

BUTTRESSING CONSTITUTIONAL PROTECTION OF FUNDAMENTAL RIGHTS IN DEVELOPING NATIONS: THE OMBUDSMAN COMMISSION OF PAPUA NEW GUINEA - A NEW HYBRID

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Influential voices in the West maintain stunning silence while politicians loot their national treasuries, but initiate and stridently sustain political propaganda based on charges of human rights violation to shield them when they flee and seek sanctuary in these countries at a time they should be facing criminal charges in their home countries.

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INTRODUCTION

Few contemporary issues are as topical nationally and internationally both in breadth and intensity as human rights. National constitutions throughout the world include a plethora of provisions on human rights as diverse in their prolixity as in their formulation. International documents similarly depict a bewildering spectrum of these rights. Academia has not been left out as myriads of treatises spawn forth from the Ivory Tower onto the book-stands in every town and city. Attitudes to human rights have just been as diverse as the colours of the rainbow ranging from supine indifference through half-hearted acceptance to exaggerated reverence.

In this legal cacophony one note is however discernible: man's free-will needs an environment as wholesome and plenary as is naturally possible for for its complete exercise and expression. Freedom is immeasurable but it must necessarily be limited, for unlimited freedom means licentiousness and over-abridged freedom connotes tyranny.

Denial of human rights in developing nations does not emanate only from the actions of the judiciary, the legislature or even the executive but also from the actions of corrupt government functionaries and politicians. Many have been denied basic human rights (we recognize that there is a difference between human needs and human rights) on account of corruption on the part of politicians. While traditionally the Ombudsman's function is to protect the citizen from bureaucratic maladministration, in Papua New Guinea the Ombudsman, in addition to his traditional role is also a watch-dog over the actions of politicians and government functionaries.

In this paper an attempt will be made to reexamine the reason d'etre of the institution of the Ombudsman, its adoption by some emerging nations and the new hybrid which the Papua New Guinean model represents. We shall finally evaluate the efficacy of this model and in particular whether or not fundamental human rights protection is really enhanced by the imposition of a high ethical standard of deportment on the part of politicians and national leaders.

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THE HISTORICAL BACKGROUND OF THE INSTITUTION OF OMBUDSMAN

It has long been asserted that the separation of powers does not of itself guarantee adequate protection of the rights of citizens. For after all judges are appointed by the executive and they have on occasions been sympathetic to the political inclination of the government of the day. And parliament in spite of the use of the device of "question time" for ventilating criticism of administrative acts of the government, the community of interest between the government and the legislature has often veiled a fuller exposure of administrative inefficiency. Besides an individual parliamentarian cannot oversee all the administrative problems of his constituency. Ministers and bureaucratic officials have, when confronted with political publicity adopted defensive tactics inimical to a thorough investigation of the issue at hand. Then there is the problem of the complexity, technicality and speciality of government programmes which make it exceedingly difficult for the ordinary parliamentarian without expert knowledge to understand the problems and to exert the necessary pressure and influence for good.

In these circumstances there evolved in the Scandinavian countries the institution of the Ombudsman - a person who acts as Spokesman for another and who is independent of both executive and legislature although appointed by the legislature. The idea is said to originate from Sweden in 1809 and was taken up in Finland, Norway and Denmark.¹ Today the institution may be observed even in Britain,² Canada³ and the U.S.A.⁴

In France where there exist administrative tribunals quite apart from the regular courts, the necessity for an Ombudsman has not been greatly felt. However a close look at the functions and operation of the Ombudsman would reveal that even France can find some need for the Ombudsman. In the first place the Ombudsman hears all types of complaints no matter what the form or content; and the range of his jurisdiction transcends that of administrative tribunals. He may even supervise the courts in Sweden and Finland. Secondly the informality associated with the work of the Ombudsman makes things easier for the ordinary citizen, and saves him costs of litigation, for, even in appeal cases in administrative courts, the procedure can be slow, cumbersome and expensive.

Of the criticisms levelled against the institution, the most crucial is that the institution has the unfortunate tendency of meddling in matters which are properly judicial or administrative matters. The answer to this criticism is that in many countries it is provided that the Ombudsman should not interfere in matters *sub judice*.

It must be observed that the institution was not conceived to usurp the judicial role of the courts, or the traditional rights of members of the legislature to act for their constituencies and to criticise and enquire about the administration but to supplement the work of the courts; it also provides an alternative to the citizen's right to turn to his

1. See W. Gellhorn, 'The Ombudsman in Denmark' (1966) 12 *Mc Gill L.J.* 1; B. Christensen, 'The Danish Ombudsman' 109 (1961) *U. Pa L.R.* 1100.
2. In the U.K., the *Parliamentary Commission Act*, (1967) *Liz.* 2 c.13 established the office of Ombudsman.
3. In Canada, the States of Alberta and New Brunswick passed the Ombudsman Acts (1967), Quebec in 1968 and Manitoba in 1970. See also D.C. Rowat, *The Ombudsman: Citizen's Defender*, (Toronto: University of Toronto Press, 2nd ed. 1968), *passim*.
4. In the U.S.A. the Hawaiian Act 1969 and the New York Act 1969 are very typical. See generally C.K. Davis, 'Ombudsman in America' (1961) 109 *U. Pa L.R.* 1057; J.H. Abraham 'A People's Watch-Dog Against Abuse of Power' 20 (1960) *Public Adm. Rev.* 152.

elected representation with his problems. The Ombudsman is armed with all types of information and is more able to explain why certain acts are performed or why certain decisions are made. Very often all that the ordinary citizen is interested in is an explanation as to why something was done and the explanation serves to disabuse his mind. It is said 90% of the cases which the Swedish Ombudsman investigated turned out to be unfounded.⁵ The Ombudsman's investigations had led in many cases to the sweeping aside of unfounded allegations, suspicions and criticisms. His work also serves to vindicate the work of accused officials and makes clear to the complainant that his suspicions are groundless.

THE OMBUDSMAN IN SOME DEVELOPING NATIONS

Some African countries have imported this institution in the hope of fortifying the protection of individual rights.⁶ The Tanzanian model affords an interesting study and will be examined in some detail.⁷ However the Zambian model deserves special attention also because it deals specifically with the problem of enforcement of fundamental rights.

Zambia:

The *Monckton* Commission (1960) concerned about discrimination in now defunct Rhodesia recommended that there should be established in both Federal and State Constitutions an institution analogous to the Kenya Council of State with power to delay proposed legislations which appeared discriminatory. The Northern Rhodesia Constitutional Council which was established in 1963 owed its existence to this principle which was embodied in the Constitution of 1961.⁸ At Independence, the Council was abolished.

5. Gellhon, *op.cit.* n.1 *supra*.

6. See generally A. Jacoby - Millette 'The Ombudsman in Africa', in published by *Legal Process and the Individual Source Material*, (New York Columbia University Press 1978), 178.

Note especially countries such as Tanzania, Mauritius, Sudan, Zambia, Ghana and Nigeria. In the case of Ghana, the idea is not altogether novel. The institution of the "spokesman" is part and parcel of the institution of chieftaincy. i.e. the *Oman Kyeame* the people's linguist or mouth piece; of him Sarbah wrote: 'A linguist occupies a most confidential position, and the head linguist is usually one of the principal advisers of the ruler... In ordinary cases the ruler and he alone can lawfully constitute a court and decide cases. It is his duty to be conversant with the history of the stool. Moreover he should be learned in the customary law, command a large stock of parables and apt phrases, be a man of ready and effective speech, and not unacquainted with the art of diplomacy'. He said further:

'The judgments of a King's court are delivered through the linguist. The linguist is to be distinguished from court criers who ensure silence and order'. *Fanti National Constitution*, (London Frank Cass & Co. New Impression 1968), 32-33; see also J.B. Danquah, *Akan Laws and Customs*, (London: Routledge & Sons 1928); R.S. Rattary, *Ashanti Law and Constitution* (Oxford; Clarendon Press 1929); K.A. Busia, *The Position of the Chief*, (London: Oxford U.P. 1968), 18.

For Nigeria see the Public Complaints Commission set up under the *Public Complaints Commission Decree 31, 1975*.

