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THE OMBUDSMAN IN THE COMMON LAW SYSTEM—ADMINISTRATIVE JUSTICE

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The objective of this brief enquiry is a response to the observation of Friedrich von Hayek that the threats that grow in relation to the rule of law, which is equated with the due process of law, will not be eliminated by importing the rules and forms of judicial procedure into places where they do not belong. "To use the trappings of judicial form where the essential conditions for a judicial decision are absent, or to give judges power to decide issues which cannot be decided by the application of [judicial] rules, can have no effect but to destroy the respect for them even where they deserve it." [1]

With regard to supervision or regulation of administrative decision-making in common law countries, there has been only marginal application of judicial rules of due process, and court enquiry has been inadequate even in this restricted context. While there is no panacea for all administrative difficulties, it is submitted that the office of Ombudsman, or legislative commissioner, based on the original Swedish model[2] with broad jurisdiction and sanctions might be a means of providing a higher caliber of justice in the bureaucratic state.

The expansion of bureaucracy has long been delineated and schematized. Max Weber noted the required ingredients as capitalism, industrialization, urbanization, and technological advancement developing concurrently.[3] In addition to its proliferation into more and more activities, bureaucracy constantly tends to be oligarchic in structure. In the first place, its exercise of control is based on disciplined knowledge

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1. F HAYEK, THE CONSTITUTION OF LIBERTY 219 (1960).

2. REGERINGSFORMEN (The Constitution Act) (Sweden, 1809) provided for the appointment of two parliamentary officials, the Justitieombudsmannen (JO) and the Militieombudsmannen (MO), to supervise the civil and military administration on behalf of the Riksdag. As elaborated by legislation, their duties included receiving and investigating complaints of private citizens concerning alleged unfair performance of official duties.

3. M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 333-40 (A. Henderson & T. Parsons transl. 1947).

or expertise. Expert training places a barrier between the bureaucrat and the citizen, with the experts having special "secrets" of their trade which no citizen can master unless he is incorporated within the system. Secondly, fixed jurisdictions ordered by rules produce a compartmentalization antithetical to lay participation. One result of such compartmentalization is a special vocabulary with particular meanings to the bureaucrats. An additional increase in symbolic distance between official and citizen is produced by a firmly established system of superiority and subordination. The growth of the situation produces a bureaucratic profession with its own interests. Finally, the use of written official records produces a complex system of filing cabinets, often locked, containing records accessible primarily to only select employees.

Numerous problems have developed in the democratic state as bureaucratization progresses: among the more difficult are problems involving the lack of accountability of bureaucrats to their constituents, to regular legislative procedures, and to traditional democratic precepts. Ancillary to the question of delegated legislation is that of administrative adjudication. Very often, in fact, the same factors that make it desirable to delegate legislative authority, *i.e.*, the technical nature of the subject and the need for speed, justify the creation of administrative adjudication machinery to decide disputes over the matters concerned. The machinery provided is generally a tribunal for determining cases of alleged abuse or disuse of executive power. The incipient problem lies in the fact that questions between individuals and the administration are adjudicated by the administrative agency itself. This problem of concentration of power is compounded in a system like ours which emphasizes separation of powers. The major objections to the administrative tribunal are urged on the one hand by opponents to increased executive power and on the other by those who are concerned with the *appearance* of justice. This latter argument follows the reasoning that no matter how fair the system may be in fact, it gives the appearance of injustice by violating the tenet that the judge of an issue in controversy should have no personal involvement in it. Slightly more than a decade ago the Committee on Administrative Tribunals and Enquiries, commonly called the Franks Committee, summed up the situation in the United Kingdom as follows:

> Reflection on the general and economic changes of recent decades convinces us that administrative tribunals as a system of adjudication have come to stay. The tendency for issues arising from legis-

> lative schemes to be referred to special tribunals is likely to grow rather than to diminish.[4]

With regard to government-administered programs, an astute legal scholar has observed that administrators and judges alike have until recently viewed such activities as privileges granted or prerogatives exercised by the sovereign rather than actions in which individual rights are involved.[5]

