. This episode, not at all discreditable in itself, has gained currency among judges, as though they welcomed being reassured that the Ombudsman can err just as they do.[251]

Though the Ombudsman need not be a very prominent public figure, nevertheless, when he begins his own work, he cannot be a non-entity.[252] But once appointed, he must rely on his own skills to earn for himself the distinction that the office carries with it, and the respect and admiration of the government administrators and the public.

Ideally, then, these are the qualities that an Ombudsman must possess: he must be non-political, impartial, of unquestionable integrity, and of known legal ability. With these qualities, the Ombudsman would have a fairly good chance of achieving the purpose for which he is appointed, provided he embarks upon his career with honesty and dedication.

Selection and Term of Office

The Ombudsman is an agent of the law-making body. Thus, in the Ombudsman schemes of other countries, he is chosen by the legis-

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[250] *Ibid.*
[251] *Id.* at 239.
[252] *Id.* at 423.

lature itself. In Sweden, the Ombudsman is to be appointed by the *Riksdag*.[253] Under the *Riksdag* Act, he is elected to a term of four years. There is no provision against reelection, but service for longer than three terms is said to be highly unlikely.[254] The Swedish Ombudsman may be removed by the *Riksdag* for loss of confidence,[255] but impeachment of an Ombudsman has never been done.[256] In Finland, Parliament chooses the Ombudsman for a four-year term. Unlike the Swedish JO, the Finnish Ombudsman cannot be removed before the end of his term, and no provision on his prosecution for misuse of office exists.[257] In Denmark, the Ombudsman is likewise appointed by the *Folketing* in accordance with the Constitution, which expressly provides that he "shall not be [a] Member[s] of the Folketing".[258] Like the Swedish Ombudsman, he may be removed by the *Folketing* even before the end of his term.[259] In Norway, the office of the Ombudsman was created by an Act of the *Storting* on 22 June 1962. In Section 1 of the Act of 1962, the *Storting* is to choose the Ombudsman after each general election to serve for four years unless sooner removed by a two-thirds vote of the *Storting*.[260]

We thus see that the Ombudsman is generally elected or appointed by the legislature to a term of four years. The term, of course, is a matter that should be left to the sound discretion of the law-making body. It must be seen, however, that the Ombudsman is given a sufficient length of time to institute the reforms he sees fit.

The Ombudsman, if he is to be effective, must be secure in his office. However, he should not be beyond reach. Thus, provision should be made for his removal from office. Again, the manner of removal of an Ombudsman must be left to the legislature's discretion; however, it is only logical that the Ombudsman be removed by the same person or body which appointed him.

Tanodbayan, an Ombudsman

In the 1971 Constitutional Convention, many disagreed on whether the office to be created should be given the appellation of "ombudsman", or if this foreign name ought to be replaced with a local tag. Some believed that an institution which is new and unfamiliar should

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253 SWEDISH CONST., art. 96, in PEASLEE, *op cit. supra*, note 127 at 866-7.
254 GELLHORN, *op. cit. supra*, note 117 at 203.
255 SWEDISH CONST., art. 97, in PEASLEE, *op. cit. supra*, note 127 at 867.
256 GELLHORN, *op. cit. supra*, note 117 at 203.
257 FINNISH CONST., art. 49, in PEASLEE, *op. cit. supra*, note 127 at 279; see also GELLHORN, *op. cit. supra*, note 117 at 425.
258 DANISH CONST., Part V, 55, in PEASLEE, *op. cit. supra*, note 127 at 261; see also Pedersen, *op. cit. supra*, note 142 at 77.
259 Pedersen, *op. cit. supra*, note 142 at 82.
260 GELLHORN, *op. cit. supra*, note 117 at 158.

be given the name by which it is known. This stand was maintained principally by Delegate Rodolfo D. Robles, who proposed the name "Ombudsman Commission" for the office to be created. Others contended, on the other hand, that precisely because the "ombudsman" is new and unfamiliar, it should be touched with a local flavor so that acceptance by the people would be enhanced. Thus, Delegate Augusto L. Syjuco, Jr. proposed the name *Tanodbayan* for the office of the ombudsman, first, in a position paper dated 19 October 1972, and later, officially, in Proposed Amendment No. 261 to the November 6 draft of the new Constitution.[260a]

Taking neither position, the Convention settled on a compromise. The office to be created by mandate of Section 6 of Article XIII was called *Tanodbayan,* but the original term "ombudsman" was used to describe the institutional concept. This, indeed, was the wiser step. Its local name renders *Tanodbayan* easier to identify with. But, since the term "ombudsman" has acquired a more or less specific legal significance through its long years of development in Sweden and elsewhere, it would have been impossible to reduce its concept to but a few words. Thus, the use of the term "ombudsman" impliedly writes into the Constitution the essential requisites, and the subtleties and ramifications of this foreign institution.