7. The Permanent Commission of Enquiry.

8. Cmnd. 1148 (1960) par. 240-250.

The Constitution of Zambia, 1964⁹ provided instead for an *ad hoc* special tribunal which would be appointed by the Chief Justice on request by at least seven members of the legislature for a report on a Bill considered contrary to the fundamental rights provisions of the Constitution. The *ad hoc* tribunal shall be made up of two justices of the High Court and their duty will be an examination of the Bill in question with a view to establishing which provisions of the proposed legislation would be inconsistent with fundamental rights. They shall then "submit a report to the President and to the Speaker of the National Assembly" stating their reasons.

It is to be observed that Article 27 does not indicate what should be done if the report should turn out to be unfavourable to the passage of the Bill into law; presumably, the obnoxious parts would be expunged.

Another function of the *ad hoc* special tribunal is to arrange for legal aid for a person who alleges a violation of his fundamental right but does not have the financial means to vindicate his right in court.¹⁰ The special tribunal shall then decide whether the applicant has reasonable grounds for bringing the application and whether he cannot afford to pay for the cost of the application. The *ad hoc* special tribunal would then issue a certification to the effect that the application is a proper one which can be determined at public expense; what the applicant is entitled to is in fact "costs reasonably incurred in connection with the application".¹¹ It is to be inferred from this provision that the applicant must first, find the money, fight the case, and then turn to the State for a refund "out of the general revenue of the Republic"¹² after the conclusion of the hearing when costs are assessed. Since the majority of people in the new nations are poor and since court cases are often expensive and time consuming, it would seem that this provision will not be very useful to persons whose rights might be violated. This, coupled with the fact that the recommendation of the tribunal under Article 27(4) is not binding on the Executive makes the protection of fundamental rights under the Constitution of Zambia a highly illusory or at best a half-hearted effort.¹³

Tanzania:

Though Tanzania has no Bill of Rights in its Constitution, the Interim Constitution promulgated on July 8, 1965 provides for the establishment of a Permanent Commission of Enquiry¹⁴ as a check on abuse of government power by the State, its Party Officials,

9. Art. 27(1).

10. Art. 27(4).

11. Art. 27(5).

12. *Ibid.*

13. See the Nigerian case *Olawoyin v. Attorney-General* (1961) 1 All N.L.R. 274 on the original jurisdiction of a country's Supreme Court. The idea is to prevent the flooding of a country's highest judicial body with frivolous causes.

14. In his "Address to the National Parliament" on June 8, 1965, President Nyerere said:

Our recent history, and the educational backwardness of the majority of our people, means that automatic checks on abuse of power are almost non-existent. To the people in the villages and scattered home-steads of our wide country, it is the policeman, the magistrate, the TANU official or the Government Officer, who represents government in their everyday life. And in the District and Regional Headquarters it is the Commissioner who wields direct and effective power in a manner which affects the life

local government authorities public bodies, corporations and commissions. Pursuant to the provisions of the said Constitution,¹⁵ the government of Tanzania enacted the Permanent Commission of Enquiry Act.¹⁶

The Commission consists of a Chairman and two others appointed by the President of the Republic. It goes into complaints by citizens directed at the officials of the state organs above indicated either *sponte suo*, or on direction by the President. It reports to the President who then, makes a decision which is final. It is to be noted that its report amounts merely to a recommendation which is not binding on the President. The President may reject the recommendation by acting contrary to it. The purview of its jurisdiction is also severely limited; under section 14 of the Act the President may by certification prevent the disclosure of any matter which relates to the security, defence, international relations of Tanzania, deliberations of the cabinet; and a person bound to maintain secrecy under the national Security Act shall not be required to supply any "information to or answer any question put by the Commission in relation to that matter or to produce to the Commission any document, paper or thing relating to it, if compliance with that requirement would be in breach of the obligations of secrecy or non-disclosure..."

The conduct of the President himself cannot be inquired into.¹⁷

A casual glance at the cases which the Commission dealt with reveal that they were mostly cases which amounted to trivial annoyance to the individual complainants resulting from administrative acts of government officials.¹⁸ In fact 54% of the complaints were groundless. But two of the cases deserve mention here because of the nature of the rights therein involved.

of our fellow citizens. This is inevitable and necessary. Only by entrusting real responsibility to such people can our nation be transformed. But we have to recognize that these powers can be - and have been-abused. And the sufferers are the people on whose behalf Government is, and should be, conducted.

Quoted in R. Martin, *Personal Freedom and the Law Tanzania*, (Nairobi, O.U.P. 1974), 183.

Mr. Kanawa in moving that the Bill be read for the first time said: 'Leaders sometimes misuse their authority to the disadvantage of others. Sometimes also the common man can abuse the leaders with false allegations'. *Id.* 185-186.

15. Arts. 64-69.

16. Act No.25 (1960).

17. Art. 67(4).

18. In France these would have been proper cases for administrative tribunals. English administrative law which most African common law countries inherited has no place for administrative tribunals. See further, M.P. Kimicha, 'The Ombudsman and the Permanent Commission of Enquiry' *Legal Process and the Individual*, *op.cit.* n.6 *supra*, 200.

Case No.71:19

The Complainant in this case alleged that an Area Commissioner had prevented the Complainant from building a house on the land of his ancestors because the particular site was very close to guest house latrines.

The Commission went to see the site and found that the site was not close to the latrines. In an answer to a question by the Commission, the Area Commissioner said that it was not he who made the order but the Village Development Committee. When the Village Development Committee was asked about this, it was revealed that the Area Commissioner had strongly suggested that the man be prevented from building his house on that site".

Case No.1057:20

The Complainant alleged that a Regional Commissioner suspended his trading license without any reason.

The Commission took the matter up and after an investigation, it was revealed that one day the Regional Commissioner concerned while visiting certain villages happened to pass near the shop of the Complainant. The Regional Commissioner saw a little scuffle occurring between children of the Shop Keeper (apparently an Asian) and an African. The scuffle was put to an end and the Regional Commissioner tried to find out the cause of the fight. The Regional Commissioner alleged that the Asian boys and their mother answered him rudely and that they had no reason to beat the African. Thereupon he ordered that the licence be suspended.

The Commission examined the facts as above outlined and left the criminal aspect of it aside and dealt with the point of suspending the trading licence. Here the Commission found that the owner of the licence was not on the spot when the fight occurred and the fight itself was irrelevant to the trading licence.

The Commission reported the matter to the President and the licence was given back to the owner."

Case No.71 involved a citizen's right to own land which was vindicated. Case No.1057 concerned exercise of a discretion, i.e. suspension of trading license. The principle is that a discretion must be reasonably exercised and must relate specifically to the mischief which the law is designed to cure. Here the licence was suspended for no cause. The applicant was being denied his means of livelihood; his vital business interest was being destroyed. Here was a case of gross abuse of legal power and intended as a punishment for an act completely irrelevant to the object of the law.

In the Canadian case *Roncarelli v. Duplessis*,²¹ where the Liquor Commissioner refused to revoke the appellant's licence as liquor seller on account of his raising of bail for arrested members of the sect of Jehovah Witnesses, Rand (J) said:

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19. Property right was in issue here.
 20. A question of capricious use of power.
 21. (1959) 16 D.L.R. 2nd 689 (Supreme Court).

A decision to deny or cancel such a privilege lies within the 'discretion' of the Commissioner" but that means that the decision is to be based upon a weighing of considerations pertinent to the object of the administration.

To deny or revoke a permit because a citizen exercises an unchallenged right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.

THE OMBUDSMAN COMMISSION OF PAPUA NEW GUINEA - A NEW HYBRID

We have gone this length in order to bring out more distinctly the peculiar nature of the model adopted by Papua New Guinea.

The Constitutional Planning Committee (CPC) which was assigned the task of preparing a constitution for independent Papua New Guinea recommended the inauguration of an Ombudsman Commission (OIC).²²

The hybrid nature of the "Constitutional" (as opposed to the "statutory" Ombudsman in many countries, e.g. Canada, Australia) Ombudsman Commission of Papua New Guinea arises because of the multiplicity of the Commission's jurisdictions which the CPC contemplated.

