

# NATIONAL OMBUDSMAN COMMISSION OF INDONESIA: COMPARATIVE ASPECTS

by

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In the history of control and supervision in Indonesia, 20 March 2000 is one more important date. That day many printing as well as electronic media in Jakarta reported and broadcasted the inauguration of the eight Ombudsmen of Indonesia in the Palace of the President of the Republic. Undoubtedly, for most Indonesian people's ears until then, even up to now, the word "ombudsman" is still undecipherable word. Whereas it is certain, the ombudsman system is one of the symbols of democracy respecting and promoting the rule of law. As a result, one cannot find any precedent in the history of modern democracy about the abolishing of an Ombudsman Institution.<sup>1</sup> On the contrary, some national states—neglecting the rule of law and governed by authoritarian and undemocratic rulers—established the Ombudsman Institutions to pursue international sympathies for having false image as democratic governments respecting the rule of law and human rights. Also it is recorded, that once the Parliament of Malawi rejected the Bill of the National

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<sup>1</sup> Cf. Emile Francis Short, "The Development and Future of the Ombudsman Concept in Africa," paper submitted to the 7<sup>th</sup> International Ombudsman Institute Conference, Durban, South Africa: 30 October-2 November 2000.

Ombudsman. Sometime later, however, the Ombudsman Office was established after the enacting of the Ombudsman Act.<sup>2</sup>

Two years after getting its independence from Kingdom of Sweden, in the end of 1919, Finland established Ombudsman Office. It is the second Ombudsman Institution in the world. Nonetheless, not until 7 February of the following year, the first letter of grievance came in to the new Office. Hence, the date became the birthdate of the Finish National Ombudsman.<sup>3</sup> On the contrary, in the case of Indonesia, many people phoned the Chief Ombudsman candidate asking when the Office would be established. The first grievance to the *Komisi Ombudsman Nasional*, or the National Ombudsman Commission on the first day of its operation was lodged by the Colonel (Ret.) dr. Rudy Hendrawijaya, MPH. It was about the case involving the judiciary. He reported that there were two judgements of the Supreme Court of Indonesia for his case. In the first one, the Court rejected the *cassation* appeal lodged by the opponent party. This meant, the complainant won the case. In the second one, however, the Court agreed to review the case and gave its own judgement by which the complainant becomes the loser of the case. The complainant is of the opinion that the second judgement (No.1082 K/Pid/1988 of 16 November 1999) is none other than a forgery.<sup>4</sup>

## I. The Spreading of Ombudsmanship

Sweden is the homeland of the modern ombudsman. Exactly it was established in 1809. Before the establishment of the Finish Ombudsman, for more than 100 years the ombudsman institution had been known only in Sweden. Then, in the second half of the last century, it spread all over the world with the Ombudsman Office of New Zealand as the first in the English speaking countries and outside Europe. Seven years earlier, in 1955, Denmark established the *Folketingets Ombudsmand*, or Parliamentary Ombudsman.<sup>5</sup> This is the third Ombudsman in the Scandinavian

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<sup>2</sup> See Lauri Lehtimaja, "Welcoming Address," in Ilkka Rautio, ed., *Parliamentary Ombudsman of Finland, 80 Years* (N.p.: Helsinki, 2000), p. 9.

<sup>3</sup> Cf. Short, "The Development and".

<sup>4</sup> Komisi Ombudsman Nasional, *Laporan Tahunan 2000/2000 Annual Report*, p. 10 and p.11.

<sup>5</sup> See Sir John Robertson, "The Danish Ombudsman: New Zealand Precedent" in Hans Gammeltoft-Hansen and Flemming Axmark, eds., *The Danish Ombudsman* (Copenhagen: Department of

countries with emphasized on the maladministration and the oversight of the public service, excluding the oversight of the judiciary. Sometime later it was followed by Norway and Iceland.

In West and South Europe, the Ombudsman Offices were established in the Republic of Ireland, Italy, Switzerland, Austria, the Netherlands, Belgium, Greek, Malta, Portugal, and Spain. In East and Central Europe, the Offices were established in Slovenia, Lithuania, Hungary, Poland, Russia, Ukraine, Albany and Rumania. It will be soon established in Bosnia-Herzegovina and Bulgaria.<sup>6</sup>