Since Section 6 of Article XIII has been stated in general terms, we must, as we have done in this paper, look back into the past in order to frame a law which is consistent not only with our system of government and the legal traditions of our country, but also with the basic concept of the institution of the ombudsman as it has come to us. In the remaining pages of this paper, we shall try to resolve some doubts which would surely arise in the interpretation of Section 6.

Who should appoint the Ombudsman?

Section 6 of Article XIII does not specify the person or body which is to choose the Ombudsman. On the other hand, Section 1 of Article IX of the 1973 Constitution provides that the executive power shall be exercised by the Prime Minister with the assistance of the Cabinet. As Chief Executive, the Prime Minister is expressly authorized by Section 13 of Article IX to appoint "heads of bureaus and offices, the officers of the armed forces of the Philippines from the rank of brigadier general or commodore, and all other officers of the Government whose appointments are not herein otherwise provided for, and those whom he may be authorized by law to appoint." May the National Assembly then "deprive" the Prime Minister of his appoint-

[260a] See footnote 30, *supra.*

ing power in this instance by itself selecting the men to be appointed to the office of the ombudsman? Is the appointment of the Ombudsman one which is not "herein otherwise provided for", and therefore falls within the Prime Minister's appointing power as defined in Section 13 of Article IX?

It may be argued that the legislative power, expressly vested by Section I of Article VIII in the National Assembly, extends over all matters not expressly withdrawn from its competence, and that, therefore, the National Assembly may provide for the manner of selection of the Ombudsman as it sees fit upon the reasoning that the mandate to "create an office of the Ombudsman" carries with it the authority to provide for such matter. It may likewise be pointed out that the Ombudsman, as we have seen, is traditionally an officer of the legislature which hires and fires him. Why this is so can only be answered by Justice Holmes' statement that "a page of history is worth a volume of logic."[261] As agent of the law-making body, the Swedish Ombudsman was the legislature's means of checking on the activities of the Crown administration. In the Philippines, although we have no tradition of royal prerogative against which the legislature must create a tool, nevertheless, the Ombudsman is meant to be the National Assembly's means of checking on the proper implementation of the law by the Prime Minister. If the Ombudsman were to be appointed by the Prime Minister, he would cease to be the agent of the legislature, contrary to the basic concept of an ombudsman.

One may, of course, straddle the fence by maintaining that the issue is academic under the parliamentary system where strict separation of executive and legislative powers does not exist. Thus, under this theory, whether appointed by the Prime Minister or the National Assembly, the Ombudsman would, in effect, still be the agent of the latter since the Prime Minister is himself chosen and removed by the National Assembly. This, however, ignores not only the ombudsman tradition but also the fact that, as earlier pointed out, the Ombudsman is meant to check the implementation of the law by the Prime Minister.

Gellhorn, the foremost commentator on the ombudsman, solves this dilemma by proposing in his "Model Ombudsman Statute" that the Ombudsman be appointed by the chief executive, subject to the confirmation of two-thirds of the members of the legislature.[262] Thus, he explains:

> In foreign countries the ombudsman has been elected by the legislature. The governmental structure in those countries differs,

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[261] Quoted in GELLHORN, *op. cit. supra*, note 117 at 232.

[262] W. Gellhorn, *Annotated Model Ombudsman Statute* in ANDERSON, (ED), *op. cit. supra*, note 168 at 161.

> however, from the American pattern. Appointive officials, whatever their nature, are customarily chosen in American jurisdictions by the Chief Executive, subject sometimes to legislative confirmation. The present proposal contemplates confirmation by an unusually substantial vote * * * This is intended to stress the "non-political" nature of the appointment and to reflect the need for the general acceptability of the person chosen. * * *[263]

Although the above proposal is meant for the selection of an Ombudsman in the American setting, it is a possibility which the National Assembly should take into consideration in drafting the implementing law.