General Jurisdiction:

The CPC proposed that, in its general jurisdiction, the Commission's work should include "the full range of administrative activities of government departments and authorities".²³ The CPC's proposals in this regard have been adopted in the Constitution²⁴ and the Organic Law on the Ombudsman Commission.²⁵

Specific Jurisdiction:

In its special jurisdiction, the CPC envisioned the proposed Ombudsman Commission to oversee "that the Leadership Code is observed by leaders".²⁶ The Constitution adopted the CPC's proposals in this regard in ss. 218 (d) and 219 (d). It is partly because of the onerous responsibility of the enforcement of the Leadership Code²⁷ that the CPC

22. See *Final Report of the Constitutional Planning Committee Part 1* Port Moresby, Govt. Printer (1974) Chapt 11 pp.11/1-11/17. (Herein after *Final Report*).

23. *Final Report*, Ch 11, para 38, p. 11/5.

24. s. 218 (a) (b) and (c) and s. 219 (1) (a) (b) (c).

25. Ch 1, adopted by the Constituent Assembly on 15 August 1975 after the adoption of the Constitution.

26. *Final Report*, Ch 11 para 41, p. 5.

27. *Constitution of PNG*, ss 26-31, *Organic Law on the Duties and Responsibilities of Leadership*, Ch 1, adopted by the Constituent Assembly on 15 August 1975 after the adoption of the Constitution.

suggested a Commission²⁸ rather than a single Ombudsman, a proposal which was given legal status in s. 217 of the Constitution.

Composition of the Ombudsman Commission:

The Ombudsman Commission in Papua New Guinea comprises of the Chief Ombudsman and two other Ombudsmen.²⁹ Of the two members of the Commission other than the Chief Ombudsman, one must have requisite accountancy qualifications and the other appropriate administrative or legal qualifications.³⁰ The members of the Commission are appointed by the Head of State, in accordance with the advice of a Committee comprising of the heads of the political, judicial and administrative branches of government.³¹ The term of office of members of the Commission is six years for citizens and three years for non-citizens with eligibility for re-appointment.³² All Ombudsmen Commissioners are constitutional office-holders.³³

The Traditional Role:

The CPC perceived the normal function of the OC as that of listening "to peoples' complaints against government and any of its agencies"³⁴ ...no doubt the traditional role of the Ombudsman. Members must have experience in accountancy, or law or administration.³⁵ In order to perform effectively, the O.C. was "to find out the facts in the matter that led to the complaint, to develop views about whether the matter was properly handled by government and to make recommendations for corrective action where is considered appropriate"³⁶

The CPC outlined the, functions of the OC in Papua New Guinea as:

- (a) impartial mediators between the people and the government and its agencies at national, provincial and local levels;

28. *Id.* para 42, p. 5.

29. *Constitution of PNG*, s. 217 (1).

30. *Organic Law on the Ombudsman Commission*, s. 4 (1).

31. *Constitution of PNG*, s. 217 (2). This provision reflects the CPC's intention that "those appointed as Ombudsmen ... [should] have broad political, judicial and public service support - an essential prerequisite if ... [the] new institution ... [was] to be effective." See *Final Report* Chapter 11, para 23, p. 3.

32. *Organic Law on the Ombudsman Commission*, s. 5.

33. *Constitution of PNG*, s. 221. By s. 223, constitutional office-holders are granted security of tenure etc.

34. *Id.* par.4, p.11/1.

35. *Id.* pars. 28, 29, p.11/4.

36. See Ombudsman Commission, *Annual Report* Vol.1-6 (1976- 81), p.2.

- (b) protectors of leadership against unfair allegations and of the community against unfair or improper practices on the part of the leadership;
- (c) watch-dogs to ensure that governmental bodies at all levels are responsive to the needs and aspirations of the people.³⁷

The CPC appropriately considered the doubts usually expressed about the efficacy of the Ombudsman in developing nations on account of the inexperience of the operators and their proclivity to excessive use or misuse of power.³⁸ It advised itself on the propensity to treat the Ombudsman as a substitute for or alternative to the judiciary.³⁹ It took pains to delineate and delimit the area of jurisdiction of the Ombudsman and encompassed it clearly as that of inquiring into 'the conduct of persons such as those in a government department, a disciplined force (the Defence Force, the Police etc) statutory authority, local government council, the staff of a Minister, constitutional office holders, members of government committees and in the parliamentary service...'⁴⁰

The CPC also expected the OC to investigate a complaint on its own volition or after it has been lodged concerning 'acts or omissions by officials which appear to it to be instances of maladministration or unfairness,'⁴¹ ...and 'to look into any apparent defects or unfairness in laws made by Parliament or in the way in which the laws are being applied by those responsible for administering them'.⁴² The main thrust of this aspect of the OC's responsibilities is the prevention of injustice not "due to an administrative action or omission, but to an unsatisfactory provision in an Act of Parliament or a regulation or rule made under it".⁴³

In contrast to the situation in other places, there is no prescribed form or procedure for laying claims by members of the public and no payment of fee is required. This was deliberately intended to afford the public maximum freedom of access to the Commission. It is on record that the Commission receives complaints even by telephone.⁴⁴ Clearly the O.C. has no power to entertain complaints involving the private sector.

37. *Id.* 3.

38. *Id.* 12.

39. *Final Report.* par. 14, p.11/2.

40. *Id.* par. 39, p.11/5.

41. *Id.* par.40 p.11/5.

42. *Ibid.*

43. *Ibid.*

44. *Annual Report* Vol. 1-6 *op.cit* 16. Indeed for ease of accessibility the CPC actually recommended as follows:

Informality should be a keynote of the Commission's procedures. We envisage that many complaints to the Commission will be made verbally and that there will be no charge for lodging a complaint with the Commission' - par. 45, p.11/6. Complainants could even lodge their complaints with heads of departments or other statutory bodies who should transmit them to the Commission.

Administrative Justice:

In the exercise and discharge of matters within the general jurisdiction granted to it by the Constitution and the Organic Law, the Ombudsman Commission deals with issues which are generally comprehended as falling within the ambit of Administrative Law. In this major role, the Commission's work is directed towards ensuring administrative justice. The general jurisdiction of the Ombudsman Commission in investigating public complaints and to remedy discriminatory practices is very wide-ranging. The Ombudsman Commission can commence investigation in respect of "wrongful conduct" on the part of, amongst others, any of the State Services, other governmental and statutory bodies, in so far as the "conduct" in question affects any member of the public.⁴⁵ The Commission also investigates allegations or suspicion of discriminatory practices affecting an individual.⁴⁶ Initiation of investigation on any of these matters, by the Ombudsman Commission, is not only confined to the lodgement of a complaint by a person. The Ombudsman Commission has been given the powers to initiate investigations on its own.⁴⁷

Among the persons, institutions, and bodies, whose "conduct" may be the subject-matter of investigation by the Ombudsman Commission, are "any state service" and "any other governmental body, or an officer or employee of a governmental body".⁴⁸ In *Constitutional Reference No 1 of 1978*,⁴⁹ the Ombudsman Commission sought the opinion of the Supreme Court on the question whether the Public Solicitor was a "state service", or alternatively, a "governmental body".⁵⁰ The thrust of the opinion sought from the Supreme Court was directed at the possibility of the Ombudsman Commission's investigation into matters relating to the work of the Public Solicitor's Office. On behalf of the Ombudsman Commission, it was submitted that the Public Solicitor was an "arm" of the National Government, and that therefore the Ombudsman Commission had jurisdiction in matters relating to the work of the Public Solicitor's office.

The submissions of the Ombudsman Commission in *Constitutional Reference No 1 of 1978* that the Public Prosecutor was an "arm" of the government was based on a "non-literal" interpretation of s. 99 (2) and Schedule 1.2 (1) of the Constitution. Schedule 1.2 (1) to the Constitution of Papua New Guinea defines "governmental body" to include "an arm ... of the National Government". S. 99 (2) provides for "three principal arms" of the National Government - the National Parliament, the National Executive and the National Judicial System. The Ombudsman Commission contended that the Public Solicitor was an "arm" of the national government outside the three "principal arms". Prentice CJ and Wilson J of the majority rejected the submissions of the Ombudsman Commission, though on somewhat different grounds. While denying the Ombudsman Commission any jurisdiction to investigate the work of the Public Solicitor's office, on the ground that

45. *Constitution of Papua New Guinea*, s. 219 (1) (a). See also s. 13 of the *Organic Law on the Ombudsman Commission*. The State Services are specified in s. 188 of the Constitution.

46. *Constitution*, s. 219 (1) (c).