In the beginning the United Kingdom was skeptical about the Nordic institution. However, an Ombudsman Office called *the Parliamentary Commissioner for Administration* was established later in London (1967) followed by other similar ombudsmen of particular public sector such as the Independent Housing Ombudsman, the Police Complaints Authority, the Prison Ombudsman, and the Data Protection Registrar.<sup>7</sup> In France, knowing that its administrative court system was the most effective in Europe, many people opposed to the Ombudsman concept.<sup>8</sup> At last, a variant of parliamentary ombudsman was established in Paris by the name of *Médiateur de la République*,<sup>9</sup> by emphasizing mediation as its method of work. The francophone countries then followed this model.<sup>10</sup> Meanwhile, the Ombudsman Office of New Zealand has become the model of the commonwealth countries.<sup>11</sup>

In North America, Ombudsman Offices were established in some Provinces of Canada. The Ombudsman Office of Hawaii is the first State Ombudsman in the

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Information, Ministry of Foreign Affairs, 1955), pp. 33-38; also it is referred in Bryan Gilling, *The Ombudsman in New Zealand* (Palmerstone North: Dunmore Press Limited, 1998), pp. 16-17.

<sup>6</sup> See Le Médiateur de la République, *1998 Report to the President of the French Republic and Parliament*, Abridge Version, pp. 116-117.

<sup>7</sup> Bryan Gilling, *The Ombudsman in New Zealand* (Palmerstone North: Dunmore Press Limited, 1998), pp.17-19 and Philip Collcutt and Mary Hourihan, "Review of the Public Sector Ombudsman in England", A Report by the Cabinet Office, April 2000. See also Cabinet Office, "Review of the Public Sector Ombudsmen in England", A Consultation Paper, June 2000.

<sup>8</sup> See Mme Nicole Questiaux, "Countries With A System of Administrative Courts, How Administrative Courts Meet Their Need," in Donald C. Rowat, ed., *The Ombudsman, Citizen's Defender*, 2<sup>nd</sup> ed. (London: George Allen & Unwin Ltd., 1968), pp. 217-225.

<sup>9</sup> See Le Médiateur de la République, *1998 Report to*, p. 9 and Le Médiateur de la République, *2000 Report to the President of the French Republic and Parliament*, on the backside of the cover.

<sup>10</sup> Marten Oosting, "Keynote Speech: The Ombudsman—A Profession," speech delivered in African Regional Workshop, Pretoria, South Africa, 26 to 29 August 1996.

<sup>11</sup> *Ibid.* See also Robertson, *The Danish Ombudsman*.

United States.<sup>12</sup> Whereas in Latin America, the first Ombudsman Office is established in Guatemala.<sup>13</sup>

In Asia, the modern Ombudsman was first introduced in India, and there are eleven local ombudsmen, or *Lok Ayukta*.<sup>14</sup> In Pakistan the modern National Ombudsman, the *Wafaqi Mohtasib*, has been in existence since 1986. Whereas in Africa, the first Ombudsman Office established is the one in Tanzania.<sup>15</sup>

Nowadays there are already 107 National Ombudsmen in the world with the National Ombudsman of Thailand is the last. It was established on 1 April 2000 or eleven days after the Indonesian Ombudsman Commission was born.

It is worth of notice, that the word of “Ombudsman” has been protected by International Ombudsman Institute (IOI). The protection is intended to give criteria for the membership of that International Organization due to the growth use of the word “Ombudsman” by similar institutions, which are *not really* independent. Other criteria are whether or not the institutions screened having: impartiality, immunity, powers of investigation and authorities to make recommendation.<sup>16</sup>

## II. Parliamentary Ombudsman vs. Executive Ombudsman

The Swedish word of *ombud* means “legal representative”. The word and function of “ombudsman” has been very popular there. Hence, the trade unions, political parties, public as well as private corporations have their own ombudsman. However, the most independent ombudsman in Sweden is the parliamentary ombudsman called *justitieombudsman*, or “JO”.<sup>17</sup>

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<sup>12</sup> Donald C. Rowat, “Preface To Second Edition” in Rowat, ed., p. xiii.

<sup>13</sup> Marten Oosting, *Contribution On Ombudsmanship* (The Hague: De Nationale Ombudsman, 1998), p. 5.

<sup>14</sup> See Directory 2000 of International Ombudsman Institute; cf. Rowat, “Preface”, p.xxii.

<sup>15</sup> See Directory 2000 of International Ombudsman Institute.

<sup>16</sup> Cf. Kevin Murphy (Irish Ombudsman) in *Annual Report of the Ombudsman 1999* (Dublin: Office of the Ombudsman, n.d.), p.7.

<sup>17</sup> Cf. Torsten Erikson, “The Ombudsman” in UNAFEI Resource Material Series No. 8, 1974, p. 63.

