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Honorary Article

Complaint Handling System in the Public Sector: A Comparative Analysis between Indonesia and Australia

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Abstract

This article deals primarily with complaint handling system with reference to an ombudsman that established by the government as opposed to the private ombudsman variety in Indonesia and Australia's jurisdictions. In practice, group of people or persons have often arisen complaints or grievances in public service, and it requires solutions. It is widely known that the ombudsman office has long been regarded as an effective office in resolving people complaint. This is mainly because the nature of the ombudsman as an independent and impartial institution. This article argues that regardless of the different context of introduction of an ombudsman in Indonesia and Australia because of different political and social context, however, the performance of ombudsman in both countries has showed significant role in enhancing public services through their expanded mandates and stronger powers.

***Keywords**: administrative justice; complaint handling system; ombudsman; procedural rights*

1. Introduction

The nature of the modern state mostly relates to its main function providing the best quality of services to its people. In this regard, the modern states are also famously known as the service states. To ensure services can be carried out properly, there are a number major determinant of overall service quality including successful front-line interactions between people and public bureaucrats, such as handling information requests, processing individual identification card (including passport), assessing health insurance benefit claims, or processing license. These decisions require "balancing administrative rules designed to ensure equitable treatment against case-sensitive discretionary decision-making".[1]

In practice, most complaints or grievances[2] appear, because people suffer inappropriate treatment, inconsistencies, misleading information or guidance, unclear procedures, or injustices when they deal with

[1] Bewer, B. (2007). Citizen or customer? Complaints handling in the public sector. *International Review of Administrative Sciences* 73(4): 550

[2] In this article, the terms "complaint" and "grievance" are used interchangeable, and both refer to cover "anything from what is in effect a request for information to a sense of unremedied wrong which might have the capability to topple a government". In theory, the two terms have different meaning. See Norman Lewis and Patrick Birkinshaw. (1993). *When citizens complain: reforming justice and administration*. Buckingham: Open University Press. p. 16-17

public officials. People complaints focus on "specific interactions while citizen redress tends to be concerned more broadly with the public sector administrative mechanisms through which individuals seek remedies, though both are closely linked aspects of citizen voice".[3]

Both developed and developing countries around the world have developed and established various mechanisms dealing with people complaints. The channels have been established either at center or local government level that mostly known as internal complaint handling mechanism. Similarly, legislative mechanism is available through the right of the House of Representatives to conduct supervision towards executive government, or it directly receives people complaints as a part of its representatives' duties.

Of those mechanisms, an ombudsman is widely known as an independent complaint handling authority by which it is empowered by certain important powers dealing with complaint or grievance, including power to investigate individual complaint and even can initiate investigation based on its own motion without specific complaint. An ombudsman originates from the 1809 Swedish Parliamentary Ombudsman. Today, it is estimated that 200 independent ombudsman institutions exist from more than 100 countries worldwide.[4]

The aim of this article is to provide comparative discussions and analysis about an ombudsman as a complaint handling institution in the area of public sector, with reference to the Ombudsman of the Republic of Indonesia (hereafter the ORI) and the Australian Commonwealth Ombudsman (hereafter the Australian Ombudsman). The selection of these two countries is based on Marten Oosting's approach which divides countries into two types when comparing ombudsman in a number of countries, namely "established democratic, constitutional states governed by the rule of law", and "new democratic countries".[5] The Australian Ombudsman represents established democratic governed by the rule of law whereas the ORI represents new democratic countries.

Before discussing the context of the introduction of ombudsman in both countries, it is important to highlight the role of state dealing with complaints or grievances in Section 2. Then, Section 3 deals with historical background of the establishment of an ombudsman in Indonesia and Australia. Discussion on the operation of ombudsman institution, including their powers, will be provided in Section 4 which followed by Section 5 that provides conclusion of the comparative discussion. It is argued that regardless of the different context of introduction of an ombudsman in Indonesia and Australia because of different political and social context, however, the performance of ombudsman in both countries has showed significant role in enhancing public services. This can be done through its expanded mandates and strong powers.

2. Redress Complaints as a State Responsibility

As mentioned, one feature of the modern state is that it is the state which provides services for its people or citizenship. In practice, services can be provided by either public authorities or private sector. However, there are some differences between public and private service providers. Usually, the private sectors provide services for the sake of profit or at least not experience a loss. Conversely, in terms of public service, citizens mostly are not necessary to pay

[3] Bewer, op., cit, p.550
[4] Available at the ioi.org
[5] Oosting, M. *The Ombudsman and His Environment: A Global View* in Reif, L. C. (ed). (1999) *The International Ombudsman Anthology*. The Hague: Kluwer Law International. p. 2-5

based on economic consideration, and even they receive services for free at the point of delivery.