47. *Constitution*, ss. 219 (1) (a) and (c).

48. *Constitution*, s. 219 (1) (a).

49. [1978] PNGLR 345.

50. The discussion of this case is partly based on Peter Bayne, 'The Constitution in the Courts 1975-1980' in David Weisbrot et al. (Eds), *Law and Social Change in Papua New Guinea* (Sydney: Butterworths, 1982), 219-239, 226 and 235. Bayne, however, discusses the issue only in the light of the "separation of powers" theory.

the Public Solicitor was not an "arm" of the national government, Prentice CJ and Wilson J conceded that the Commission does have jurisdiction to investigate the personal conduct of the Public Solicitor under the *Leadership Code*. This conclusion is, of course, obvious.

Pritchard J dissented from the majority in *Constitutional Reference No 1 of 1978*. His Honour accepted the argument of the Ombudsman Commission that the Public Solicitor must be understood to be included in the definition of "governmental body". On this finding, Pritchard J concluded that the Ombudsman Commission had the jurisdiction to investigate the work of the Public Solicitor. Pritchard J's analysis of the issues relating to the Ombudsman Commission's jurisdiction over the Public Solicitor is "much the more persuasive".⁵¹

Administrative "conduct" in relation to the Ombudsman Commission's jurisdiction has been defined by the Constitution to include any action or inaction relating to a matter of administration.⁵² "Wrongful" conduct as a subject-matter of the Ombudsman Commission's investigation includes not only unlawful action or legal or factual mistakes, but also broader grounds. Among these are, conduct based on improper motives, irrelevant considerations and conduct for which no reasons are given.⁵³ With regard to discriminatory practices, the Ombudsman Commission's investigation into "wrongful" conduct extends to "unreasonable, unjust, oppressive or improperly discriminatory, whether or not it is in accordance with law or practice".⁵⁴

In investigating complaints of individuals arising out of administrative action, the Ombudsman Commission is empowered to enquire into "any defects in any law or administrative practice".⁵⁵ And although the Commission cannot enquire into decisions of a court in its investigations, an apparent defect in law empowers it to review a court decision.⁵⁶ The power given to the Ombudsman Commission to review a decision of a court for a "defect in law" appears to mean that the Commission's enquiry into public grievances are not restricted to legalistic and technical interpretation of law and practice.⁵⁷

The non-justiciability of National Goals and Directive Principles (NGDP) of the Constitution of Papua New Guinea⁵⁸ does not apply to the jurisdiction of the

51. Bayne, *supra*, at 235.

52. *Id.* s. 219 (8).

53. *Id.* s. 219 (2).

54. *Ibid.*

55. *Id.* s. 219 (1) (b).

56. *Id.* s. 219 (5).

57. Cf. John Goldring, *The Constitution of Papua New Guinea* (Sydney: Law Book Company, 1978), 60-62.

58. The issue of "non-justiciability" in the constitutional context of Papua New Guinea should not be interpreted in conventional terms. Although s. 25 (1) of the Constitution declares the National Goals and Directive Principles (NGDP) non-justiciable, a number of other provisions qualify this "non-justiciability". Thus sub-section (2) of s. 25 establishes the duty of governmental bodies to apply and give effect to the NGDP, and sub-section (3) directs that legal interpretation should be made as nearly as possible with the spirit of the NGDP. S. 22 of the Constitution is very significant in this regard. Under the provisions of this Section, the National Court is directed to

Ombudsman Commission.⁵⁹ Indeed s. 25 (4) of the Constitution directs the Ombudsman Commission to "take the National Goals and Directive Principles fully into account in all cases". The provisions of s. 25 (4) are reiterated in s. 219 (1) (a) (iv) of the Constitution. The latter provision enjoins the Commission to consider the NGDP, the Basic Rights and the Basic Social Obligations of the Preamble in their investigations and recommendations.

Complaints may be made to the Ombudsman Commission by any person on any matter within the general jurisdiction of the Commission. Even persons in custody, individuals confined in hospital, and inmates of corrective and other state institutions can address complaints to the Commission.⁶⁰ Complaints from members of the public are generally enquired into by the Commission, unless, amongst other reasons, a complaint is "trivial" or a complainant has some other remedy available to him or her.⁶¹

The Ombudsman Commission's investigations into public complaints are held in private and there is no compulsion on the part of the Commission to hold hearings as such. However, where a report of a Commission affects a State Service or a statutory body, the heads of those bodies are to be provided reasonable opportunities to provide comments on the investigations. In this regard the rules of "natural justice" are incorporated in the *Organic Law on the Ombudsman Commission*.⁶²

If, during the course of investigation, the Ombudsman Commission decides that administrative law and practice in question was vitiated or defective, the Commission reports its opinion to the proper authority. Among those persons are, the Minister concerned and the head of the the relevant statutory body. The Commission may also refer a matter to the Public Prosecutor for further action. In cases where the Ombudsman Commission is of the opinion that the unfairness of the administrative action was the effect of legislation, the Commission may report the matter to the Legislature.⁶³ It is within the discretion of the Ombudsman Commission to publish the results of its investigations and recommendations.⁶⁴ The Ombudsman Commission is also empowered to ask the relevant governmental authority to notify it of steps taken by the authority to implement the Commission's recommendations.⁶⁵

use the principles and values enshrined in the NGDP where the need for these principles is felt. Despite the express recourse to the NGDP permitted by the Constitution, "[t]he courts have only occasionally relied on the provisions which permit reference to the Preamble, the National Goals, and the Basic Social Obligations". See Peter Bayne, 'The Constitution in the Courts 1975-1980', in D. Weisbrot, et al., (Eds), *Law and Social Change in Papua New Guinea* (Sydney: Butterworths, 1982), 227.

59. *Constitution of PNG*, s. 25 (4).

60. *Organic Law on the Ombudsman Commission*, s. 16 (1) and (2).

61. *Id.* s. 16 (3).

62. *Organic Law on the Ombudsman Commission*, s. 17. By s. 59, the principles of "natural justice" are entrenched in the *Constitution of Papua New Guinea*.

63. *Organic Law on the Ombudsman Commission*, s. 22.

64. *Id.*, s. 23 (1).

65. *Id.*, s. 22 (3).

From the yearly Reports of the Ombudsman Commission, it is apparent that a good number of cases, on a diverse range of matters, affecting people from all walks of life, are brought before the Commission. These cases range from complaints of police and prison system brutalities to discrimination to service matters. While in some cases, investigations by the Commission and subsequent recommendations resulted in relief to the applicant, in others, the Ombudsman either expressed its inability to go any further than it had, or the Commission's recommendations were not given effect by the proper authority. A few instances of the work of the Ombudsman Commission in ensuring Administrative Justice is presented below.

An expatriate female doctor sought the help of the Ombudsman Commission on grounds of discrimination.⁶⁶ She was recruited overseas as a medical surgeon. In PNG, she lived with her husband and family, her husband being employed part-time in a high school on local salary. The Public Service Commission of Papua New Guinea would not allow her the status as "Head of the Family" under the Public Services Interim Arrangements Act 1973. The Public Service Commission argued that since her husband was living and capable of full-time employment, she could not be allowed "Head of Family" status. The Ombudsman Commission requested the Public Service Commission to review its decision on the matter as discriminatory. The Ombudsman Commission also recommended that the Public Service Commission review its legislation relating to the employment of specialised overseas contract officers. After "persistent efforts" in this regard, the Public Service Commission undertook a review of the rules and regulations relating to overseas recruitment and as a consequence of this, the applicant got her remedy.

Quite a good number of complaints to the Ombudsman Commission involve police brutality and treatment of inmates in "corrective institutions". Two cases reported in the Ombudsman Commission's Sixth Report (1981)⁶⁷ reveal the degree of success and failure of the Ombudsman Commission in safeguarding citizens' rights against abuses by the law-enforcement agencies. In one case,⁶⁸ a young man, bearing the marks of repeated police beatings while in custody, complained to the Ombudsman Commission of police brutality. Upon investigation, the Ombudsman Commission found that the complainant had indeed been the subject of physical abuse. The Commission therefore recommended that some compensation be paid to the victim, and disciplinary action be taken against the policeman responsible for his injuries. None of the recommendations were, however, carried out. In another more serious case,⁶⁹ police brutality at the time of arrest was responsible for the death of a young man. The Ombudsman Commission was instrumental in the payment of a modest sum of money as compensation to the victim's father. The Ombudsman Commission, however, noted that although the three policemen responsible for the death were charged and committed for trial, they were released on the production of *nolle prosequi* by the Public Prosecutor.⁷⁰

In some of the cases brought before it, the Ombudsman Commission faces a real dilemma. These are situations which involve a transgression of law on the part of the

66. See the Ombudsman Commission of Papua New Guinea, *Annual Report*, 1 July 1979 - 30 June 1980, Report No 5, 63-64.

67. Ombudsman Commission of Papua New Guinea, *Sixth Report*, 30 June 1981.

68. *Id.*, 53-55.