The authority of the *justitieombudsman* (the ombudsman of justice) is to oversee the application of law by the public service, military, and judiciary. Whenever there is diversion of law or apparently there is abuse of power, the JO will investigate it and give the recommendation and even it may prosecute the particular bureaucrat, military officer and judge who has allegedly violated the law or abused of authority. At the same time, those who think they have been the victims of malfeasance may lodge complain to the JO.<sup>18</sup>

The JO is a parliamentary ombudsman since he sends special as well as annual report to the Swedish Parliament (*Riksdag*) that elected him. Most ombudsmen in the world are parliamentary ombudsmen. The variants of it are found in some countries, where the ombudsmen are appointed by the Head of State (the King, the Queen or the President). Still, they are responsible to and send the report to the Parliament. For example, the Queen appoints the Parliamentary Commissioner, or the English Ombudsman, on the advice of the Prime Minister after consulting the leaders of the opposition parties.<sup>19</sup>

There are, however, ombudsmen elected by the Head of State and they send the report to the Head of State, not to the Parliament. Hence, they are executive ombudsmen. Ombudsmen of the Republic of Korea, Pakistan, Indonesia and Tunisia belong to this group. The variant of it is the French Ombudsman, or *le médiateur de la République* that is appointed by the Cabinet. Also he sends report to the Head of state. Without having full independence, still the executive ombudsmen play significant role in protecting rights of the public and to improve the rigid application of regulation and practices.<sup>20</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> The credit should be given to Professor Roy Gregory, Reading University, England, UK, who corrected that particular paragraph in our paper dealing with comparative study on the Ombudsman System in Africa and Europe (written with Chief Ombudsman of Indonesia, Mr. Antonius Sujata in winter 2000) during my training in Public Administration International in London, UK in May 2001 on “The Institution and Role of Ombudsman.” See also RM Surachman, “Institusi Ombudsman: Perkembangannya”, paper submitted to Interactive discussion with the topic: The prospect of establishing Local Ombudsman in West Borneo, 22 September 2001.

<sup>20</sup> Daniel Jacoby, “The Future Of The Ombudsman,” paper submitted to International Ombudsman Conference, Taipei, Taiwan (19-24 September 1994), p.6.

One should notice, it is one of the universal principles of ombudsmanship that no one or no other institution—not even the Parliament (in case of a parliamentary ombudsman) or the President (in case of an executive ombudsman)—may intervene, instruct, and dictate ombudsman. Thus “responsible” in the context of ombudsmanship means that he has to send the special as well as annual report.<sup>21</sup>

As previously mentioned, the other Scandinavian countries later adopted the Swedish Classic Ombudsman. As a matter of fact, the West and South European countries did not adopt the Swedish model genuinely. They adopted the parliamentary ombudsman of Denmark instead. Without having the power of prosecution and without having the authority of scrutinizing the judiciary, the Danish Ombudsman oversees the bureaucracy and public administration.<sup>22</sup>

In later development, some Ombudsman Offices extended their jurisdiction encompassing the power to investigate and prosecute corruption practices. This extension of power may be seen in the Philippines, Vanuatu, Ghana, Namibia, Sudan, Uganda, and Zambia. In other words, these offices have shifted from the position of the “Magistrature of Influence” into the “Magistrature of Sanctions”.<sup>23</sup>

Other variant, the extension of jurisdiction may be seen in Latin America *inter alia* in Mexico, Guatemala, Honduras, El Salvador, Costa Rica, Panama, Colombia, Argentina, Peru and Bolivia. They established the so-called “Human Rights Ombudsman”, since the Offices have jurisdiction to investigate the human rights as well as maladministration violations.<sup>24</sup>

The Ombudsman Offices in the East and Central European countries took the similar path. Meanwhile, unlike many Ombudsman Offices in some African countries, the Ombudsman Offices in Latin America and in East and Central Europe are not vested with the power to investigate corruption practices. However, all those

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<sup>21</sup> Surachman, “Institusi Ombudsman”, pp.8-9.

<sup>22</sup> *Supra* n. 5.

<sup>23</sup> The term of “Magistrature of Influence” and “Magistrature of Sanctions” see the Office of Federal Ombudsman, Kingdom of Belgium, *Annual Report 1988*, p.18.

