

WHY AN OMBUDSMAN MAY NOT BE INTRODUCED IN
JAPAN: JAPAN'S UNIQUE MANNER OF DECISION-MAKING
AND COMPLAINT-HANDLING

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A. The Point at Issue

There are many complaint-handling systems using gratuitous complaint officers in Japan, for example, local welfare commissioners, civil liberties commissioners and administrative counsellors. These have attracted considerable international attention.¹ But the ombudsman institution, which has by now been introduced in most of the civilized nations, is not yet established in Japan. The proposal to establish an ombudsman-like institution in Japan was made a few years ago, but there is as yet no indication that a bill will be submitted.²

Why is the ombudsman withheld in Japan, while the above-mentioned commissioners and counsellors are welcomed?

Professor Walter Gellhorn and Professor Lawrence W. Beer have, in the articles footnoted below, evaluated the activities of the above-mentioned commissioners and counsellors very highly. For instance, concerning the Civil Liberties Commissioner, Professor Beer commented as follows:

He/She is neither an arbitrator nor a judge, but a conciliator in a group context within a culture which recognizes the fitness of group problem solution and the propriety of calling upon a prestigious third party to serve as a sympathetic presence facilitating dispute resolution with a minimum loss of face on the part of all concerned. Black and White Justice- is not descriptive of what is sought or what happens; an intersubjectively persuasive and acceptable local resolution of conflict with substantive attention to human rights standards- seems better. In sum, the Commissioner system is low cost and highly held in all respects, and it reinforces the legitimacy of both human rights and the constitutional regime by linking national law with the ordinary citizen's daily environment in a salutary manner.

¹On civil liberties commissioners, see Prof. Lawrence W. Beer, "Human Rights Commissioners and Lay Protection of Human Rights in Japan," Occasional Paper #31, October 1985, International Ombudsman Institute; and on administrative counsellors, see Walter Gellhorn, Ombudsmen and Others, Harvard University Press, 1966, p. 372ff. and my work, "Administrative Inspection, Administrative Counselling and Disclosure of Official Information," in Administrative Management in Japan, edited and published by Institute of Administrative Management, Tokyo, March 1982, and "Japan," in Gerald E. Caiden (ed.) International Handbook of the Ombudsman - Country Survey, Greenwood Press, 1983.

² Prof. D.C. Rowat has already criticized this proposal. See his "A Critique of the Japanese Study Group's Report on the Ombudsman," Occasional Paper #22, International Ombudsman Institute, April 1983

Though I agree with Professor Beer's comment that this system has such merits, there are two sides to all institutions, the formal functions which by law should be implemented, and the informal functions which are affected actually by one's consciousness to law. This is the theme which I should like to discuss, to extract and explain the informal functions which are effected by the Japanese commissioners and counsellors, somewhat magnifying the effect, so as to make clear the contrast with the function of an ombudsman.

B. The Unique Nature of Decision-making in Politics or Management in Japan

The Importance of "Wa" (Consensus)

It seems to me that the main reason the ombudsman has not been accepted in Japan lies in the inconsistency between the standard of complaint-handling by an ombudsman and that of traditional decision-making by commissioners or counsellors.

The standard of decision-making by an ombudsman in settling disputes may be considered to lie in justice, that is reconciling the inconsistency between the laws and the law, that is the current laws and the ideology of law. Therefore the ombudsmen are normally elected from among judges or lawyers.

Further, the fact that the office of ombudsman is an institution of Parliament shows that its function should be to supplement the defects in laws and regulations and to coordinate them. In the case of the Consumer Ombudsman or the Equality Ombudsman in Sweden, law courts (Market Court or Labor Court) are given the final authority to enforce the recommendations of the Ombudsman. But in Japan the standard of decision-making in politics or complaint-handling in general, while now rapidly changing, is not so much justice or reason as "wa," which means consensus or friendship. This standard of decision-making or complaint-handling sometimes comes into conflict with justice.

Decision-making by "wa" brought about a brilliant success in the field of economics because it gave the employees a chance to participate in the management and improve their morale. But in the field of politics, where the aim is to serve the public interest and which needs the leadership of far-sighted politicians, "wa" sometimes brings about great deficiencies. It is probably the main reason Japanese policies cannot be

leaders in the international community and have consequently received such a low evaluation in such fields as of protection of national environment, freedom of information, privacy protection, protection of wild animals, etc.

The conception of "wa" was first introduced in Japan when Crown Prince "Shootoku" promulgated it in the first clause of the first Constitution of Japan in 607.³ The first clause said, "have respect for "wa" and the vassals of the Emperor should not dispute." In those days some of the vassals became powerful and contended against each other, and the position of Emperor was also threatened. The Crown Prince wished to unite them under the Emperor with the idea of Buddhism, which was introduced into Japan at that time.