69. *Id.*, 55.

70. *Ibid.*

applicant or complainant, yet partake of aspects of traditional societal norms. As an example, the Ombudsman Commission points out:⁷¹

[A] youth received a five year sentence for a criminal act he carried out under pressure from traditional leaders. He requested our advice on what he could do to be released from what he considered to be an unfair punishment. Had he spoken out in court? No. Would he be prepared to take the elders to court? No, he has to fit back into his community when released ... [sic]

In one major case, the Ombudsman Commission was asked to intervene in respect of an Act of Parliament impinging upon the entrenched political right of citizens of Papua New Guinea to vote for and contest elections.⁷² The Act in question was the *Organic Law on National Elections (Amendment) Act 1981*,⁷³ which amended s. 86 (c) of the *Organic Law on National Elections*.⁷⁴ The effect of the amending Act was that a candidate for election to the National Parliament would have to deposit K 1000, in place of the previously required deposit of K100. Although the applicant had approached the Ombudsman Commission to challenge the Act in question on grounds of infringement of a constitutional right, the Commission sought an advisory opinion of the Supreme Court on the matter.

Invoking the advisory jurisdiction of the Supreme Court under s. 19 (3) of the Constitution, the Ombudsman Commission requested the Court to give its opinion on three questions. In the decision of the Supreme Court, reported as *Supreme Court Reference No 2 of 1982*, [1982] PNGLR 214, the Court reformulated the questions as follows:⁷⁵

One question queries whether the [amending] Act infringes the special right of citizens under the Constitution, s. 50, to stand for elective public office, by denying them a reasonable opportunity to stand. The second question queries whether the Act discriminates amongst citizens on the basis of wealth, amounts to denying them an equal right to stand for Parliament, and is therefore contrary to the *Constitution*, s. 55, which provides for all citizens to have the same rights ... The third question is whether the Act is invalid because it was not made in the manner and form which the *Constitution* requires.

Before the Supreme Court, the Ombudsman Commission relied principally on the National Goals and Directive Principles enshrined in the Constitution, and the provisions of s. 50 (2) of the Constitution. The Commission submitted that the amending Act which required a K1000 deposit was not "'reasonably justifiable' for the purpose of regulating the exercise of the right to stand for Parliament, 'in a democratic society that has a proper regard for the rights and dignity of mankind'".⁷⁶ It was further submitted by the Ombudsman Commission that "a K 1000 nomination fee, by tending to curtail rather than

71. Ombudsman Commission of Papua New Guinea, *Ninth Report*, 31 December 1984, at 17.

72. *Constitution of Papua New Guinea*, s. 50.

73. Act No 46 of 1981.

74. 'Adopted' by the Constituent Assembly on 15 August 1975, after the adoption of the Constitution.

75. *Supreme Court Reference No 2 of 1982*, [1982] PNGLR 214, at 217.

76. *Id.*, 230.

maximize the opportunity for political participation by eligible citizens ... [was] not reasonably justifiable in a democratic society".⁷⁷

In his leading judgement, Kearney Dep C.J. upheld most of the submissions made on behalf of the Ombudsman Commission. His Honour examined the arguments in support of the enhancement of the nomination deposit, and observed:⁷⁸

Whatever the weight to be given to these matters, it appears to me that it is heavily outweighed by the emphasis in the *Constitution* on the right and duty of citizens to take part in the political process ... I do not express that as a personal evaluation, but as an evaluation that is very manifest from the *Constitution*. If the values consciously favoured in the *Constitution* which this Court is directed to implement, create difficulties in practice, that can be remedied only by a reconsideration of these values and by constitutional amendment. It is the duty of this Court meanwhile to enforce the values in the *Constitution* as expressing, in terms of the *Constitution*, s. 50 (2), the 'proper regard for the rights and dignity of individuals' of this country.

Political Justice: Enforcement of the Leadership Code

The impeachment of members of the Executive, parliamentarians, judges, civil officers, and other public functionaries in Papua New Guinea is entrusted to the Ombudsman Commission. In other constitutional systems, the impeachment of members of the Executive and public officials is the domain of the Legislature. The Legislature also commences impeachment proceedings in respect of judges. Members of the Legislature face censure on the floor of House. For instance, under the Constitution of the USA, the President, Vice-President and all "civil officers", which includes judges, can be removed from office as a consequence of impeachment proceedings for "treason", "bribery" and other "high crimes and misdemeanors".⁷⁹ In this regard, the House of Senate in the USA has "the sole power to try all impeachments".⁸⁰ Congressmen (or Congresswomen) in the USA are not subject to impeachment proceedings. They are, however, subject to disciplinary action and expulsion by their respective Houses.⁸¹

77. *Id.*, 231.

78. *Ibid.*

79. *Constitution of the USA*, Art. II, s. IV. The expression "civil officers of the United States" does not include members of the Congress (see Art I, s. VI, para 2).

The expression "other Crimes and Misdemeanors" means "acts which, like treason and bribery, undermine the integrity of government" ... [T]he essential nexus to damaging the integrity of government may be found in acts which constitute corruption in, or flagrant abuse of the powers of, official position". See the report on "The Law of Presidential Impeachment" (1974) quoted in Edward L. Barrett, *Constitutional Law: Cases and Materials* (New York, Foundation Press, 1977), 525-526.

80. *Id.*, Art. I, s. III, para (6). Impeachment proceedings are initiated and voted on in the House of Representatives and the Senate finally hands down the verdict on the alleged misconduct.

81. *Id.*, Art. I, s. V, para (2).

The uniqueness of the PNG experiment lies in the role which the CPC believed the OC should play in ensuring probity in national life.⁸² The global problems of conflict of interest situations, bribery and corruption, abuse of trust and abuse of power on the part of national leaders appeared petrifying and daunting to a nation about to be set free from the tutelage of a colonial master to be on its own untutored in the art of graft and greed often indulged in by power-hungry and acquisitive politicians. The CPC felt the need to scrutinise the actions of public office holders, acceptance of bribes, accumulation of wealth, collusion with foreign and national businessmen to dupe the State.⁸³ Recognizing human frailties as natural to man, it advocated the need to fashion clear rules to ensure integrity in the performance of leaders and politicians.

The fear of leaders being corrupted by foreign businesses desirous of doing business in PNG by gifts and other favours with the object of enticing them to compromise taking objective stand on economic issues was critically analysed. This situation it was thought could arise also where a leader has shares in a foreign enterprise. The CPC deliberated over the need for the nation to have leaders who would stand on the side of principles and not involve themselves in foreign businesses which could have the effect of making it easy for them further to take a principled stand on economic issues.⁸⁴

The CPC made it clear however that it was not their intention to bar leaders from participation in business altogether; they recognised indeed that for some leaders it would be desirable that they broadened their knowledge in business and economics, a thing which would be impossible without their engagement in business. What they were proposing was that:

a leader should not place himself in a position where he may well have a conflict of interest due to his share-holdings or business activities, nor should he use his position to gain rewards or benefits which he would be unlikely to obtain if he were not in a position of leadership.⁸⁵

The CPC's proposals were accepted. In introducing the motion for the adoption of the CPC's proposals, Mr. Somare, then the Chief Minister also stressed the need for leaders of integrity who would not tolerate corruption or misconduct. He concluded his statement thus:

People must know that our leaders can be trusted and will see the leadership code as a guide to their conduct.⁸⁶

These proposals⁸⁷ are embodied in the *Constitution of PNG (1975)*⁸⁸ and the Organic Law on the Duties and Responsibilities of Leadership. The Organic Law is designed to lay down a code of conduct in both public and private matters for persons designated as

82. The Commission's third function is that of enforcement of legislation prohibiting discriminatory practices - par.3 p.11/5.