<sup>24</sup> See “The Ombudsman and its Relation to the Inter-American Commission of Human Rights”, p. 1, material for discussion (*handouts*) in the Program on the Institution and Role of the Ombudsman, University of Reading/PAI (Public Administration International), London, UK., p. 1.

ombudsmen are categorized as the second generation. Many of them called themselves as the “Human Rights Commission” or any other titles among other things are: Commissioner for Human Rights and Administrative Justice, Civil Rights Protector, Public Protector, Le Protecteur du Citoyen, Commission Nationale de Droit de l’Homme, Comision Nacional de Derechos Humanos, Procurador para la Defensa de los Derechos Humanos, Defensor del Pueblo, Defensor de los Habitantes, Difensore Civico, and Provedor de Justiça.<sup>25</sup> Whereas the first generation of ombudsmen are those classical ombudsmen that are responsible to scrutinize the public administration.<sup>26</sup>

### **III. The National Ombudsman Commission of Indonesia**<sup>27</sup>

Most National Ombudsmen in the world were established by an Act. On the other hand, the National Ombudsman Commission of Indonesia was established based on the Presidential Decree Number 44 of the Year 2000. As previously mentioned, on 20 March 2000, the eight *Anggota* (Member), or Commissioners (Ombudsmen), were inaugurated by President Abdurrahman Wahid in the Palace in Jakarta. The position of the ninth Commissioner is still vacant. Few months later three Commissioners resigned and one of them became the Chief Justice of Indonesia. Now therefore there are four vacancies for the position of Commissioner.

It is worth of notice, that similar to the Ombudsman Commission of Indonesia, the National Ombudsman Office of Pakistan too was created by a Presidential Decree (President’s Order Number 1) in 1983.<sup>28</sup> Both Ombudsmen are appointed and responsible to the President of the Republic. Hence, both of them are not Parliamentary Ombudsmen.

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<sup>25</sup> See Directory 2000 of International Ombudsman Institute; cf. Daniel Jacoby, “[Report of the] International Ombudsman Institution Board of Directors’ Meeting”, in the 7<sup>th</sup> International Ombudsman Institute, Durban, South Africa, 30 October to 2 November 2000.

<sup>26</sup> Cf. Jacoby “[Report of the]”.

<sup>27</sup> Cf. Surachman, “Institusi Ombudsman”.

<sup>28</sup> See *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983*; also *Annual Report 1999* (Islamabad: Wafaqi Mohtasib (Ombudsman)’s Secretariat, 1999), p.4 and pp.138-149.

As have been seen, some parliamentary ombudsmen are appointed by the Head of State (the King, the Queen or the President). They are responsible to and send the report to the Parliament and yet they are autonomous and independent.<sup>29</sup>

Accordingly, either the Ombudsman of Pakistan or the Ombudsman of Indonesia will become a Parliamentary Ombudsman, if each of the Presidential Decree mandates each of the Ombudsman to send the report to the Parliament.

Indonesia, however, will not amend the Presidential Decree for two reasons. Firstly, the Ombudsman Commission has composed the Draft of the Bill on the National Ombudsman. The preparing of the Draft is one of the mandates provisioned in the Presidential Decree. Secondly, the Ombudsman Commission has decided that it is the Indonesian Parliament, not the Head of State that will elect the future National Ombudsman.

It does not mean that the Indonesian Ombudsman Commission will become political partisan. The choice is motivated solely for gaining political support from the Parliament. In that condition, the National Ombudsman of Indonesia will hold a stronger position and will be more independent and impartial. What is more, being an outsider of the Executive, it will become an autonomous supervision institution. Needless to say, the Act of Indonesian Ombudsman as legal basis will be stronger than the present Presidential Decree.

#### **IV. The Objective and the Mandates**

As a matter of fact, the establishment of Ombudsman Commission was one of the commitments of the President Abdurrahman Wahid Administration (and continued by the present Administration under the leadership of President Megawati Soekarnoputri) to reform the laws and institutions in pursuing a better and clean administration and to enhance the realization of good governance. In other words, the establishment of the Commission is to prevent those authorities in public sector from

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<sup>29</sup> *Supra* n. 18.



abusing of authority and discretion; to assist them in performing their jobs effectively and efficiently; and to compel them for maintaining the accountability and fairness.

For those purposes the Ombudsman Commission was given the following mandates described under the Presidential Decree Number 44/2000:<sup>30</sup>

- (1) To accommodate the social participation in conditioning the realization of clean and simple bureaucracies, good public service, professional and efficient justice administration as well as impartial and fair trial by independent judiciary.
- (2) To promote the protection of individuals in getting public service, justice and welfare and in defending their rights against illegal actions and irregular practices resulting from abuse of power, corruption, collusion, discrimination, undue delay, deviation and improper discretion.
- (3) To enhance the supervision of the government institutions and agencies including the judiciary by sending clarifications, queries, and recommendations to those reported institutions and agencies (target groups), followed by uninterrupted monitoring of their compliance with the recommendations.
- (4) To prepare the transforming of the Ombudsman Commission into a more effective, autonomous, and completely independent Parliamentary Ombudsman of Indonesia by drafting the Bill on the National Ombudsman to be submitted to the Legislature within six (6) months.