Since then the idea of "wa" has often been quoted by various people to authorize their own views or to increase the public's morals or solidarity to overcome various difficulties. And by now "wa" has become the idea which the Japanese love best, and one of the keys which explains the behavioral pattern of the Japanese people. The reason "wa" was accepted so fully might be explained by the fact that, since Japan was an agricultural country with quick seasonal variations, close collaboration was indispensable, especially in the case of rice-planting or rice-reaping.

Today the word "wa" is very popular, and is used very often in the "Charter of Citizens" of cities or towns, or in mottos of schools or firms. In contrast to this, the word "justice" is seldom used in the mottos or slogans of cities or firms. It is unpopular in Japan, when compared with its popularity in the western countries. One of the reasons may be that Japan did not have a mature enough system to enforce justice and had a long history of having solved disputes without resort to law. The standard of settling disputes were not so much law but real power or the compromise with influential people. Perhaps that left no other choice for the mass of people but to compromise with a boss or man of influence in order to survive.

The unpopularity of justice is also caused by the short history of law. In western civilized nations law is ideally assumed to be the means through which one could develop one's personality and by abiding by it one could cultivate one's character on the premise that one is charged with sin by nature on the doctrine of Christianity. Legislations should

³As the Constitution of 607 had 17 clauses, it was commonly known as "the 17 Clauses Constitution."

essentially materialize this idea of law. Under this assumption legislators would be given a positive role to actualize social justice or public good. But in Japan the general idea of legislation, without understanding this ideology of law, was introduced as a means of social control. Any legislation so long as it was passed through the parliament was assumed to be law and the understanding that laws should materialize this ideal of law is rare. As the laws were assumed for the general public to be a necessary evil, the less regulative laws were welcomed and accepted to be better laws.

Since justice is not established as the background of laws, laws are expected and welcomed by the public if they are not applied strictly but generously as far as possible, and in practice laws and regulations in Japan are generally speaking not applied strictly, for example, speed limit is not enforced if it does not exceed more than 10% (or 10km/h) of the limit, and the Minor Offences Act, the Outdoor Advertisement Act or the Antiprostitution Act are some of the examples which are practically not applied or enforced.

As laws are not applied strictly, it is often possible for the government to apply laws to new situations without amending it. In practice the amendments of laws are very rare compared with other civilized nations, for example, both pre-war Constitutional Law and present Constitutional Law were never amended, above all the most famous example is the existence of the Self-Defence Forces without amending article 9 of the present Constitutional Law which denounced war potentials.

Thus laws are functioning in Japan without inherent value, the risk that the Constitutional Law or laws are ignored in the emergency, it seems to me, still exists in spite of the bitter experience of World War II. This makes clear contrast with the fact that West Germany has added new provisions to abide by Basic Law even in the emergency learning from the bitter experience of World War II.

In more detail, what is meant by "Wa", or in what situations would the word be used? The word stresses unity, solidarity or collaboration. And functionally it stresses cooperation or the unity of organization, and demands the members' loyalty to the organization. It implies that the members should settle a dispute within the organization and not bring it to the outside world, where it might be settled on the standard of justice.

Taking the example of relations between students and professors, once students enter the university through the entrance examination, they are assumed to be a member of the community, and the professors are generally very generous in marking tests, thus sometimes clashing with the opinions of foreign professors in Japanese universities. Accordingly, almost all the students graduate from the university regardless of their substantial achievements. The same behavioral pattern is also seen in government offices and firms, where there is a lifetime employment in Japan. A pay scale based on seniority also incorporates the idea of "wa" because as employment grows longer, the loyalty to the organization usually increases.

One of the functions of justice is to protect minorities, but minorities are not protected by "wa". According to "wa" it is not desirable for a minority to insist on their own opinion or interest, though it might be reasonable or justifiable. If the minority still insist on their opinion they would probably be ostracized by the community; accordingly, the consensus of the community would be achieved. For example, former Prime Minister Nakasone implemented a policy to privatize the Japan National Railways to improve its deficit operation. This was very hard on the opposition minorities, and consequently more than 80 workers, mainly the union leaders, committed suicide during 1985 and 1986. Similar incidents now occur also in the schools. Pupils who are not trained to adapt to the majority are often bullied. They sometimes refuse to attend school and some commit suicide. This shows that Japan, contrary to Western practise, silence often means opposition. Consequently it became customary to decide things unanimously. This is also the important characteristic of decision-making by "wa" in Japan.

This is the reason that seniority systems and pay scales based on seniority are adopted in many organizations and function smoothly. In other words, chiefs in the organization need not necessarily be able men, but should have the ability to make use of the talent of subordinates to the full. This is the reason that there are chiefs or leaders who leave everything to their subordinates, and yet maintain a high position in the organization. Foreigners sometimes wonder why a leader who is seemingly not talented was given such a high position in an organization or political party. Although policy or political views are often taken into account and appear to be an element in deciding on a

leader, they rarely have a substantial influence. To put it in an extreme way, it is feared that if a political leader had a policy of his own, this would disturb the forming of consensus.