83. *Final Report*, par.15, p.3/2 Notice however the Guyanese Integrity Commission.

84. *Id.* par.22, p.3/4.

85. *Id.* par.30, p.3/4.

86. *Hansard*, vol.111 No.36 p.4604 (1974).

87. *Final Report*, par. 30, p.3/4.

88. ss. 26-31.

"leaders" so that integrity is maintained in the nation's leadership cadre and in the event of misconduct occurring to provide a basis of action against the persons concerned.

Its aim is not to prohibit all participation in business activities, but to regulate those activities and in doing so, to attempt to prevent bribery and corruption".⁸⁹

The OC itself is provided for under Part VIII Div.2 of the Constitution, and administers the Organic Law on the Ombudsman Commission.

S.26 enumerates the category of leaders affected by the *Leadership Code* and includes the Prime Minister, Deputy Prime Minister, Ministers; the Leader and Deputy Leader of the Opposition; Members of Parliament; all Judges, the Public Solicitor,⁹⁰ the Public Prosecutor, the Chief Magistrate, Members of the OC, Members of the Electoral Commission, the Clerk of Parliament, Members of the Public Services Commission, the Auditor General; all head and Deputy of the National Public Service, the Commissioner of Police, the Commander of the Defence Force; Ambassadors, Senior Diplomatic and Consular Officials; the Public Trustee; the Personal Staff of the Government; Executive Officers of Registered Political Parties (when the Organic Law on Political Parties comes into effect).

The *Code* applies also to part-time members of Statutory Boards. It applies to wives or husbands of persons subject to the Code.

A leader must submit a Statement of Assets within three months of assumption of office and once a year while in office on himself/wife and children under 18 including money, personal property, real property, business connections, share-holdings, total income received and sources of same, directorships or other offices in a profit making organisation, business transactions, gifts received, assets acquired and liabilities incurred or discharged.⁹¹

Leaders who use their position to ask for or receive gifts in the course of their duties will be prosecuted,⁹² and if convicted would be guilty of misconduct in office.

Where a conflict of interest situation could arise, limitations are placed on shareholding.⁹³ A leader should not take paid employment after his official employment without written approval of the OC.⁹⁴

Those affected should not have any beneficial interests in any contract entered into by the Government or any of its agencies without the approval of the OC.⁹⁵

89. *Id.* par.22 p.3/3.

90. But see n 66 *infra*.

91. OLDRL s.4. The first task which the O.C. undertook after its inauguration was to prepare the appropriate form for this purpose.

92. *Id.* s.5.

93. s.8.

94. s.9.

95. s.10.

Limitations are placed on acceptance of loan or the holding of franchises by leaders,⁹⁶ from foreign enterprises. But normal bank loans are not affected.

The duties of a person subject to the Leadership Code are outlined in s.27 of the Constitution which provides:

- (1) a person to whom this Division applies has a duty to conduct himself in such a way, both in his public or official life and his private life, and in his associations with other persons, as not
 - (a) to place himself in a position in which he has or could have a conflict of interests or might be compromised when discharging his public or official duties; or
 - (b) to demean his office or position; or
 - (c) to allow his public or official integrity, or his personal integrity, to be called into question; or
 - (d) to endanger or diminish respect for and confidence in the integrity of government in Papua New Guinea.
- (2) In particular, a person to whom this Division applies shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or has carried out the duty imposed by Subsection (1).
- (3) It is the further duty of a person to whom this Division applies -
 - (a) to ensure, as far as is within his lawful power, that his spouse and children and any other persons for whom he is responsible (whether morally, legally or by usage), including nominees, trustees and agents, do not conduct themselves in a way that might be expected to give rise to doubt in the public mind as to his complying with his duties under this section; and
 - (b) if necessary, to publicly disassociate himself from any activity or enterprise of any of his associates, or of a person referred to in paragraph (a), that might be expected to give rise to such a doubt."

The Organic Law on the Duties and Responsibilities of Leadership (OLDRL) spells out in greater detail the duties of leaders.

A leader may be prosecuted for misconduct if he misappropriates government funds,⁹⁷ or discloses official information except in the course of his duty...⁹⁸ A leader who fails to disclose his interest in a matter on which a debated or voting takes place may similarly be prosecuted.⁹⁹

96. s.11.

97. s.13.

98. s.14.

99. s.15.

Among the conducts which would amount to "misconduct in office" are, non-submission of statement of income,¹⁰⁰ use of office for personal benefit,¹⁰¹ paid company directorship,¹⁰² interests in contracts,¹⁰³ acceptance of bribes,¹⁰⁴ and misappropriation of funds.¹⁰⁵

The OC has the power to search and issue directives to ensure the attainment of the Leadership Code.¹⁰⁶ Where the OC establishes a *prima facie* case against a leader, it is enjoined to refer the matter to the Public Prosecutor to decide whether to lay actions against him or not.¹⁰⁷

Under the provisions of the *Organic Law on the Duties and Responsibilities of Leadership*,¹⁰⁸ the Ombudsman Commission refers matters to appropriate Tribunals if preliminary investigations reveal that there has been a breach of the Leadership Code.¹⁰⁹ The structure and composition of these Tribunals vary according to the designation of the person, who is being investigated for "misconduct" in office, under the Leadership Code.¹¹⁰ Thus for "misconduct" in office of a Prime Minister, the Tribunal is to comprise of the Chief Justice and two other persons who are serving judges and former judges of the Superior Courts of Papua New Guinea or foreign Superior Court Judges of a comparable jurisdiction.¹¹¹ On the other hand, breaches of the Leadership Code by, for example, Members of Parliament, are investigated by a Tribunal staffed by a Judge and two senior magistrates appointed by the Chief Justice.¹¹²

In its deliberations on matters referred to it by the Ombudsman Commission, the appropriate Tribunal is unencumbered by "legal formalities or the rules of evidence".¹¹³ The only broad requirement is that the Tribunal comply with the principles of natural

100. *Organic Law on the Duties and Responsibilities of Leadership* s. 4.

101. *Id.*, s. 5.

102. *Id.*, s. 7.

103. *Id.*, s.10.

104. *Id.*, s.11.

105. *Id.*, s.13.

106. See Final Report par.48 p.11/6.

107. s.27(1).

108. Adopted on 15 August 1975, after the adoption of the Constitution.

109. *Constitution*, s. 28 (1) (g), and *Organic Law on the Duties and Responsibilities of Leadership* s. 27.

110. *Organic Law on the Duties and Responsibilities of Leadership* s. 27 (7). See also *Constitution*, s. 28 (1) (g).

111. *Id.*, s. 27 (7)(d).

112. *Id.*, s. 27 (7)(e).

113. *Organic Law on the Duties and Responsibilities of Leadership* s. 27 (4).

justice.¹¹⁴ Prior to *Constitutional Amendment No 4 - Leadership Code* (1976), the only penalty which the appropriate Tribunal could recommend for a positive finding of "misconduct in office" was dismissal.¹¹⁵ The 4th Amendment was in response to the decision of the Supreme Court in *The State v The Independent Tribunal Tribunal: Ex Parte Moses Sasakila*.¹¹⁶ In *Sasakila*, the Minister of Culture, Recreation and Youth Development, Moses Sasakila, was found guilty of non-submission of a statement of income and assets to the Ombudsman Commission as required under the *Organic Law on the Duties and Responsibilities of Leadership*. Although the Organic Law in question lists acts of varying degrees of seriousness to constitute "misconduct", only "dismissal from office" was mentioned as the remedy. The Tribunal which heard the *Sasakila* case therefore felt itself bound to conclude that Moses Sasakila should be dismissed from office. There was one more omission in the Organic Law as it then stood whereas s 28 (2) of the Constitution provided for a recommendation of dismissal to the Head of State by the Tribunal, the Organic Law provided for a power of dismissal by the Tribunal itself. In *Sasakila*, the Tribunal, however, did not order a dismissal but rather, recommended to the Head of State that Moses Sasakila be dismissed. In accordance with the Tribunal's recommendation, the Head of State actually dismissed Moses Sasakila from the offices of Member of Parliament and Minister.