The last several decades, however, have witnessed an expansion of individual rights. Justice Frankfurter attributed the raising of society's standards of decency to our reaching a "certain stage of civilization."[6] With regard to benefactory statutes, for example, a legislature may narrow or repeal a previously enacted benefit, and beneficiaries established by a legislative act may have their interests reduced by subsequent legislation. Recently, however, the courts have increasingly spoken out against legislative manipulation of benefactory statutes resulting in violation of constitutional rights. In short, it has been obvious that denying a benefit can deprive a citizen of his liberties as effectively as imposing penal sanctions.[7] Another ramification of the greater awareness of personal rights has been the change in attitude toward bureaucratic discretion. In this regard judges have found conflict with the first amendment right of free exercise of religion in an administrative disqualification of an applicant for benefits on the ground that she objected to Saturday work due to religious beliefs.[8] In like manner, there has been elimination of administrative conditions imposed on tenants in public housing facilities if such conditions curtail constitutional rights.[9]

A similar pattern of development is observed in review of administrative action. Traditionally the legislature announced that permission to enquire into decisions of administrative officials, boards, or agencies was a matter of legislative discretion to be granted or withheld as the legis-

4. REPORT OF THE COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, CMND. 218, at 8 (1957).

5. W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS, ch. 3 (1956). This subject, originally explored in Professor Gellhorn's lectures in the Edward Douglas White Lectures on Citizenship to the Louisiana State University Law School, is expanded in his book OMBUDSMEN AND OTHERS (1966).

6. Setin v. New York, 346 U.S. 156 (1953).

7. Spevack v. Klein, 385 U.S. 511 (1967). A license could not be conditioned on waiver of privilege against self-incrimination.

8. Sherbert v. Verner, 374 U.S. 398 (1963).

9. Holt v. Richmond Redev. & Housing Auth., 266 F. Supp. 397 (1966). In this case the administrative conditions sought to curtail the tenant's rights of political expression.

lature saw fit; the courts typically ratified this assertion with language to the effect that there was no right of appeal in administrative matters. Not only could the legislature announce with finality which questions might be reviewed, but also which tribunals could hear a permitted appeal and where review should stop.[10] Consequently, if no statutory procedure was defined, there was no review. An exception to this lack of recourse was possible when the prerogative writs were applicable.[11] The use of these extraordinary writs as a method of review has been highly complicated and usually unsatisfactory. Professor Davis has aptly referred to the system as "[a]n imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation [which] would copy the major features of the extraordinary remedies." [12]

Of the six traditional prerogative writs—procedendo, certiorari, mandamus, prohibition, quo warranto, and habeas corpus—the first and last have virtually no relevance to administrative action. Procedendo, where it is extant, concerns the relationship of superior to inferior court and directs a judicial action. Habeas corpus is usually of significance in criminal law when improper incarceration is at issue. Quo warranto, which requires full explanation of the authority by which a person exercises an office or franchise, also has only minimal application. Therefore, for the purpose of judicial enquiry into administrative actions, the remaining extraordinary writs have been of significance. Certiorari is a writ from a court to a quasi-judicial body ordering it to send up a case record in order that more sure and speedy justice may be secured or that errors and irregularities may be corrected. Mandamus commands a tribunal, corporation, or person to perform a clear public duty imposed by law. Finally, prohibition forbids or restrains an action by a lower tribunal which usurps a jurisdiction with which it is not lawfully vested.

These incomplete and overlapping procedures were utterly inadequate as a system of judicial review. They were granted only in the discretion of the court after it first determined that it had jurisdiction to take the case. Besides this, the general rule was that the prerogative writs were not applicable if there were adequate statutory procedures available.

10. Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N.E. 496 (1914).

11. This name was applied to certain judicial writs issued by the courts only upon proper cause shown and never as a matter of right. The theory was that they involved a direct interference by the government with the liberty and the property of the citizen, and therefore were justified only as an exercise of prerogative of the Crown.

12. 3 K. DAVIS, ADMINISTRATIVE LAW § 24.01 (1958).