In this context, the Ombudsman Commission practises these procedural activities: if it is discovered that there is a kind of maladministration committed by any government institution or agency in the form of undue delayed, inappropriate and arbitrary decision, actions, omissions, or deviation or apparently it is a result of abuse of discretion, and abuse of power, or it is in contradiction with law and regulations, the Ombudsman Commission will give recommendation to the target groups (the

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<sup>30</sup> See *Laporan Tahunan 2000/2000 Annual Report* (N.p.: Komisi Ombudsman Nasional, 2001), p.6 and p.7. See also Arts 3-4 of Presidential Decree Number 44 of the Year 2000.

reported institution or agency) that the case is under the monitoring. Even if on the surface it is legal or not in contradiction with law and regulations, the Ombudsman Commission will do the same. Accordingly, it is possible for the Ombudsman Commission to dispose the case based on equity.<sup>31</sup>

In short, the immediate objective of Ombudsman Commission is *inter alia* to pursue the realization of the clean and effective bureaucracies in providing good services to the public based on the supremacy of law as well as the realization of the professional and credible law enforcement agencies including the accountable and independent judiciary that respect human rights and fundamental freedoms and maintain equal opportunity and justice for all.<sup>32</sup>

In other words, the public institutions and agencies concerned are at least willing to accept and recognize the existence of the Ombudsman Commission. Further, those institutions and agencies will soon realize that a new institution of accountability and integrity i.e. the Ombudsman Commission now controls their works.

The long range objective of the Ombudsman Commission is *inter alia* to pursue the realization of good governance in the context of civil democracy based on the rule of law and supported by a strong judiciary that respect the principle of equality before the law, the presumption of innocence, and the right to a fair public hearing by an independent and impartial tribunal.<sup>33</sup>

The influx of complainants to see the Chief Ombudsman for reporting their grievances reflect the wishful expectations of the people, that the Ombudsman Commission is completely independent and vested with broad authorities. They believe they have found the real protector for their rights and interest. They believe the Ombudsman Commission may provide the last opportunity to get redress and

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<sup>31</sup> RM Surachman, Commissioner (Ombudsman) of the National Ombudsman Commission, Address to Workshop on Administrative Law, Surabaya, October, p.2.

<sup>32</sup> *Laporan Tahunan 2000/2000 Annual Report*, p.6 and p.7.

<sup>33</sup> *Ibid.*, p.8 and p.9.

remedies for their rights which have been damaged, dishonored, abrogated, or even abolished by the unfair authorities and impartial judges.<sup>34</sup>

## V. The Principle of Independence

Pursuant to article 17 of the Presidential Decree all expenditures for executing the duties and functions of the Ombudsman Commission will be born by the State Secretariat. In other words, the budget of the Ombudsman Commission is part of that of the State Secretariat.

Many of the opinion, that the article may distort the independent status of the Ombudsman Commission. However, the Ombudsman Commission has so far been successful in maintaining its independence from the Executive. It is recorded that the Commission send occasionally a critical recommendation to the President. For example, President Abdurrahman Wahid apparently did not want to appoint one of the two Chief Justice candidates nominated by the Parliament. The Ombudsman Commission sent the recommendation reminding that according to the law the President had to appoint one of them. Eventually, the President appointed Professor Bagir Manan, one of the candidates, as the Chief Justice.

As noted earlier, it is one of the universal principles of ombudsmanship that no one or no other institution may intervene, instruct, and dictate Ombudsman.<sup>35</sup> Dean M Gottehrer points out that the Ombudsman Office is established as independent and impartial institution. Even in many Constitutions the principle of independence for the Ombudsman is guaranteed. This means that “[t]he Ombudsman in the exercise of the office’s functions, duties and responsibilities under this Constitution shall not be subject to the direction or control of any other person or authority.”<sup>36</sup> Any individual thus must have easy access to the office. There is even no charge for any grievance lodged to the Ombudsman. In addition, Gottehrer comments that “[i]ndependence and

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* n. 19a.