Subsequent to Moses Sasakila's dismissal, the Supreme Court quashed the order and recommendation of the Tribunal, and the order of the Head of State. The Court's decision in *Sasakila* was based, in part, on the fact the Organic Law was invalid for not providing for lesser penalties in accordance with the provisions of the Constitution. The Court also declared that the provision in the Organic Law, which gave to the Tribunal a power of dismissal, as *ultra vires*.

The 4th Amendment to the Constitution directed that the Organic Law was to provide for the recommendation of lesser penalties by the Tribunal.¹¹⁷ Pursuant to the 4th Amendment, the *Leadership Code (Alternative Penalties) Act, 1976*¹¹⁸ was passed. The alternative penalties specified by this Act include fines, suspension without pay, reprimand, reduction of salary, and demotion.¹¹⁹

A leader who is dismissed for misconduct in office is precluded from holding any elective public office for a period of three years after the dismissal.¹²⁰ He is also banned for the same period from holding a directorship, consultancy or any other prescribed position with a foreign enterprise without the approval of the OC.

A significant body of caselaw has emerged from the Ombudsman Commission's enforcement of the *Leadership Code*.

114. *Ibid.*

115. *Constitution*, s. 28 (1) (g) (ii), prior to the 4th Amendment, and *Organic Law on the Duties and Responsibilities of Leadership*, s 27(5) before amendment.

116. [1976] PNGLR 491.

117. *Constitution*, s. 28 (1A).

118. Act No 79 of 1976.

119. *Ibid.*, s. 2.

120. s.35.

The cases range from those involving failure to file returns (Statements of Account)¹²¹ through those requiring investigation and which end in their being referred to the Public Prosecutor for prosecution¹²² to those requiring reference to the Supreme Court.¹²³

Some of the cases are quite interesting and topical to warrant some discussion of them. They confirm the fears of the CPC on such matters as conflict of interest,¹²⁴ corruption,¹²⁵ abuse of office.¹²⁶ Some raise serious issues of evasion of liability through the simple process of resignation from office.¹²⁷

Some of the decisions are discussed below:

In re Chan.

As Minister of Finance he failed to disclose to the OC his interest in a foreign company, i.e., Placer Pacific Ltd. He, his wife and companies took shares in the said company contrary to s6 of the *Leadership Code*. His defence was that when the interest occurred he was no longer acting in his official capacity. It may be asked: Why did he place other Papua New Guineans and PNG institutions at the top of the priority list?

The decision was appealed to the Supreme Court. That Court said in its ruling:

"The integrity of our leaders is a matter of great significance and is protected by s27 of the Constitution. The main purpose of this provision is:

- (a) to prevent a leader putting himself in a conflict of interest or compromise.
- (b) not to demean the office.
- (c) not to allow his integrity to be called into question.
- (d) not to endanger and diminish the regard and confidence in the integrity of the government of Papua New Guinea.

In a morally corrupt society we need to protect the leadership of our nation. ..."

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- 121. *In re Kaputin* (1788) Unreported Independent Tribunal Decisions (ITD); *The State v. The Independent Tribunal Ex Parte Sasakila* (1976) PNGLR 491; *In re Grey* (1981) Unreported ITD.
 - 122. *In re Uru* (1989) Unreported N730; *In re Sigulogo* (1989) Unreported N756; *In re Auna* [1980] PNGLR 500; *Constitutional Reference No.1 of 1978* [1978] PNGLR 460; *In re Mopio* (1981) PNGLR 416.
 - 123. *Chan v. Investigating Authority* [1988] PNGLR 43.
 - 124. *Chan, supra.*
 - 125. *In re Sigulogo*, n 122 *supra.*
 - 126. *In re Morgan*, [1978] PNGLR 460; *In re Brown* (1985) Unreported ITD; *In re Toua* (1978) Unreported ITD; *In re Pondros* (1983) Unreported; *In re Aparima* (1985) Unreported ITD.
 - 127. *In re Amin* (1982), Unreported S.C. 231; *In re Auna* n 122 *supra.*

In re Sigulogo. (1989) Unreported N.756.

This former MP was charged with among other things accepting gifts and benefits contrary to s4 the Leadership Act. The evidence against him was that he received a gold watch for his wife and that he wrote a letter demanding K30,000 from a Malaysian company he was "helping" to exploit timber in the country. The letter was discovered in a police raid on the premises of the company and tendered in evidence in another tribunal (The Forests Commission). On the admissibility of this evidence the Tribunal said:

It seems good to us to make that ruling to avoid a multiplicity of legal proceedings. Moreover, where an independent Commission of Inquiry, observing the rules of natural justice, has investigated deeply into a matter, we should get the benefits of its research without having to replicate that hearing...

Constitutional Reference No.1 of 1978 [1978] PNGLR 460.

Here the principle was established that a Head of Department whether acting or substantive comes within the purview of the Leadership Code. The accused was Secretary of Department of Works and Supply. He was charged with the offence of causing some staff of his Department to perform non-governmental work.

In re Brown (1985) Unreported ITD.

In this case the Managing Director of the National Provident Fund used his office to purchase two properties, one of which he occupied. He bought a Government house in which he was living and then occupied another Company house under the terms and conditions of his appointment. He was bound over in the sum of K500 to comply with Div. III.(2) of the Leadership Act for 12 months.

In re Toua (1978) Unreported ITD.

The Chairman of the Electricity Commission of PNG signed papers authorising payments of arrears of his bill from his salary thus averting discontinuance of electricity supply to his house, between February 13 the date of his appointment as Commissioner and February 16 1976 thereby creating a conflict of interest situation in breach of s.27 of the Constitution.

He also assigned to himself an unmarked vehicle of the Commission and caused a person to be employed by the Commission to work as a domestic in his house. He was suspended from office without pay for one month.

In re Pondros (1983) Unreported N425.

This former member of Parliament used government money to set up a band for his adopted son. Over K147,000 of State money was used in the process.

In re Aparima (1985) Unreported ITD

This was the notorious "Executive Diaries Affair" in which a member of Parliament caused government contract to be awarded to a person of his choice, a Mr. Loh of Kampsax Co, Singapore.

In re Amin (1982) Unreported SC 231.

This member of Parliament and Minister, resigned before his case had been heard. The issue was whether the Tribunal had jurisdiction. The matter was referred to the Supreme Court.

The Court held that where a member of Parliament tenders his resignation or resigns, he ceases to be a leader and the the OC has no jurisdiction to deal with him.

In re Auna [1980] PNGLR 500.

The accused, who was Executive Director of the National Investment and Development Authority (MIDA) was later named PNG Ambassador to Belgium and the EEC-ACP. While holding the former position allegations of misconduct in office against him were investigated by the OC which then having satisfied itself that a *prima facie* case had been made referred the matter to the Public Prosecutor. The State subsequently revoked the accused person's ambassadorial appointment.

On the issue whether inspite of the revocation of his appointment, the Tribunal had jurisdiction over the accused the Supreme Court said:

"The words carrying out or has carried out" indicate that Sub-s(2) (of s.27 of the Leadership Act) was directed both at persons holding office and those who had ceased to hold office. It is clear that the existence of misconduct might not come to light, until the person had ceased to hold office. An investigation necessarily takes time; it would be against the clear intent of the Leadership Code to interpret it so as to enable a person to escape its provisions, for example, by resigning his office when he learns an investigation is under way. A Tribunal's jurisdiction is created as soon as the Ombudsman Commission 'is satisfied that there is a *prima facie* case that a person has been guilty of misconduct in office', pursuant to s.29(1) of the Constitution; and cannot thereafter be lost. The words 'has been' in s.29(1) also point to past misconduct'.

And again:

"We are of opinion that the Leadership Code is directed to persons actually holding an office as specified in s.26 of the Constitution; and that, as the Tribunal put it in this case, 'the entire thrust of the legislation is directed towards removing a person who is considered, after due inquiry, to be unworthy of continuing in office'. All the provisions of the Constitution and the Organic Law are consistent with, and support, that conclusion. Once the primary purpose of the legislation is clear, it is not anomalous that a person, having ceased to hold any of the designated offices, becomes immune from proceedings under the Leadership Code in respect of any alleged misconduct in office, during the time he held office. The purpose is to prevent continuance in office of unworthy people; and thus it is, that a person holding a leadership office may be proceeded against in respect of alleged misconduct in leadership office which he had formerly held; and, if found guilty, dismissed from his current office."