Furthermore, the courts would not accept review if they interpreted the statute to give agency decisions a preclusive effect. For example, the New York courts, until the twentieth century, demonstrated a marked deference to administrative judgment and incorporated this attitude into a rule (shared by other state judiciaries) that mandamus would not lie to review the exercise of judgment or discretion.[13] Shortly before the First World War, however, it was increasingly recognized that the logical extension of this restriction would permit administrative bodies to operate without the control of law or even in disregard of law. The New York Court of Appeals in 1912 enunciated a rule to provide some legal oversight of administrative discretion:

> In the absence of some express limitation the action of the commission in fixing such tests must stand, unless it is so clearly irrelevant and unreasonable as to be palpably indefensible and improper. If any fair, reasonable argument may be made to sustain the action the courts should not interfere, even though they may differ from the commission as to its advisability.[14]

The substance of this "unreasonable—arbitrary" criterion has continued to be the guiding rule. There has also been little distinction by the courts between administrative discretion exercised in rule-making and that exercised in adjudication.

Obviously it is a delicate affair for a court to conclude that an agency acted arbitrarily or unreasonably notwithstanding the administrator's assertion that all relevant factors have been weighed. The language of the federal Administrative Procedure Act[15] indicates several of the difficulties involved. Section 10(a) of the APA states in part:

> Except so far as . . . . (2) agency action is by law committed to agency discretion—
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.[16]

13. People *ex rel.* Wooster v. Maher, 141 N.Y. 330, 36 N.E. 396 (1894), which construes Chap. 16 of the CODE OF CIVIL PROCEDURE (1880).

14. People *ex rel.* Moriarty v. Creelman, 206 N.Y. 570, 100 N.E. 446 (1912).

15. 5 U.S.C. § 1001 *et seq.* (1964).

16. *Id.* § 1009(9).

On its face, this section appears to prohibit judicial review whenever an issue is committed to agency discretion. Section 10(e) of the same law, however, provides that agency action may be set aside for "an abuse of discretion," which implies reviewability. An interpretation that reconciles these two provisions is that once a question has been committed to agency discretion, the only ground for reversal is an administrative decision which is arbitrary or unreasonable. Clearly "abuse of discretion" must mean more than that the agency, after considering all relevant aspects, reached a conclusion different from that which the court would have reached. As indicated earlier, bureaucrats are delegated responsibility because of their expertise and their special ability to carry out the legislative policy, but if the bureau were to exclude a factor that the legislature intended to be considered, or included an irrelevant factor, the delegated discretion would be abused. Another possible abuse might occur where unreasonable weight is given to one of the relevant factors. In any of these situations a court might void the agency action as unreasonable. The balance is so delicate, however, that the courts avoid striking down administrative acts unless they feel that arbitrariness is clearly present.[17]

All of the countries of common law tradition demonstrate marked limitation upon review of administrative action. Without any separate administrative court hierarchy as in the French and German systems, the English-law countries have typically established administrative tribunals with limited court review similar to the American arrangement. New Zealand's legal and juridical structures demonstrate many parallels to ours, and its experience with the Ombudsman provides a relevant precedent for American inquiry. Following publication of the Franks Committee Report, mentioned above, parliamentary and judicial discussions concerning administrative justice were held within the Commonwealth, and New Zealand was the first member country to borrow the Scandinavian institution by enacting the Parliamentary Commissioner Act 1962.[18]

In New Zealand, as in the United States, the legislature finds itself increasingly unable adequately to supervise administration. The regular court systems of all common law countries are practically powerless to entertain allegations of unreasonable delay, partiality, official rudeness, or unexplained failures to act. Many complaints deal with matters for

17. Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958).