Assuming that the National Assembly may provide for the selection of the Ombudsman as it sees it, may the power of appointment be delegated to another person or body? As repeatedly pointed out, if we are to adhere strictly to the original concept of an ombudsman, the selection must be made by the legislature itself. However, the history and legal traditions of the countries which evolved the ombudsman concept differ from ours. In the Philippines, the forces of politics have, in the past years, nearly destroyed the people's faith in their law-makers. The only branch of government that has, so far, escaped contumelious condemnation is the Judiciary. The Committee on Constitutional Bodies of the 1971 Constitutional Convention was overcome by this sentiment when, in its Committee Report No. 01, it provided that the Members of the proposed Ombudsman Commission should be appointed by the Supreme Court.[264] The Committee's primary concern was the "depoliticalization" of the appointment. This, however, is, at best, an indication of how the people probably feel, and is not binding upon the legislature. The National Assembly, it is maintained, may provide for the manner of selection of the Ombudsman as it sees fit.

Who are within the Ombudsman's jurisdiction?

Section 6 of Article XIII provides that *Tanodbayan* shall "receive and investigate complaints relative to public office * * *" This grant of jurisdiction is broad and seems to indicate that all public servants fall within the Ombudsman's competence. A look into the records of the Convention bears out this interpretation.

The October 30 draft of the new Constitution provided in Section 15 of Article XV that the Ombudsman shall "receive complaints, investigate the same, make proper recommendations and in appropriate cases file and prosecute the necessary administrative, civil or criminal

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[263] *Ibid.*

[264] Prop. Art. on the Ombudsman Commission, sec. 2, Comm. Rep. No. 01.

charges against public officials and employees, except Members of Parliament, before the competent court or body." In this draft, the ombudsman's jurisdiction clearly extended over all public servants except Members of Parliament.

In the later drafts of the Constitution, however, the phrase "except Members of Parliament" did not again appear. Although nothing in the records of the Convention categorically explains this elimination, a clue may be found in Proposed Amendment No. 319 to the October 30 draft which proposed such a deletion. The proposal is explained thus:

> It is also proposed that the words "except Members of Parliament" on line 19, page 56 of the Official Working Draft be deleted. This phrase constitutes an exception to the class of public servants over whom the Ombudsman shall have jurisdiction. This would mean then that the Ombudsman Commission cannot receive, and must reject and turn away complaints against a Member of Parliament. Much less can it investigate said complaints or prosecute the administrative, civil or criminal charge necessary therefor.
>
> This provision renders nugatory the purpose for which the Ombudsman Commission is meant to be created. The idea behind the establishment of an Ombudsman is to provide the common man, the helpless citizen who would otherwise find no other recourse, a means by which he may be heard and minded, instead of being stepped upon and subsequently ignored. No man, however high or mighty, must be above the law; otherwise, the fear of many that ours is fast becoming a government of men and not of laws might as well be true. In any case, abuses of the Ombudsman may be checked through the power of the National Assembly to prescribe the manner of removal and discipline of its Commissioners.[265]

In all of the later drafts of the Constitution, the statement of the Ombudsman's jurisdiction has been broad and all-encompassing. Thus, by the general terms of Section 6 of Article XIII, all public servants, with no exception, from the lowest to the highest, fall within *Tanodbayan's* competence.

This should give no cause for alarm. For, in any case, the National Assembly may further delimit the scope of the Ombudsman's subject of inquiry. For instance, it may provide that only the exercise of powers and duties, rather than the wisdom and/or content of judicial or administrative actions and decisions, may be criticized or inquired into by the Ombudsman.

What shall be the form and composition of Tanodbayan?

Section 6 of Article XIII does not specify the number of persons to be appointed to the office of *Tanodbayan,* nor the manner in which

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[265] Prop. Am. No. 319, p. 5.

these persons are to act. Again, the records of the Convention provide some possibilities.

Committee Report No. 01 of the Committee on Constitutional Bodies proposed an Ombudsman Commission composed of five members, one of whom shall be Chairman, 2 to be assigned to Luzon, one to Visayas, and one to Mindanao.[266] The Commission may act either as a body or individually, except that to prosecute impeachment cases and to formulate its rules of procedure it must act *en banc*.[267]

On the committee level, Committee Report No. 01 of the Constitutional Bodies Committee is the major basis of Section 6 of Article XIII. Thus, although this proposal is not at all binding on the National Assembly, it should be taken into consideration. The assignment of different Ombudsmen to Luzon, Visayas and Mindanao is made imperative by Philippine geography.