This style of decision-making was one of the main reasons that the pre-war government adopted a misguided foreign policy, because decisions made in this way often weighed in favor of the interest of members of the group and against outside interests. If all the members of the pre-war government had had enough information on the outside world, their decision might not have been misguided. But their decisions were misguided in spite of the objection of the leader, who had fuller information. Since a leader who is elected in the above-mentioned way is not likely to be a decisive man.

An example was the cabinet decision to dispatch troops to Shandong peninsula in China in 1926 because of which Japan lost international confidence in its ability to maintain peace. Through this decision, trust between China and Japan was decisively lost, leaving no other way but to rush into war. The decision was not made in accordance with the conviction or by the full responsibility of the then Prime Minister Giichi Tanaka. He was against dispatching troops to China because he had as prime minister full information on the views of foreign countries, which had suspicious eyes on the intention of the Japanese government. But under the pressure of the professional soldiers, who expected him as an ex-general to implement the policy of the armed forces, and of politicians, who wished to give relief to the electorate who were having hard times but knew little of the international situation, and of public opinion, which was made under a total blackout on news, he decided to dispatch three divisions to China. If it had been the case of western countries, the prime minister would have chosen to resign rather than to implement a policy against his will. But Tanaka was aware, perhaps unconsciously, of his duty to implement policy on the basis of consensus, and assumed that it was his duty to lead policy according to his belief.

This kind of irresponsibility seems to me rather common among the prime ministers of Japan. For example, Mr. Kishi, who died a few months ago, was a minister of industry and commerce under Prime Minister Hideki Tojo, who was sentenced to death by hanging through the Far East Trial, but became prime minister after the war. This was possible perhaps because he and other politicians did not feel any responsibility

for having implemented the policy of war, considering that it was not their own policy but a policy based on consensus.

Some of the war criminals held responsible for the war said that no other way was left for them. They did not have a sense of responsibility because they felt that they did not start or carry out war on their own initiative or leadership, but on the consensus. This attitude was in striking contrast with that of the war criminals of Germany. They were aware of their responsibility. There are some people even today who regard the Far East Trial as an impeachment by the victorious nations and do not accept that it was our responsibility for the war.

C. Problems of Decision-Making by "Wa"

In civilized western countries an effort has been made to search for the reasonable or objective grounds, or to eliminate arbitrariness in the face of decision-making. But in my view not so much effort has been made in Japan, and justice, morality or scientific grounds did not have much weight in decision-making or settling disputes. Instead, the ground of legitimacy in political, administrative or managerial decisions could be said to lie in consensus. In Japan decisions of a political or strategic nature are ordinarily made unanimously. Of course every effort is exerted to achieve consensus before the decision is formally made. This custom became very famous recently, and was known as "nemawashi" (behind-the-scenes negotiations aimed at reaching a consensus). The members who have some doubts about a proposal or the members who are opposed to it are, in the process of "nemawashi" either assimilated into the decision or resign their claims in the formal decision-making scene in order to maintain unity or "wa".

For example, in government offices in Japan, the decisions of the authorities are made by "ringisei" (group-centered decision-making), which means that policy proposals are generally made by low-ranking officials and then get the approval of superiors. Each gets the approval of a superior one after another in the hierarchy, probably with some corrections by the superiors. Thus the decisions of the authorities are formed by consensus of all the officials concerned, that is by "wa". Accordingly when one makes an approach to some organization asking certain decision-making, it is not enough to

make contact with the chief or the organization. It is desirable and effective to make contact also with the section which is in charge of the issue, because it is often these people who make substantial decision-making in the organization. It is also possible that the primary concern of the chief may lie not so much in his achievements but in "Wa" in the organization especially in case of bureaucracy.

As "Wa" is thus a fairly important factor in organization, it involves some risk to a minority to indicate one's opinion before one confirms the other's opinion. The custom to remain noncommittal before one confirms the other's opinion would be one of wisdom of people not to reduce to formal minorities in case one's opinion were quite different from the one of the majority and this custom has now even been considered one of the national characteristics of the Japanese. Further, according to the politics of consensus it is not indispensable or has little effect to speak to an audience on a formal decision-making occasion because substantial decisions are already made and decisions on such occasions are often ceremonial. We can see one of the typical examples in a general meeting of stockholders. This is formally a supreme decision-making organ of the company, but the meeting will be over in almost all the cases within a quarter of an hour.

As the decisions made in this way are unanimous, the responsibility for the decision-making is not clear. If the decision proves to be erroneous later, it is very difficult to find out who should be blamed for it, because the decision was made not by the majority, but unanimously. If the problem of responsibility comes to be at issue, perhaps from outside, usually all the participants in the decision will unify and justify the decision. Consequently all the members become liable for the decision, and actually no one assumes the responsibility for it. One of the examples we can see is in the actual proceedings of the Parliament. In spite of the rules that decisions of Parliament should be made by majority vote, the opposition parties engage in various obstructions to prolong the debate on bills or cause their withdrawal, though these parties have no real responsibility for the approval of law. Thus ordinarily the government's bill does not pass unless agreement with the opposition parties is secured. This is perhaps because there exists unconsciously the sense that the approval should be unanimous. Accordingly the responsibility of the government party comes to be vague, and the government party

sometimes tries to shift the responsibility for the failure to pass draft legislation to the opposition parties. What is worse, in trying to get the agreement of all members, so that the decision will be based on consensus, they are liable to adapt the draft so as to get the approval of the members who are the most selfish. Accordingly the supporters of the decision are inclined to take a self-righteous attitude.