18. Law of Sept. 7, 1962, Statute No. 10 (N.Z.).

which damages or other judicial remedies are not appropriate. At the time this legislation was enacted, there was no requirement in New Zealand law that administrative authorities afford a reasonable hearing, adequate to the circumstances of the particular case, to citizens likely to be adversely affected by administrative action. The regular courts in this country have traditionally exercised a limited review over officials possessing statutory powers. The scope of judicial review, however, has been shaped largely by the nature of the remedies available to bring administrative acts or omissions before the courts. Unfortunately, these remedies (the prerogative writs of mandamus, prohibition, and certiorari) have become so encrusted with historical limitations as to render them only partially effective in dealing with modern problems. The action for a declaration also has been available, but it has in practice filled only a few of the gaps left by the prerogative writs. Broadly speaking, therefore, it can be said that the supervision of the courts at law has extended to insuring that administrators do not exceed their statutory powers. These powers are exceeded when an official does something for which there is no warrant in the statute, or in other words, acts ultra vires.[19] A similar situation existed in the United Kingdom at the time the British Ombudsman was established in 1967.[20]

The New Zealand statute provides for the formal executive, the Governor-General, to appoint the Ombudsman on the recommendation of the legislature, the unicameral House of Representatives, and sets forth an extensive jurisdiction for the office. Practically all departments, boards, commissions, and authorities of the government come within the purview of the Act, and the last section states that its provisions are in addition to any other remedy or right of appeal existing in law.[21] A common ingredient of statutes which establish administrative tribunals in New Zealand is a privative clause stating on its face that the tribunal's action is final. The nation's supreme court, however, has consistently asserted the right to rule on questions of jurisdiction based on the principle that privative clauses can be effective only if confined to decisions made by the tribunal acting within its jurisdiction.

Within the scope of his powers, the principal function of the Ombuds-

19. G. Orr, Report on Administrative Justice in New Zealand, pt. V (1964).

20. The Parliamentary Commissioner Act 1967, c. 13 which came into force April 1, 1967 does not use the word "Ombudsman." Neither the British nor the Hawaiian Ombudsman (The Ombudsman Act of 1967, Act 306 Hawaii) has powers as extensive as those of the New Zealand official.

21. The Parliamentary Commissioner Act 1962, § 29 (N.Z.).

man is investigation. He is empowered to investigate any decision or recommendation made, or any act done or omitted (relating to a matter of administration and affecting any person or body of persons in his or its personal capacity) by any named government entity or by any officer or employee in the exercise of any power or function conferred on him by any law. Excluded from his authority, however, is the power to investigate any decision or act for which there is a specific right to apply for review to any court on the merits of the case. Also excluded are decisions made by a minister of the Crown and matters of military command.[22] Other than in decisions involving deliberations of the cabinet, national defense, diplomacy, and criminal investigation, administrative secrecy (encountered in the United States under the heading "executive privilege") is largely penetrable by the Ombudsman. Investigation may be made either on a complaint by any person or on his own initiative. In any case, investigation is discretionary, and he may direct that even the nominal complaint fee be waived. Before investigating any matter, the permanent head of the department or other government organization must be informed. Although no person has any right to be heard, an opportunity to present evidence must be given to an affected agency when it appears that an adverse report is indicated. The Ombudsman is authorized to examine on oath and to require the production of documents and materials from any officer, employee, or member of any government organization. Every such examination is a judicial proceeding with regard to perjury and the privileges of witnesses. Subject to the exceptions referred to above, *i.e.*, the areas of international relations, cabinet deliberations, etc., the rule of law which authorizes the withholding of information on the ground that disclosure would be injurious to the public interest does not apply in respect to any proceedings before the Ombudsman. The Act goes on to provide criminal sanctions for willful obstruction or deception or failure to comply with the Ombudsman's requirements in the exercise of his functions.

The ultimate goal of the Ombudsman's inquiry is exposure of maladministration. Section 19 of the New Zealand law provides for publicity to be given after his investigation if he decides that any decision, recommendation, act, or omission:

(a) Appears to have been contrary to law; or
(b) Was unreasonable, unjust, oppressive, or improperly discrimina-

22. *Id.* § 11.

tory or was in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

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

(d) Was wrong.[23]

The provisions of this section also apply when the Ombudsman is of the opinion that in the making of a decision or in the commission or omission of an act an administrator's discretionary power has been exercised for an improper purpose or that reasons should have been given for the decision.