In any event, it is clear that the term "ombudsman" is to refer to the office itself as clearly provided for in Section 6 of Article XIII. This provision, therefore, does not preclude the legislature from naming several persons as "Ombudsmen" who shall compose the office of *Tanodbayan* and who may act either individually or collectively.

Thousands of years ago, when a greater part of the world was still covered with ice sheets, bold men in horned helmets dared to accept the challenge of the unfamiliar. In their long narrow wooden galleys, they braved the dark unknown terrors of the North Atlantic, skirting icebergs and weathering storms, thus setting the pace in discovery in the early ages. In the early 19th century, the Swedes, with the characteristic daring and vision of their Viking forefathers, established the institution of the ombudsman. From bold seafarers, they had become social pioneers.

Today, the ombudsman institution has come to us perfectly polished. A tribute to the Swedish genius for originality, the ombudsman has been adopted in countless other countries. But the success of the ombudsman in Sweden should lead us to no illusions. It may be disappoining to expect that simply because it has succeeded and survived elsewhere, the ombudsman would likewise find irrepressible success in the Philippines.

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[266] Prop. Art. on the Ombudsman Commission, sec. 1, Comm. Rep. No. 01.
[267] Prop. Art. on the Ombudsman Commission, secs. 4 & 5, Comm. Rep. No. 01.

The history of public service in Sweden is long and venerated. Thus, within the context of a basically sound and efficient system of administration, the ombudsman flourished:

> * * * Sweden has long had a thoroughly justified pride in its able and honorable public servants. Furthermore, for all the folklore about "the stubborn Swede," willful adherence to opinion is not commonplace among officials; they seek consensus rather than dissent and are therefore receptive to other officials' views even when not, in theory, forced to accept them. Thirdly, to a degree far beyond the usual, Swedish officials function in the proverbial goldfish bowl. Their files are, with stated exceptions, open to the press and the public at large, so that reckless or too highly personalized patterns of action can perhaps be discerned and criticized more readily than in other countries * * * Fourthly, since each official must apply The Law as he understands it, care is taken to draft statutes that cannot admit of many diverse readings * * * Fifthly, statutes sometimes explicitly authorize the issuance of regulations or general instructions that will diminish the range of individual officials' choice. Finally, individual administrators' judgments are, in varying degrees, subject to review by others, first within their own official establishment (such as a central administrative board) and then by appeal to the king, that is, to the cognizant minister.[268]

Since the ombudsman can only "make recommendations" and cannot legally compel compliance with its orders or decisions, the institution cannot prosper in a system where the public servants can violate the law with impunity. The Ombudsman's power to make recommendations would be inutile if the civil servants, having no respect for the law, have much less for the Ombudsman. Reforms from within the administration itself must come hand in hand with the institution of the ombudsman, for alone, the Ombudsman cannot accomplish the mission for which he is to be appointed. He cannot, in single-hand combat, battle the inept and the corrupt in the public service.

Worth noting too is the fact that in its country of origin, the ombudsman has behind it, perhaps to make up for its lack of revisory jurisdiction, the force of public opinion secured through publicity. In Sweden, the press enjoys nearly unlimited access to incoming and outgoing mails and other records of the ombudsman,[269] and accords heavy publicity to findings adverse to public administrators.[270] A study must therefore be made to determine the feasibility of the ombudsman within a milieu where freedom of the press is limited. It may be pointed out, for instance, that in Japan, efforts are exerted to prevent undue publicity over administrators' faults because it is believed that where the organ

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[268] GELLHORN, *op. cit. supra*, note 117 at 199-200.
[269] *Id.* at 437.
[270] *Ibid.*

of external criticism (such as the ombudsman) does not shame public servants into being self-defensive, it is more likely to succeed in encouraging self-correction of administrative faults.

While freedom of the press is presently tempered, the reforms instituted since Martial Law make the outlook more auspicious. With the hope that these reforms will continue, we may then look to *Tanodbayan* for the promise of Article XIII – that, because public office is a public trust, public officers and employees shall serve with the highest degree of responsibility, integrity, loyalty and efficiency. Then may we say that ours is a government which "heed[s] the Filipino's grievances, nurture[s] his hopes, advance[s] his aspirations".[271] Then may we claim that ours is a government which "every Filipino, whether of the classes or the masses, can respect and trust, look up to, believe in".[272] Then may we state with certitude and consummate faith that ours is a *good government.*

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[271] Svjuco, Jr., Sponsorship speech on Article XIII, *supra*, note 10.
[272] *Ibid.*