A difficult constitutional law issue is whether the decision of the OC is appealable. In *Ombudsman of PNG v. Donohoe*¹²⁸ the Court said that the combined effect of s.217 of

128. (1985) PNGLR 348.

the Constitution and s.24 of the Organic Law on the Ombudsman Commission is that the Superior Courts have no power of judicial review of the Commission's proceedings except where it is alleged that it has exceeded its jurisdiction.

On the issue of the standard of proof of charges preferred against an accused person the Court said that this is neither proof beyond reasonable doubt, nor preponderance of probabilities. The Court said in *In re Mopio*¹²⁹

"There is no absolute degree or standard of proof to be applied ...the Tribunal must be reasonably satisfied of the truth of the allegations and it must give full weight to the gravity of a charge of misconduct in office by a person subject to the Leadership Code, to the adverse consequences which may follow and to the duty to act judicially and in compliance with the principles of natural justice. Such satisfaction in matters so grave can never be achieved on a mere balance of probabilities."¹³⁰

The Court noted that the CPC envisaged procedures before the Tribunal to be 'somewhat more informal than those in court, but that there will be adequate protection of the rights of those charged...'¹³¹

In re Kedeu Uru (1989 Unreported) N 756

The accused was Chairman of the National Broadcasting Commission and was charged with receiving a rental of K350 a month improperly i.e. that he was not entitled in law to its receipt. He was appointed Commissioner in 1985. In 1986 rental allowance was accorded Constitutional Office holders. This right was extended in 1987 to heads of statutory bodies.

The accused was living in a house rented from his Commission and for which he paid K12.00 a week. The issue then was "why give a man K350 to pay rent of K12? The K350 rent was to enable people rent decent accommodation from private sources.

But he did not act dishonestly. He asked for a ruling on whether or not he was entitled to the rental. He waited for the ruling and acted only after he received a ruling favourable to him. He was therefore ordered to refund a total of K25,000 which was what he received over a period of eighteen months. In contrast to the sordid tale of misconduct in office vividly illustrated by the foregoing cases is this case which establishes the principle that *bona fides* vitiates the essential element in the proof of a charge of misconduct in office.

CONCLUSION

In the process of the evolution of society and politics in Papua New Guinea, from the early stages of independence to a more mature polity, there are bound to be numerous instances where "matters of administration" would give rise to controversies. In so far as

In *Constitutional Reference No.1 1978* (1978) PNGLR 345 it was held that the Public Solicitor's conduct can be investigated by the OC only on complaint by a client of the P.S. in any other case, the client must waive the right of professional privilege.

129. (1981) PNGLR 416.

130. *Id.* 421.

131. *Ibid.*

administrative practice which adversely affects citizens as the result of lack of acquaintance, understanding and appreciation on the part of the authorities, there would seem to be little purpose in going to formal litigation if the Ombudsman Commission could remedy a situation. Even when administrative behaviour is intentional, callous or malicious, recourse to the Ombudsman Commission, and consequent remedial action, saves a good deal of human and financial resources. There is of course an element of discretion on the part of the Ombudsman Commission to choose or to decline to investigate matters brought before it. But elements of discretion are to be found in the formal litigation system as well.

A formalized litigation system is something that the society and people in Papua New Guinea have only recently been acquainted with. In consonance with the organization and regulation of society around traditional norms and customary principles, dispute resolution in Papua New Guinean society has been along the lines of "mediation", "arbitration", "conciliation" for "harmonious on-going relationship" of the disputing parties. There is an echo of such traditional and informal dispute-resolution in the Ombudsman mechanism provided by the Constitution of Papua New Guinea.

In countries such as Britain and Australia, there are no recognised institutional rights of persons guaranteed by the Constitution. In those countries the Ombudsman directs its efforts against discriminatory practices, ensure the functioning of the basic rights of persons in general, and the rights of disadvantaged groups such as women, students, and prisoners. In Papua New Guinea, it was thought necessary, even with entrenched constitutional rights and the power of the courts to enforce the rights, to establish an Ombudsman Commission. What this means is that the subject-matter of the rights of persons is so wide, diverse and multi-dimensional that an articulation of the rights in the Constitution and the provisions for their enforcement has not been considered adequate by the constitution-makers. Indeed, the submissions by the Ombudsman Commission in *Supreme Court Reference No 2 of 1982*, [1982] PNGLR 214, discussed earlier, show how the Commission was instrumental in having expansive parameters of a political right recognized.

In overseeing administrative practice and ensuring that the operation of constitutional rights is not jeopardized, the Ombudsman Commission in Papua New Guinea has some significant functional advantages. As has been discussed in the case summaries, a complainant who has been brutalized by the police is able to walk straight into an Ombudsman office. Here, in contrast to a litigation process, there are no formal requirements of obtaining a medical report, its scrutiny by opposing counsel, cross-examination and so on, sometimes long after the incident, when visible evidence of alleged brutality is no longer apparent. Sometimes an administrative malpractice puts a person in destitution. Given that no system of social security is available in Papua New Guinea, lengthy court action could entail grave social and economic injustice. The Ombudsman Commission in this regard has the capacity to remedy such situations speedily. Some of the cases discussed bear this out.

One of the greatest advantages of the Ombudsman Commission in the constitutional system of Papua New Guinea, with regard to the enforcement of rights is its competence to "enforce" the National Goals and Directive Principles (NGDP) of the Constitution. As has already been discussed, although the NGDP are "non-justiciable", the Ombudsman Commission is enjoined to take the NGDP into account in its deliberations. Such themes as "Integral Human Development" (NGDP 1) or "Equality and Participation" can and do constitute very important points of reference for the Ombudsman Commission for accepting complaints, instituting investigations and formulating recommendations. In *Supreme Court Reference No 2 of 1982*, [1982] PNGLR 214, the Ombudsman Commission submitted that the political right to vote and hold public office was to be seen in the broader context of NGDPs 1 and 2. The Court accepted these submissions.

It appears that in its dual function of ensuring administrative justice and enforcing the *Leadership Code*, to keep the political system free of vices, the latter task has taken up more time and resources. It is not suggested that enforcing the *Code* is any less important than ensuring administrative justice. What is important to ponder over is the question whether the onerous responsibility of ensuring the integrity of political and other leaders is a task that the Ombudsman Commission can carry out realistically.

A significant number of case-law has emanated from the deliberations of the Ombudsman Commission in discharging its function of keeping political and administrative channels free of corruption and vices. Notwithstanding the responsibility entrusted to the Ombudsman Commission to enforce the *Leadership Code*, proceedings in respect of breaches of the *Code* can be taken under other provisions of the *Constitution* and Law in Papua New Guinea. However, it appears that the alternate avenues are not really explored. Also, there is no bar, as a matter of convention, to censure politicians on the floor of the Parliament for infractions of the *Leadership Code*. The non-recourse to these alternate channels has had the effect of political controversies being dumped on the Ombudsman Commission.

The recent incident of alleged payoffs by the Government to four MPs on the eve of a No-confidence motion in Parliament¹³² is an instance where a political controversy was conveniently transferred to the Ombudsman Commission. Here, almost all the documents apparently incriminating the MPs and government functionaries were released by the Opposition. One would have thought that the case could be directly investigated by the Public Prosecutor and appropriate proceedings initiated. Instead, the matter has been referred to the Ombudsman Commission. It appears that, at least in this case, the Ombudsman Commission has acted as a safety valve in a moment of great political pressure on the Government.

Quite apart from the controversy as to whether or not the Ombudsman Commission is the best-equipped state institution to handle questions of probity of political and other leaders, the more practical question is the level of success attained by the Ombudsman Commission in its enforcement of the *Leadership Code*. The discussion on the caselaw indicates a fair degree of success on the part of the Ombudsman Commission in initiating investigations, making recommendations, constituting Tribunals, and moving the Supreme Court for opinions.

One serious drawback of the Ombudsman Commission in its tasks of ensuring administrative justice and in enforcing the *Leadership Code* is the absence of a mechanism of putting its findings and recommendations into effect on its own. There is also the problem of adequate resources to enable it to undertake major investigations in matters affecting economic and social justice. In sum, however, the record of performance of the Ombudsman Commission of Papua New Guinea is quite impressive.

132 See *The Times of Papua New Guinea*, 19 July 1990.