In any of the foregoing situations the Ombudsman must report his reasoned opinion to the appropriate department or division together with such recommendations as he thinks proper. Furthermore, he may request the administrative agency to notify him, within a specified time, of the steps (if any) that it will utilize to give effect to his recommendations. He also must send a copy of his report and recommendations to the minister concerned. The section finally provides that if, within a reasonable time after the report is made, no administrative action is taken which seems to the Ombudsman to be adequate, he may send a copy of his report and recommendations to the prime minister. Thereafter, he may make such a report to the parliament on the matter as he thinks appropriate under the circumstances. As an exception to the ordinary rule that no one has a right to appear in a hearing before the Ombudsman, it is specified that no comment that is adverse to any person shall be contained in any report under the Act unless the person concerned has been given the opportunity to be heard.

Another section of the Act provides that the Ombudsman make an annual report to Parliament of the exercise of his functions in general. Subsequent legislative guidelines enacted by the House of Representatives direct that general reports relating to his office be published in the public interest.[24] These published reports have been widely disseminated by the New Zealand news media.[25] Consequently there has developed a comprehensive public awareness of the existence of the Ombudsman, the scope of his powers, and the individual's rights to make use of his services.

23. *Id.* § 19.

24. House of Representatives, Ombudsman's Rules, 1962, *as amended.*

25. The regular feature *From the Ombudsman's Casebook* apearing in The New Zealand Herald (Auckland) is typical of newspaper coverage in the nation's cities.

The professional journals of the New Zealand legal profession also carry regular reports of the Ombudsman's activities. The following is an example of materials reported in "The Ombudsman, Cases of Interest to the Legal Profession," a regular section of the New Zealand Law Journal (condensed by the writer):

> The complaint involved the enforcement of fishing regulations and the ambiguity of language used in a fishing license issued by a local governing district. The dispute concerned whether the license was for a short- or long-term period, and the complainant was charged with fishing without a proper license by a Wild Life Officer of the national Department of Internal Affairs. The case was not brought to a hearing until five months later at which time the complainant was convicted in Magistrate's Court. The Ombudsman's investigation indicated that the Departmental prosecutor had been aware before the hearing that the particular ambiguity in the wording of the license had been inquired into and ruled incorrect by his Department. This information, however, had not been made available to the complainant or to the Magistrate's Court. The conclusions reached by the Ombudsman were that there had been unreasonable delay in bringing the case to a hearing and that the prosecuting officer had acted in an irresponsible manner. Added to the conclusions was a recommendation that officials who would be called to conduct prosecutions in the course of their duties should receive training in the responsibility of a person prosecuting on behalf of the Crown. As the problem could well arise in other national departments, the case was also brought to the attention of the State Services Commission (which heads the national civil service) for the purpose of including the recommendations in staff training programs in general.[26]

In evaluating the data available regarding New Zealand's experience with the Ombudsman, it is apparent that much of his work is in the nature of bringing about citizen understanding of official actions in situations where there has been insufficient explanation of the considerations underlying the decision. In practice, only a very small percentage of complaints have been found to be justified. In two recent years, for example, slightly more than seven percent of complaints have resulted in recommendations for improved procedures.[27] The institution thus

26. 21 N.Z.L.J. 504 (1967).

27. POWLES, REPORT OF THE OMBUDSMAN FOR THE YEAR ENDED 31 MARCH, 1966, at

provides an impartial agency in which misunderstanding can be corrected. It is also beneficial to the administrator to have this device for quashing unjustified allegations of maladministration.

There are several serious restrictions on the effectiveness of the New Zealand Ombudsman. His competence does not extend to local authorities, nor to the courts. Nor has he jurisdiction whenever there is a right of appeal to some administrative tribunal. He has no executive functions and is limited to making recommendations and reports. A recent study of the New Zealand Ombudsman from an authority system perspective indicates considerable instability in his bases of influence. Professor Hill concludes that the personal attributes of the incumbent, economic fluctuations in the system, and changes in partisan tides are major factors in the Ombudsman's authority. Despite the uncertainties inherent in the existing arrangement, however, he notes that: "The knowledge that an independent agent can review their every administrative action has a definite prophylactic effect on officials' actions." [28]

Conclusions

The inadequacies in administrative law of common law countries have caused serious consideration of possible corrective measures. One widely respected solution is that found in most civil law countries and typified by the French *Conseil d'Etat.* This judicial institution includes an elaborate jurisprudence with separate procedural techniques and is especially commendable in the area of government contracts. It has developed an extensive set of safeguards balancing the interests of the individual and those of the state, a set of principles which determine when it will intervene and overrule administrative actions. The proponents of such an institution further argue that only an *administrative* supreme court can achieve realistic control over the vast scope of activities of the modern administrative state.