One of the reasons the Japanese are making little progress with the friction over foreign trade, it seems to me, lies in this traditional, self-righteous decision-making process and behavioral pattern based on "wa". In contrast with the solidarity within the community, they can be very cool towards strangers including another enterprise and foreign enterprises. This has made Japan a highly competitive society on the one hand, but has brought about indifference toward external problems. Although there are many advisory councils as in western civilized nations, ostensibly giving a decision scientific grounds or reflecting public opinion on the matter the actual functions of most Japanese advisory councils are, it seems to me, different. To give an extreme yet typical example, the drafts of decisions are sometimes already prepared by the bureaucracy, and the advisory councils have generally no independent investigative ability. In such cases the actual functions of the councils appear to only give the decisions a scientific or objective appearance and the legitimacy of having been made by consensus or "wa". The members of the councils are often carefully chosen from this angle, that is, those who are able to give the decision prestige. Accordingly several retired high officials, presidents of big companies and a few professors serve dozens of councils. This is the case when these councils are chosen in a typical traditional way, but I do claim that most of the councils are managed in this way.

In sum, the decision-making process by "wa" has, in my opinion, the following characteristics compared with western democracy. In the latter case leadership is given on the basis of evaluation of the leader's policy and is accompanied with responsibility for that policy. Therefore the leader is always exposed to the critics who support another policy and to the latent threat of being replaced by them. The existence of opposition is officially justified and duly respected. In other words the organization is exposed to the potential to be split, and a technique to integrate it would be the rule to obey the decision of the majority, giving the members the fundamental right to criticize

the leaders.

In a society controlled by "wa", though I do not insist that most current organizations in Japan are controlled by "wa", the oppositions or minorities formally do not exist. Their policies are absorbed or assimilated into the policy of the organization, or altogether suppressed. But efforts are always made to absorb their policies in order to integrate the organization, and a leader who has the ability to integrate diverse policies or interests is highly respected and can strengthen his/her position. The informal minorities are also usually prepared to accept a compromise so as not to be reduced to formal minorities. For example, the positions of Ministers are customarily allotted in proportion to the number of members in all factions of the ruling party, and the persons who are recommended by these factions will usually be appointed as Ministers. A cabinet which has been formed faithfully following this rule is called "a cabinet resting on a balance of factions," and gains stability, because all the factions are satisfied.

This behavioral pattern is one of the most important reasons why the conservative party (Liberal party, Democratic party and Liberal-Democratic party) has always gained a majority and has formed the government for more than forty years. The reason for the Socialist party's decline could also be attributed to the fact that they ignored this behavioral pattern and tried to follow the one of western democracy. That is, they were bound by a specific doctrine or policy, and could not absorb the diverse interests of the people.

Further, the development of Japan's big businesses, adapting themselves to different situations, could also be considered to lie in this behavioral pattern, and also the low percentage of divorce compared with other civilized nations.

But this decision-making process by "wa" also has some serious problems. In order to get the consent of all the members, the decisions are apt to be adapted to the opinion of the most selfish, conservative or unintelligent members and to be unrealistic, or merely to confirm accomplished facts. A decision which asks the members for some sacrifice or patience for the purpose of the abstract public interest or the long-term public welfare would be very difficult, because there are always the discontented groups who would insist on their own interests. This may be one of the main reasons

why Japan is not playing a positive part in international politics. It reveals a deficiency in the area where the government should lead public opinion on the base of scientific grounds, for example, control of the production of freon, the preservation of beautiful or traditional scenery, privacy protection, freedom on information, etc. As the political leaders in Japan, including the prime minister, are traditionally not chosen on the basis of their ability for political leadership, but rather their ability to unify or mediate various interests and to make compromises or deals, they have generally lacked the ability to lead public opinion. Former Prime Minister Nakasone was somewhat different from the traditional type of politician, because he has policies of his own, and formulated his policies by taking advantage of new consultative councils, which had the ability to recommend their own policy. Present Prime Minister Takeshita seems to be the typical traditional type of politician, motivated by lust for power but having his own policy, however he has some kind of popularity at least in Japan because he has the generosity to accept and coordinate various policies.

D. Administrative Counsellors

Administrative Counsellors and Decision-Making by "Wa"

The system of having complaints handled by gratuitous officers such as Administrative Counsellors or Civil Liberties Commissioners, which is evaluated highly by some scholars, is not irrelevant to the above-mentioned behavioral pattern of the Japanese. That is, this complaint-handling system has now been firmly established because it has adapted to the traditional behavioral pattern based on "wa". And this fact is, in my opinion, an obstruction to introducing an ombudsman in Japan.