However, public services are often monopolistic in nature through which citizens do not have any alternative choice to receive such services.[6] As a result, abuses of power by service providers may occur as there is often inequality of bargaining power in the relationship between service providers and citizens.[7] One possible means to express disappointment is "voice", that is making a complaint.

In order to provide effective services, the public authorities should use rules and even discretion. To ensure that rules properly applied and preventing arbitrary in terms of discretionary power, adequate procedures are fundamentally needed with the main aim to provide administrative justice. Citizens who are suffered from administrative injustice can use a number of ways. First, courts provide a check toward public authorities in order to redress complaints or grievances. However, a number of limitations also exist within this scheme. In many cases, they have lost flexibility necessary for remedying the wrongs of administrative actions. Moreover, for litigants, courts' procedures often have been regarded as slow, costly, and involve technicalities that may be difficult to understand by ordinary people. More importantly, even in countries where the administrative courts exist, it often happens that administrative officers are reluctant to follow up court's decision when they lose the case.

Second, tribunals can also be used to challenge administrative decisions. UK is an example of country which establishes tribunals in order to provide forum for the resolution of disputes in the area of administrative decision making. According to Mary Seneviratne, there are approximately 70 different administrative tribunals in England and Wales, dealing with such diverse issues as parking, pensions, special education needs, mental health and social security.[8] They are known as statutory bodies with the main aim to decide on the merits of administrative decisions. Like courts, tribunal also has some weaknesses. These include the issue of slowness, time-consuming, as well as independency.

Third, unlike courts and tribunals, an ombudsman has some characteristics that attract aggrieved persons to file their complaints using simple procedures. Thus, the Ombudsman provides prospective complainants with high accessibility and flexibility in working procedure. The main reason of implementing this procedure is that the Ombudsman avoid the "formalities typical of judicial or administrative procedures".[9] More importantly, the informal and non-bureaucratic natures of procedures make the Ombudsman seem more personalized and "human" compared to other institutions.[10] In addition, using informal and non-adversarial methods can make it easier for complainants to understand procedures that should be followed. In some cases, such as in the case of the ORI, complainants may even receive help from the assistants of the Ombudsman to make written complaints, thus providing equal treatment to those who are educated and those who are poorly educated, or who have difficulties in expressing themselves in writing.

From the perspective of human rights, redress of complaints or grievances can be approached from the point of view of procedural rights. Unlike Karel Vassak who divides human rights into three generation, Roy Gregory and Phillip Giddings divide human rights into two major classifications,

[6] Seneviratne, M. (2002). *Ombudsmen: public services and administrative justice*. London: Butterworths LexisNexis. p. 70

[7] Ibid.

[8] Ibid. p. 72

[9] Harijanti, S. D. (2010). *The Indonesian ombudsman system and good governance: 2000-2005*. PhD thesis. Melbourne: Melbourne University. p. 39.

[10] Ibid.

namely: substantive and procedural rights.[11] For Gregory and Giddings, substantive rights refer to all rights that fall within the first, second, and third generations as proposed by Vasak. In terms of procedural rights, they explain:

> *First,…**right to good administration**, that is, to receive fair, just, equitable and considerate treatment at the hands of officials who exercise public power in relation to any of the substantive rights…and second, … **the right to complain, to be heard**, and **to have corrective action taken if one has suffered harm from government**.[12] (Emphasis added)*

It is clear from the above explanation that redress complaints or grievances is a right and since states have three main obligations in relation to rights, including obligations to respect, to protect and to fulfil. Once states fail to implement this fundamental procedural right, it means that states also fail to fulfil substantive rights of aggrieved persons.

As the ombudsman plays major role in handling complaints in the public sectors, the following Section deals with this matter.

3. The Introduction of the Ombudsman

Ombudsman is one of the important bodies which usually have a role to check and balance the government power. This body has a function to scrutinize the administrative affairs in case the government failed to act in line with the good government principle. Likewise, the ombudsman can act to prevent and prosecute maladministration issued by the institutions.

3.1. Indonesia[13]

Although President Abdurrahman Wahid officially established the National Ombudsman Commission (hereafter the NOC) through Presidential Decree No. 44 of 2000, however, the need of having an ombudsman had been constantly discussed among groups of society, including journalist, scholars and NGO's since 1960's. P.K. Ojong – the founder of Kompas (the leading daily newspaper in Indonesia) – had raised an issue of an ombudsman from the perspective on democracy and the rule of law in 1967. This was merely because obstructions of the legal system by the authorities were seriously taking place.