It is submitted, however, that the Swedish rather than the French import is likely to be more assimilable to the common law system. In the first place, the creation of a kind of *Conseil d'Etat* would seem almost certain to create elaborate and expensive procedural rules requiring representation by counsel and extensive documentation techniques. Instead of complex litigation, the usual complaint requires a device charac-

4 (1966). The figures were 45 of 685 complaints in the year ending March 31, 1966 and 55 of 743 complaints in the previous year.

28. Hill, *The New Zealand Ombudsman's Authority System,* 20 Pol. Sci. 48-50 (1968).

terized by simplicity and lack of expense. Informality is the hallmark of the Ombudsman; the independent third party who has all necessary powers of investigation and on the basis of whose findings the administrator can properly be asked to take action. Experience in other countries has indicated that a recommendation from an Ombudsman who enjoys public confidence may be just as effective as an order of a court.[29] An additional factor to be considered in the confrontation between the individual citizen and bureaucracy is the auxiliary or supportive role of the Ombudsman. His concurrence could well be a significant factor in converting an isolated, insecure individual into a formidable opponent or group of protestors. It should be remembered, however, that probably most of the complaints that come before the Ombudsman will be found to be unjustified after investigation.[30] A resulting benefit is the provision of not only a complaint channel for the citizen, but also a screen for the conscientious bureaucrat against inaccurate criticism.

Implicit in the concept of the institutionalized third party investigator is an expansion of our constitutionalized personal rights. The area of "non-visible decision-making" [31] would be reduced if a kind of administrative bill of rights were to be added to our system. Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*[32] described administrative carelessness or bigotry in apt language: "secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness." Positive obligations with regard to contemporary requirements for establishing justice and promoting the general welfare need to be erected alongside the prohibitions on government. But a broad gulf separates recognition of the existence of rights and their successful assertion. Because litigation remains as the ultimate implementor, judicial remedies, now so inadequate and unwieldy, must also be modernized. For example, by expanding and creating remedies uniform in all jurisdictions, the old prerogative writ procedures would become more effective. In like manner, the archaic areas of executive privilege and sovereign immunity should be drawn to conform to contemporary facts of economic and political life. In common law countries the whole field of government contract needs drastic revision to place the government in a position equal to that of an ordinary citizen when contracting for ordinary commercial purposes.

29. CURRENT LEGAL PROBLEMS 71-72 (G. Keeton & G. Schwarzenberger ed. 1968).
30. *See* POWLES, *supra* note 27.
31. Manigo v. New York City Housing Auth., 279 N.Y.S.2d 1014 (1967).
32. Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123 (1950).

Even when such standards of administrative propriety are not enforced in courts, they act as guides to direct the conduct of the vast number of administrators who are strongly motivated to act justly.

It is conceded that it is too soon to know whether it will be practicable to have a single Ombudsman to cover a given sphere of authority, whether the context be New Zealand, or the United Kingdom, or an American state like Hawaii, or the entire United States. There would appear to be too wide an area involved in each of these entities. It should be remembered, however, that the original Swedish arrangement was a dual system, and different offices could be designated for different categories or levels of administration.[33] Certainly the office of Ombudsman will require a great deal of further study and development in the light of experience. To the ordinary citizen, however, the Ombudsman may well present a practical prospect of help in achieving administrative justice and due process in the bureaucratic state.

33. For example, one would expect two of the likeliest areas of citizen complaint against bureaucracy to be public welfare and police administration, both of which are operated by local government to a large degree.