Accordingly I should explain the function, nomination and behavioral pattern of Administrative Counsellors in more detail. The Administrative Counsellors have two functions, firstly that of listening to and answering people's grievances, opinions and complaints against administration, and that of analysing them in the light of administrative policies or administrative management. In order to accomplish these two functions, the Administrative Inspection Bureau of the Prime Minister's Office trusts the administrative counselling activities to local individuals without paying them. The origin of this method, the costfree commitment of the lowest level of administrative activities to private

citizens, is thought to lie in the Field Commissioners (hoomen-iin) system which began to be established in some prefectures (Okayama and Osaka) about 1917 and spread all over the country in a few years. Before the war, administrative authority was considered to belong only to the government of the Emperor and was supposed to be carried out through the exercise of the Emperor's sovereignty. Hence it was not committed to private citizens. Only in some exceptional cases was national administrative authority committed to the mayors of cities, towns or villages, and they exercised this authority only in an honorary capacity and were not rewarded for their efforts. So it was considered to be a great honor for the ordinary citizens to be appointed for the disposal of some part of public affairs, but having no direct public authority.

The Field Commissioners originated in the following way. In 1918, in the midst of World War I, the price of rice jumped and oppressed the lives of the poor. This caused the people to attack rice shops in many places, especially the wealthy people and big shops, because the cornering of the market by these people was the main reason for the high price. These events were referred to as the Rice Riot (kome-soodo). After the Riot, Governor Hayashi of Osaka prefect considered it necessary to understand the real conditions of the poor, so that social works could be really effective, so he originated the Field Commissioner system in that year.

The name Field Commissioner was used, thus avoiding the name of Poor-Relief Commissioner, and meant District Commissioner. It was an honorary post without any remuneration - indeed, the Commissioner was even unable to claim expenses. One Commissioner took charge of, on average, 300 households. His/her duty was to investigate the conditions of persons needing aid and to examine if the aid given to them was appropriate. Their relief was provided chiefly through non-material support. The cost of this work was paid by the contributions of citizens and institutions within the prefecture.

As this method, the cost free commitment of low-level administrative activities to private citizens, was successful, similar kinds of Commissioners have been established since then, and there are now 39 kinds, such as Social Welfare Commissioners, Civil Liberties Commissioners, Juvenile Guidance Commissioners, Protectors, Consultants for Physically Handicapped Persons, and Commissioners for the

Aged Persons' Home Service.

The reasons that the Commissioner system was originated could be summarized as follows. The living standards of the general masses were low, and if someone in a family happened to fall ill or lose a job, the family would fall into a miserable condition, but they would not ask for social welfare because there was danger of becoming a target of denouncement by neighbors, because the public's consciousness of human rights remained at a low level. To leave the situation as it was ran the danger of bringing about social unrest, such as the Rice Riot. But the government, the prefectures and the cities would not take measures for the relief of the poor positively on their own initiative.

And the reason that the Commissioner system has gained such a firm footing in Japan is that, though the post of Commissioner was without financial reward, the Commissioner had some authority over ordinary people, and was one step toward being a man of note in the district.

The name Field Commissioners was changed to Social Welfare Commissioners with the passing of the Social Welfare Commissioner Act in 1947, and they continue to function as part of the over-all social welfare administration based on the National Assistance Act. It was the Social Welfare Commissioners that the Administrative Counsellors and Civil Liberties Commissioners were modeled on. Nowadays, Administrative Counsellors are allocated one or more in each city, town or village all over the land. In urban areas there is one for every 50,000 people. The total number in 1981 was 4,789. Regarding their appointment, ordinarily the mayors of cities, towns and villages are asked for their recommendations. The heads of the Regional or District Administrative Inspection Bureaus ordinarily select from those recommended, and notify the head of the central Administrative Inspection Bureau. Then the Director-General of Administrative Affairs in the Prime Minister's Office delegates responsibility to them. About 75% of them are over 60 years of age, and about 92% of them are male. As for their occupations, 25%, the largest group, are farmers, followed by merchants, company directors, men with religious connections, and association directors. They are appointed for a two-year term of service, but do not acquire the status of a public official. The duties of Administrative Counsellors are as follows:

- 1 To hear complaints concerning the activities of the departments of government.
- 2 To give appropriate advice to those lodging complaints.
- 3 To inform the Regional or District Administrative Inspection Bureau and the government department concerned of the complaints.
- 4 To receive the answers relating to these grievances from the government department concerned and to inform the complainants of the answers.
- 5 To inform the public about administrative counselling and propagate it.
- 6 To express any opinions concerning the improvement of administrative management to the Director-General of the Prime Minister's Office.