During 1970s, the idea of an ombudsman was also discussed by two leading scholars, namely Prof. Satjipto Rahardjo of Universitas Diponegoro and Prof. Muchsan. In 1976, Professor Rahardjo pointed out the necessity of forming an Ombudsman as an independent supervisory institution aimed at controlling the government's actions for two reasons. The first was based on the concept of the modern welfare state and the second referred to traditional Javanese complaint mechanisms, known as "pepe". Unlike Rahardjo, Prof Muchsan stated that the Ombudsman was essential, as a preventive mechanism, for at least three reasons. First, it monitors the administration of government, ensuring it is conducted in accordance with the law. Second, it provides a means for the people to lodge complaints against government

[11] Gregory, R. & Giddings, P. *Citizenship, Rights and the EU Ombudsman* in Bellamy, R & Warleigh, A. (eds). (2001). *Citizenship and Governance in the European Union*, London – New York: Continuum, p. 73.
[12] Ibid.

[13] Materials are extracted from my PhD thesis titled "The Indonesian Ombudsman System and Good Governance: 2000-2005" at Faculty of Law, the University of Melbourne, 2010, p117-126. Some parts have also been published in Susi Dwi Harijanti. (2014). The evolution of the Indonesian Ombudsman system. *Int. J. Public Law and Policy* 4(1): 38-40. Some additional materials, however, have been included, in particular dealing with the discussion about the background of the enactment of Law No. 37 of 2008.

officers' conduct. Finally, it provides a way to communicate and educate the people about issues of administrative law.

The debate whether or not Indonesia should have an ombudsman was continued, but using different arguments developed by several actors, including NGO's. In 1990's, Indonesian Corruption Watch, for instance, argued that an Ombudsman would play an important role to enhance democracy and to protect the people from its ruler and political interests.

The debates during the late 1960s until the late 1990s indeed had showed basic agreement among those proponents of having an Ombudsman. They made it clear that the existing system for protection of individuals against the ruler was insufficient. The wide range of views about the need for an Ombudsman has a direct relevance to the development of an Ombudsman during the Habibie and Wahid administrations. They suggest a focus on problems pertaining to the introduction of the new institution for redressing complaints or grievances, including:

a. Legal issues: the need to further elaborate the concept of an Ombudsman from the perspective of constitutional and administrative laws.

b. Institutional issues: the capacity of an Ombudsman to deal with extension of mandate (such as to enhance better understanding of the people of administrative law, as suggested by Muchsan). Although the question of whether a regional or local Ombudsman would be more effective does not appear in the discussion, this issue should be seriously considered given the fact that Indonesia has now applied radical decentralisation.

c. Political issues: the question of whether or not the government would allow the introduction of an external control institution over its acts, and more importantly, whether the government would give priority to the establishment of an Ombudsman.

When Habibie came into power in 1998, he had initiated to follow up the idea of having an ombudsman for Indonesia through a number of efforts, including sending Prof. Sunarjati Hartono (leading legal scholar who used to be Head of the National Agency for Legal Development) to carry out field work research to some countries that having an ombudsman, such as Sweden and the Netherland in 1999. Sadly, the initial process should be ended up since he lost presidency in 1999.

President Abdurahman Wahid as his successor was keen to continue Habibie's initiative to establish an ombudsman. To back up his plan, Wahid asked his opinion to Marzuki Darusman (Attorney General at the time). Interestingly, Darusman requested his former fellow at the National Human Rights Commission and was a Deputy Attorney General for Specific Crime: Antonius Sujata. When provided strong arguments for the establishment of an ombudsman, Sujata, indeed, used valuable comparative materials developed by Prof. Hartono during the Habibie administration.

After conducting intensive discussions, President Wahid firmly agreed on the establishment of an ombudsman using presidential decree as a legal base. However, his Minister of Justice Yusril Ihza Mahendra declined the form of ombudsman legal base, and he strongly argued that the establishment of an ombudsman should use statute. President Wahid did not accept Mahendra's argument as he predicted long debate in the DPR. But he truly understood that the ideal legal base for an ombudsman was statute. The solution was then giving an ombudsman a mandate for preparing a bill.

On 10 March 2000, President Wahid officially promulgated Presidential Decree No. 44 regarding the establishment of an ombudsman known as Komisi Ombudsman

Nasional or the National Ombudsman Commission (hereafter the NOC) with Antonius Sujata as the first incumbent and Prof. Hartono became the Deputy of the NOC. A number of prominent figures were also appointed as members, including Prof. Bagir Manan and Teten Masduki, to name a few.

Soon after the NOC operated, however, it was evident that a number of significant issues gave rise, including the issue of weak legal base that could put the NOC in danger. Since the NOC was established by Presidential Decree, its existence greatly depended upon the pleasure of the President. If the President regarded the NOC was ineffective, thus, it failed to achieve its primary aims, then he could abolish it. In addition, it is argued that having presidential decree as its legal base would mean that the NOC was under "the President's power", and this could lead to the problem of independency.