<sup>36</sup> Dean M. Gottehrer, “Ombudsman Legislative Resource Document”, Occasional Paper #65, (Edmonton, Alberta: International Ombudsman Institute, 1998)

impartiality of the Ombudsman are critical to the office's success because otherwise people will tend not to use it if it appears to be another bureaucratic government office."<sup>37</sup>

Gottehrer is an American expert on ombudsmanship and one of the Indonesian Ombudsman Commission's consultants. In his research report he concludes that Constitutions of 54 countries accommodate the basic provisions on the Ombudsman. Moreover, he has read not less than 100 Ombudsman Acts of many countries. His discoveries show everyone that there are 59 universal principles of ombudsmanship. Practically, the Commission has dubbed them "Gottehrer principles", or "G-principles".<sup>38</sup>

Truly, G-principle 1 (G-1), or the principal of independence is the most essential. This principle links with the purpose of its establishment, its sustainability, the appointment of Ombudsman, the tenure of office, functions, and procedure of removal.<sup>39</sup>

The purpose of the establishment of Ombudsman Office is to oversee the public administration; to promote the standard of competence and efficiencies, to protect the individual from being the victim of injustice, maladministration, and abuse of discretion committed by any public authority; to promote and protect human rights as well. Moreover, the establishment of Ombudsman Office should be based on an Act. To repeal and to amend an Act needs a larger majority vote in Parliament. Hence, the Act is not easily changed. Further, the Ombudsman must have high qualification of personal and moral integrity; and must be capable to analyze problems of law, administration, public policy, and human rights (G-2 to G-6). Furthermore, the normal term of office may be between four and six years with or without the possibility of reappointment for the second term (G-8). In addition, the Ombudsman must be vested with the power to investigate (G-20) and to give recommendation (G-44). Then the causes for the removal of the Ombudsman must be specified in the Act *inter alia*

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<sup>37</sup> *Ibid.*

<sup>38</sup> Surachman, "Address to".

<sup>39</sup> Gottehrer, "Ombudsman Legislative".

because of permanent mental or physical inability to execute his functions or because of misbehave actions and omissions (G-12).

As Marten Oosting, the past President of International Ombudsman Institute (IOI) and former Dutch Ombudsman points out, the independence of ombudsman encompasses three elements, namely institutional, functional, and personal independence.<sup>40</sup>

Firstly, *institutional independence* means the Ombudsman is not part of any public agency. Moreover, he holds a high level position in the government system. He may not therefore be controlled by any power of authority (G-1). Secondly, *functional independence* means the Ombudsman may not be dictated or pressured by any authority or influence. To prevent any intimidation or instruction restricting his performance, he must be empowered with wide jurisdiction and flexible procedure by an Act (G-20 and G-26). Besides, he must be sustained by sufficient budget to promote his professionalism and quality standard in executing his duties and functions (G-59). Thirdly, *personal independence* means he must be a person of high integrity. The selection for his position in the office must be based on best qualifications. His term of office must be explicitly described in the Act (G-2 to G-6). Likewise, his remuneration and facilities must be guaranteed and equal with those of government officials of very high echelon (G-9 and G-10).

## **VI. The Principles of Impartiality and Immunity<sup>41</sup>**

Other pillars of ombudsmanship are the principles of impartiality and immunity. In conducting the investigations and in giving the recommendations, the Ombudsman must be impartial. Therefore, there are some positions that are incompatible for him. For example, he is not eligible to be a member of political party, a Member of Parliament, and a judge (G-7). Whenever there is the possibility of

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<sup>40</sup> Marten Oosting, "Protecting The Integrity And Independence of The Ombudsman Institution: The Global Perspective," in *Conference Papers, VII<sup>th</sup> International Ombudsman Institute Conference*, Durban, South Africa, 30 October 2000-2 November 2000, pp.21-22.

<sup>41</sup> Gottehrer, "Ombudsman Legislative".

conflict of interest, he must refrain from any case if he has any interest on it (G-14). Therefore the Ombudsman may appoint one or two Deputy Ombudsmen who will handle such matters.<sup>42</sup>

Equally important, G-48 states, “The Ombudsman and persons acting under the Ombudsman’s direction or authority are immune from civil and criminal proceedings for any act performed in good faith under this Act. Ombudsman reports and proceedings are privileged.” To this Gottehrer gives his comment: “These immunities protect the Ombudsman, staff and anyone else acting under the Ombudsman’s direction or authority from harassment when dealing with controversial issues or making a finding seen as favorable to an unpopular position and from any consequences in a libel or slander suit.”<sup>43</sup>

Not less important as one of the shields for an Ombudsman, his deputy and staff is G-47 stating that the conclusions, findings, recommendations and reports of the Ombudsman, his deputy and staff may be reviewed by any court except whether the Ombudsman has jurisdiction over the target groups or over grievances lodged to him.<sup>44</sup>

## **VII. The Future of the National Ombudsman of Indonesia**<sup>45</sup>

Measured by those international standards, or universal principles of ombudsmanship, the present Indonesian Ombudsman Commission is still embryonic or prototypic in nature. Even though the Commission has proved to be an independent and impartial institution so far, it lacks of essential power for exercising full investigation, such as power of subpoena, power of ingress, and other protections or shields for his actions. This weakness was surely seen and felt by the Drafter Team.