Administrative counselling is, in principle, carried out at home, but the Commissioners are assigned in turn to the civil counselling offices set up in city halls and elsewhere to hear complaints. Since this system was established, the number of cases of counselling has increased year by year, and stood at 190,000 in 1980. This includes about 40,000 cases which the Administrative Inspection Bureau heard directly, and those which the Commissioners heard numbered about 149,000, i.e., 31 per Counsellor per year. Among these 190,000 counselling cases, civil cases which are not concerned with government departments numbered about 60,000, 30% of the whole. As regards the time taken to resolve cases, 44% were completed within one month, 20% within two months, and another 10% within three months, and thus 75% of the whole were resolved within three months. The Counsellors become less active as we move up from villages to towns to small, medium and big cities, so that in big cities, 70% of all the counsellors each accepted less than 20 cases a year.

If we classify the 130,000 of the administrative counselling cases that do not include the civil cases, inquiry and the like accounted for 63%, grievances 20%, and requests and opinions 17%. Classifying them according to the various administrative activities, requests for repair, proper maintenance and administration of roads accounted for 13%; requests for pension arbitration, 8%; requests regarding registration procedure of immovables, correction of false registration and the like, 5%; requests regarding environmental hygiene such as control of food and proper treatment of

waste, 3.5%; requests about procedure of receiving welfare benefits, consultations about qualifying for it and the like, 3%; proper traffic rules, establishment of traffic security equipment and the like, 3%; while the remaining matters cover almost all aspects of human life.

Cases of law suits against the officials of the Administrative Inspection Bureau or Administrative Counsellors regarding losses caused by bad advice are very rare. The Counsellors do not apply for insurance against having to pay for such a loss. An important aspect of administrative counselling is that because it was established as a part of the information collecting activities for administrative inspection, it was organized to work in conjunction with the local inspection of the Administrative Inspection Bureau. In other words, if there are some administrative counselling cases which are expected to arise again unless the sources of the problem are improved, the administrative inspection is expected to find the general solution of the problem. Actually, however, the administrative inspections arising from the administrative counselling are only about 10% (about 13 a year) of the local administrative inspections.

There have been some significant recent improvements in the administrative counselling system. Although various kinds of complaints are brought forward, the legal competence of the Administrative Inspection Bureau to deal with complaints is only to mediate and it does not have the legal competence to investigate. The number of complainants who were not satisfied with the power of the Bureau only to communicate the answer of the department concerned has increased. The Administrative Inspection Bureau has decided to involve itself actively in this problem, by establishing a study committee composed of private citizens such as lawyers, certified accountants and university professors.

A second improvement is that, for civil cases and family troubles, which amount to 30% of the counselling cases, the Administrative Inspection Bureau has set up some permanent general administrative counselling offices in cooperation with the Administrative Counsellors, with lawyers, licensed tax accountants, arbitrators of the Court of Family Affairs and other specialists. These offices are located in busy places such as department stores and are open also on Sunday, and are thus planned for many citizens to make use of them.

Thirdly, in response to complaints which require an amendment of laws or ordinances, and which can be answered only by the central government, in October 1981 the Administrative Inspection Bureau set up an emergency telephone call system for administrative complaints so that anyone would be able to submit complaints directly to the headquarters of the Administrative Inspection Bureau. Formerly such complaints did not reach the centre quickly because they were obstructed by the Bureau's bureaucracy in the field.

E. Conclusions on Counsellors

In sum, I agree with Professor Gellhorn's and Professor Beer's comments on the various merits of the Administrative Counsellors and Civil Liberties Commissioners, but they are not without demerits. Firstly, the Administrative Counsellors are appointed by the Director-General in the Prime Minister's Office on the recommendation of the mayors. Some mayors are apt to recommend citizens who have assisted with their elections or have had some other connection with them. Accordingly some Counsellors assume the post as one of honor and do not work actively, and it is rare that law professors or legal experts are appointed. There are several reasons to suspect that legal experts are assumed by mayors to be unsuitable as Counsellors. The standard to settle the complaints was to be not only by justice, but also in the spirit of "wa". In many cases the standard of justice and "wa" coincide and there is no problem. But in cases where justice is difficult to achieve because of some obstruction caused by big business, politicians or influential figures, an attempt may be made to compromise justice with the actual balance of powers. In extreme cases it becomes the role of Counsellors to lead complainants to be aware of the actual balance of powers and to explain the difficulties of achieving justice. One can easily understand that this method of settling disputes is quite different from the one used by an ombudsman. Ombudsmen are principally chosen among justices or legal experts and, also where this is not the case, the results and method of settlement are recorded and published and examined by the Parliament. But the cases which the Counsellors deal with are treated as restricted documents, in part through the consideration of protecting privacy, and are not published. Although chosen cases are published for the reference to Counsellors by the

National Association of Administrative Counsellors.

Secondly, since Counsellors and Commissioners are nominated by mayors and appointed by the Director General of the Public Affairs of the Prime Minister's Office or Minister for Justice, they are generally loyal to the government. In extreme cases there are some who have the feeling that it is their duty to remove obstacles to implementing government policy and do not wish to criticize officials, the government or the ruling party. If they find an administrative deficiency, in extreme cases they make every effort to settle disputes without bringing disgrace on the name of the officials or government agency in question. And they are generally eager to settle disputes in accordance with government policy. In the case of Civil Liberties Commissioners, they act against the discrimination against the "burakumin" (the customary outcast occupational group) or against the violence of school teachers against pupils, but are not so eager to act against illegal construction or the pressure of visiting salesmen whose coercion of the old has come to be of great social concern, as Japanese houses can easily be entered into.

Professor Rowat has made the proposal that an ombudsman in Japan should receive appeals against the decisions of Counsellors. 'I appreciate it as a very meaningful proposal, but it would be difficult to adopt in practice because of the differences in the standards of settling disputes between the Counsellors and an ombudsman, whose standard would be the one used by the courts.

F. Proposals for an Ombudsman in Japan

Interest in the Ombudsman

The office of the ombudsman became known to Japan around 1965 when its introduction was actively discussed in England. It was the Japanese Federation of Bar Associations that first got interested in the office. In September 1970 the Federation established a study group on the ombudsman to discuss how the Federation should deal with the problem establishing ombudsmen in order to protect citizens from unjust and improper administration. Considering the political circumstances, however, the study committee judged that speedy legislation to set up an ombudsman would be difficult, and that it would also be difficult to finance private ombudsmen within the Federation,

⁴op. cit. p.12

and hence ceased to discuss the matter in March 1975.

Soon after this the activities of ombudsmen abroad came to be covered by the press, and the public became concerned with the ombudsman, who was idealized as "an ally of justice" or "a tribune of the people".

In February 1976 the documents concerning the overseas sales maneuvering of the Lockheed Aircraft Corporation were exhibited in the U.S. Senate, and it was made clear that politicians and businessmen in Japan had taken bribes from the Lockheed Corporation. In June various influential figures, including former Prime Minister Tanaka, were arrested. It also became clear that many other high officials were also concerned in this scandal, but the government refused to release their names, and the suspected politicians were called "grey high officials". In face of this scandal, opposition parties and newspapers insisted on the introduction of an ombudsman to reveal the truth as well as to prevent such scandals from being repeated. Since then in almost every session the opposition has raised the question of the necessity of an ombudsman.

In 1979 the Chairman of the Ad Hoc Research Committee of the House of Representatives on Aircraft Import announced the idea of setting up in the Parliament a research committee with the powers to inspect and take other legal action modelled on the ombudsman in order to clear up the suspicions around the aircraft import scandal. And in September 1979 an informal council advisory to the Prime Minister, name a "Commission to Discuss Measures for Allaying Public Suspicions over Aircraft Imports," proposed that an ombudsman institution adapted to the national situation of Japan should be considered in order to prevent a repetition of the matter. In September 1979, too, the Democratic Socialist Party proposed a draft ombudsman bill at the general session.

Meanwhile, economic growth in Japan has gradually slowed down, but there has been a steady growth of expenditure due to reliance on a great amount of national bond flotation. In the period 1975 till 1981, this bond flotation reached 82 billion yen. Administrative reform became indispensable to reduce expenditure.

Accordingly the "Second Provisional Commission for Administrative Reform" was established in November 1980, and its sessions actually began in April 1981. It decided to discuss the problem of introducing an ombudsman, and in 1985 finally decided to recommend that the office be studied with a view towards adoption.

Meanwhile, in September 1980 all of the opposition parties except the Communist Party issued "the Four Parties Agreement on Administrative Reform," in which they insisted, "An Ombudsman must be instituted who will be appointed jointly by the Speaker of the House of Representatives and the President of the House of Councillors with the approval of the Parliament."

If the office should be adopted, its jurisdiction would overlap - even rival - that of the Administrative Counselling Service. Therefore the Administrative Inspection Bureau has been deeply concerned with it, and in the autumn of 1978 asked scholars to research and report on the nature of foreign ombudsmen. From 1979 till 1980 the movement to ask for the introduction of an ombudsman became increasingly active in the Parliament, and in March 1980 the Administrative Inspection Bureau set up a study committee on the ombudsman for advice as to whether an ombudsman should be adopted. The committee submitted an interim report in July 1981, and its final report in June 1986.

G. The Report of the Study Committee on the Ombudsman

The study committee proposed that an ombudsman board should be appointed by the Cabinet with the approval of the Parliament, and that their report should be submitted to both Parliament and Cabinet. Although the proposal is designed on the model of the ombudsmen in Scandinavia, it evidently differs from the Scandinavian models since the board would not be attached directly to the Parliament but would instead be an offshoot of the executive. The independence of the institution is proposed to be secured by the provision that the ombudsmen form an administrative board composed of 3, 4 or 5 members. This ombudsman board is expected to cooperate with the existing administrative counselling system in dealing with the complaints, but the problem of how to maintain its neutrality while cooperating with the Counsellors is not treated in the report.