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Cf. Antonius Sujata and RM Surachman, “Preparing the Establishment of A Parliamentary Ombudsman: The Indonesian Experience”, paper submitted to the 6<sup>th</sup> Asian Ombudsman Association Conference, Tokyo, Japan 18-21 June 2001.

As a result, most of the Gottehrer-principles or International standards and practices of ombudsmanship were incorporated into the Draft of the Bill, namely:

The reasons of the establishment and the purpose of the National Ombudsman of Indonesia. This is *G-principle 1*. (See Chapter Two of the Draft of the Bill, Art. 2.)

- The qualifications to be Ombudsman, or *G-principle 6*. (See Chapter Seven, Arts. 31 and 34.)
- To be independent and impartial, the Ombudsman may not hold any incompatible positions, such as a member of political party, a Member of Parliament, a judicial officer or a particular public official. This is *G-principle 7*. (See Chapters Five, Seven and Eight, Art. 35 jo. Art 1 point 1; Art. 37 jo. Art. 3 and Art. 13 section (4); and Art 38. jo. Art. 2.)
- Term of office and the eligibility to be re-elected as seen under *G-principle 8*. (See Chapters Seven, Art. 31.)
- The removal of the Ombudsman based on the incapability, such as permanent physic as well as permanent mental illness and misconduct, or *G-principle 12*. (See Chapter Seven, Art. 36 jo. Art. 45.)
- The Ombudsman shall refrain from investigation or examination of cases in which he has an interest in it. The purpose of this *G-principle 14* is to avoid the conflict of interest. (See Chapter Eight, Art. 38.)
- The authorities of the Ombudsman, or *G-principle 20* must be detailed in the Acts. (See Chapter Three, Arts 5 to 8.)
- *Ex-officio*, or *sua sponte* investigation, or the authority to initiate the investigation without complaints. This is *G-principle 20*. (See Chapters Three and Five, Arts. 6f, 6b, 6g, 8 and 13 section (2).)
- Who may lodge grievances or reports is *G-principle 22*. (See Chapter Four, Art. 4.)
- The jurisdictions of the Ombudsman and the categories of public agencies and institutions should be described, or *G-principle 23*. (See Chapter Three, Art. 8.)

- The categories of grievance and reports. This is *G-principle 24*. (See Chapter Three, Arts. 6 point a, 7 point a, and 11.) Note also the statute of limitation, or *kadaluwarsa* in Indonesian legal term. (See Chapter Four, Art. 39 section (3) point e.)
- *The G-principle 25* dealing with the obligation of the Ombudsman to keep the grievance and report confidential. (See Chapter Five, Art. 14 section (3).)
- The procedure rules starting from the grievances or reports received through the investigation processed up to the cases disposed in the form of discoveries, conclusions, and recommendations. This is *G-principle 26*. (See Chapter Five, Art. 13 to Art. 26.)
- The access to any public or confidential records is *G-principle 34*. (See Chapters Five, Art. 19 (1).)
- The power to enter the public premises, or *G-principle 37*. (See Chapter Five, Art. 24.)
- The power “to summon, to subpoena, to compel production of any records and the presence of any person to give testimony under oath” in the process of investigation. This is *G-principle 38*. (See Chapter Five, Art. 20.)
- The authority to give recommendation on the amendment of law to any government institutions or legislature, described under *G-principle 45*. (See Chapter Three, Arts. 9 and 10.)
- *The G-principle 48* dealing with the immunity. Since the Commission currently won the case when it was sued in the District Court of South Jakarta, it is worth being quoted completely here: “The Ombudsman and persons acting under the Ombudsman’s direction or authority are immune from civil and criminal proceedings for any act performed in good faith under this act. Ombudsman reports and proceeding are privileged.” (See Chapter Eight, Art. 38 section (3).)