The most important characteristic of the proposal is its recommendation that the ombudsman board should belong to the executive branch in contrast with the internationally accepted definition of an ombudsman. Here I can suggest some of the background.

Firstly, Parliament in Japan has long been subservient to the executive branch and lacks the competence to control the administration. For example, the Meiji Government (1868) set up Parliament only to form the appearance of constitutionalism in imitation of the Prussian Constitution (1850), and did not give it any substantial powers to control the administration. After the war Parliament was newly established as the highest organ of state power under the constitution, but for more more than forty years after the war the conservatives (Liberal Party, Democratic and now Liberal-Democratic Party) maintained a dominant majority, and the executive branch thus maintained its leadership even after the war. The members of the ruling party have been given much opportunity to cultivate the electorate by accepting the policy requests of the executive branch, with the result that the dominant party has been able to maintain an absolute majority semipermanently in the Parliament.

Secondly, if an ombudsman scheme should be set up in Japan, it is expected that a great number of complaints would be submitted since the population is over one hundred million. It was considered necessary for the ombudsman institution to cooperate with the existing administrative counselling system and it could do this most easily as part of the executive branch. Thirdly, is Japan's unusual concept of neutrality. The most important characteristic of an ombudsman's office is its neutrality and also the confidence of the people in its neutrality, which it is said is secured best if the office is attached to the Parliament. But the conception of neutrality in Japan has been inherited from the pre-war period. At that time neutrality was considered to be secure by standing above the general public's conflicts of interest, that is, by acting under the direct control of the Emperor. Therefore the Board of Audit was established under this direct control. This old-fashioned idea of neutrality was maintained even after the war. For example, although the Constitution, drafted under the supervision of General MacArthur, tried to secure the neutrality of the Board of Audit by affiliating it to the Parliament, the government of Japan tried to change this provision and to secure its neutrality by making it an independent organ. Here we see two ideas of neutrality. One is the idea that neutrality would be secured by standing above the conflicts of interests of the general public, which could be called negative neutrality. Another is the neutrality secured when all the interests concerned exercise their influence equally, which could

be called positive neutrality. The proposal to establish an ombudsman as an organ attached to the Parliament stands on the idea of positive neutrality, but in Japan almost all institutions where neutrality is required, as in case of advisory councils, are based on the idea of negative neutrality.

As I mentioned before, Professor Rowat has already commented on the committee's interim report in the International Ombudsman Institute's Occasional Paper #22, 1983. Since the content of the final report of June 1986 is almost the same as the interim report, his comments are also valid for the final report. Concerning his detailed proposals, I agree with the desirability of his proposal for the consent of opposition parties to the appointment of an ombudsman, even if it is unacceptable to attach the institution to the Parliament. But I believe it is impracticable because, unlike in commonwealth countries, in Japan the formal status of opposition parties is not recognized and there is no precedent for giving such a formal competence to the opposition parties. Factual approval of the opposition parties is given for most bills and personnel matters by "nemawashi", though the opposition parties may formally oppose. The proposal to require a special majority for the appointment of an ombudsman seems to me more realistic. However as there are no precedents for requiring a special majority for the appointment of commissioners of an independent administrative agency it will be argued that this is against precedent. Professor Rowat also proposed the council system followed by Austria instead of establishing several independent ombudsmen, as in the Swedish model, so as not to bring about among them an inconsistency in the interpretation of laws and regulations. However, it seems to me that in Japan there would be no need to worry about inconsistency of interpretation, because the ombudsmen would unconsciously cooperate with each other around the chief ombudsman, based on "wa". I quite agree with his fourth proposal to include ministers in the jurisdiction of the ombudsmen, though, if it were adopted, in Japan the actual function of the ombudsmen in this respect would be different from the western civilized countries, because the unity, integrity and uniformity of administration are stressed too much in Japan. Due to the spirit of "wa", it is very unlikely that a government institution would criticize ministers.⁵

⁵In my interviews with them, Canadian Information Commissioner Inger Hansen stressed that a clash of opinions between the Commissioner and the government

At the present time, it is difficult to tell whether a bill based on the report will be submitted to the Parliament. If a bill is to be drafted, it is probable that beforehand a new advisory council, including members representing other ministries, will be created. But under the present circumstances the proposal will be frozen indefinitely.

This paper was written in compliance with Dr. Bernard Frank's request during my stay at the International Ombudsman Institute. I sincerely express my gratitude to him and also to Dr. Randall E. Ivany for his encouragement and valuable suggestions. I must also thank Professor D.C. Rowat of Carleton University for his advice and correction of the sentences.

³(cont'd) often gives good results, and the Canadian Privacy Commissioner John Grace also stressed that the Commissioner had good relations with the government in spite of their severe criticisms of the government in their annual reports to the Parliament. I could not help feeling the difference in the heritage of democracy between the two countries.