Unfortunately, there are some more Gottehrer-principles should be applied into the Draft of the Bill. For example, it does not accommodate the following principles:

- The numeration or salary received by the Ombudsman may not be diminished and it should be equal to that received by the highest government officials such as justices and cabinet ministers. This is *G-principle 10*.
- It is mandatory for the Ombudsman and the staff to take an oath or pledge before he assumes his office or they assume their positions. These principles are respectively *G-principle 11* and *G-principle 15*.
- The authority to delegate the power and responsibility of the Ombudsman to a staff, or *G-principle 16*.
- There will be no cost or charge for anyone who lodges the grievance or report. This is *G-principle 27*.
- It is an offence to interfere with works of the Ombudsman, or *G-principle 50*.
- Anyone who complaints or reports should be protected from retaliation, or *G-principle 53*.
- *The G-principle 59*, or the last principle, dealing with the guarantee that the Office of Ombudsman shall have sufficient budget and funds.

The Commission will in due time try to insert those provisions into the final Draft of the Bill that is now being prepared by the Parliamentary Commission on Legislation (hereinafter referred to as “the Parliamentary Commission”).

## Closing Remarks<sup>46</sup>

Meanwhile, the Draft of the Bill on the National Ombudsman of Indonesia has been prepared by a small Team consisting of *Professor Sunaryati Hartono* (Deputy Chief Ombudsman), Mr. RM Surachman, *APU Research Professor eqv* (Ombudsman), Mr. Bennemay (Assistant Ombudsman), and Mr. Winarso (Assistant Ombudsman). After being socialized through some seminars in Jakarta and several provinces, the Draft was submitted to the Department of Justice and Human Rights on 8 May 2001 with some copies submitted to the Indonesian *DPR* (Parliament) and to the President of the Republic.

As previously pointed out, the drafting of the Bill is one of the mandates of the Presidential Decree on the Commission. The accomplishment has been possible by the sponsorship of the Asia Foundation in Jakarta, which allocated some funds as part of the second year budget granted to the Commission. After the Draft is reviewed by the Department of Justice and Human Rights, it will be submitted to the Parliament as a Bill.

The Parliamentary Commission, however, invited the Ombudsman Commission for the hearing about the Draft on 13 July 2001. On that day the Ombudsman Commission gave the clarifications on the background, general principles, objective, structure, functions and jurisdictions of the future National Ombudsman based on the Draft. In that hearing the Chairman of the Parliamentary Commission informed the Ombudsman Commission that the Parliamentary Commission is considering to transform the Draft into a Bill and then to submit it to the Plenary Meeting of the Parliament as the Bill proposed by its own motion, not proposed by the Government (Department of Justice). However, before reaching that stage, the Draft will be reviewed for some amendments based on the new inputs submitted by the public and by the Ombudsman Commission as well.

One should notice, that the existence of the Ombudsman Commission is to create an independent institution, to which nobody may intervene or influence.

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<sup>46</sup> Quoted almost verbatim from “The 2001 Interim Report of the National Ombudsman Commission”.

Nevertheless, the Ombudsman Commission must submit its incidental reports as well as annual reports to the President of the Republic, since it was established by a Presidential Decree and its Ombudsmen (Commissioners) were appointed and inaugurated by the President too. It does not mean, the Ombudsman Commission may be intervened or instructed by the Executive, since its main function is just to oversee the Government Bureaucracies, Public Institutions, and Public Administration.

As soon as the Bill is enacted, the National Ombudsman will not be a Commission anymore. Moreover, the Chief Ombudsman will be elected by the Parliament and inaugurated by the Head of State. From that time, Annual Reports will be submitted to the Parliament, not to the President. Hence, the Ombudsman Commission will become a Parliamentary Ombudsman. Still, it will hold an independent and impartial status, with nobody (not even the Parliament) may intervene or influence it. In addition, the National Ombudsman will have wider jurisdictions and authorities.

Realizing the significant meaning of the Role of the Ombudsman Commission in the present situations of Indonesia, all Commissioners (Ombudsmen) will continue to execute their mandates with sincere and to the best of their efforts. They are even ready to work *pro bono publico* for the interest of those who feel that they have been the victims of *maladministration* and the victims of injustice as well.

In the meantime, several names will be submitted soon to the President of the Republic, Ms. Megawati Soekarnoputri, to be appointed Commissioners (Ombudsmen). Pursuant to the Presidential Decree Number 44 Year 2000 the Ombudsman Commission should consist of nine persons. To date, there are only five Commissioners after the resignation of three Commissioners as mentioned earlier.

With its limited authorities and jurisdiction, the Ombudsman Commission continues to execute its functions by preserving its independence and impartiality in motivating the target groups to comply with the recommendations for the interest of pursuing good governance and fair judiciary in Indonesia.