In response to the above concerns, the NOC took clear steps towards the implementation of its additional mandate according to the Decree No. 44 of 2000, namely preparation of a Bill on the Ombudsman. The team was headed by Deputy Ombudsman, Professor Sunaryati Hartono. When a Bill was concluded, however, the Executive government failed to provide a clear response. Frustrated with the Executive's response, the NOC made a decision to submit the Bill to the DPR through its Badan Legislasi (the Legislative Agency).[14] The DPR had already agreed on to propose the Bill pursuant to its right of initiative.

After more than five years having a weak presidential decree as the NOC's legal base, in October 2008, the House of Representative and the President finally agreed on to adopt a new statute governing the Indonesian Ombudsman system, known as Law No. 37 of 2008 regarding the Ombudsman of the Republic of Indonesia or the ORI. With the change of the name from the NOC to become the ORI and a stronger legal base, it is hoped that it will be able to develop more effective and solid system in regard to complaint-handling system in the public sector in Indonesia.

3.2. Australia

A number of factors have strongly driven desirability to create an Ombudsman in Australia. The first was extensive debate regarding complaint-handling institutions in Britain during the 1950s and 1960s.[15] The second factor was the adoption of the Ombudsman office in New Zealand in 1962.[16] Following this, Australian regional public administration groups organised a conference in 1963, discussing citizens' rights against the modern state.[17] The incumbent New Zealand Ombudsman, Sir Guy Powles, was one of the speakers in this conference.[18] Other social groups also supported the idea of having an Ombudsman, including academics and the press.[19] During the 1960s, a number of academic articles were published, notably by Geoffrey Sawyer and Naomi Caiden.[20] The media, without doubt, also played a role in disseminating the Ombudsman concept. They published reports on the establishment of the New Zealand Ombudsman, which attracted significant public interest.[21]

On 29 October 1968, the Gorton government established the Administrative Review Committee, famously known as the

[14] Harijanti, S. D. (2010). *The Indonesian ombudsman system and good governance: 2000-2005*. op., cit. p.154

[15] The Parliament of the Commonwealth of Australia. (1992). *Review of the Office of the Commonwealth Ombudsman*. p. 6.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid. p. 7.
[20] Ibid.
[21] Ibid.

Kerr Committee.[22] The Kerr Committee stressed the need to evolve "an Australian system of administrative law"[23] that needed to be "comprehensive", "essentially Australian" and "specially tailored to meet our own experience, needs and constitutional problems".[24] There are a number of reasons given as to why Australian administrative law needed to be overhauled.[25] The first was major concern about growth in government size, and the threat of this expansion to the individual.[26] The second justification was that new legal machinery was required to rectify errors in the administrative process.[27] The final reason was the inadequacy of the existing accountability mechanisms, to ensure justice for individuals in the exercise of massive discretionary power and administrative authority.[28]

In August 1971, the Kerr Committee presented its report recommending a wide range of reforms to administrative law. Among them was the establishment of a "General Counsel for Grievances".[29] Having compared the practices of the New Zealand Ombudsman, as well as the United Kingdom Parliamentary Commissioner, the Kerr Committee concluded that the United Kingdom model was inappropriate due to the potential of "limited advantages" in the Australian context.[30] In regard to the New Zealand Ombudsman, the Kerr report suggested that "the success of the New Zealand experiment requires the examination of proposals for inexpensive grievance machinery".[31] The Kerr Committee proposed to locate its "grievance man" within the legal system of administrative review, rather than in the parliament-executive context.[32] This led the Committee to suggest a dual function for the General Counsel for Grievances. The first function was investigating complaints from the people against the administration. This involved discretion not subject to review by courts or tribunals; actions that were not justiciable or complaints that, for reasons of cost, were not worth bringing before a court or a tribunal.[33] The second function was advising complainants of their rights of review before courts or tribunals or proceeding on their behalf in some cases.[34]

Unfortunately, there was no immediate response by the McMahon administration to the Kerr recommendations.[35] Although members of the Labour Opposition, such as Whitlam, the then leader, championed the report, the Prime Minister stated that further consideration of the Kerr recommendations was required, in particular in relation to the issue of preserving the roles of members of

[22] The Attorney General of the Commonwealth specified terms of reference for this Committee as follow: 1. to consider what jurisdiction (if any) to review administrative decisions made under Commonwealth law should be exercised by the proposed Commonwealth Superior Court, by some other Federal Court or by some other Court exercising federal jurisdiction; 2. to consider the procedures whereby review is to be obtained; 3. to consider the substantive grounds for review; 4. to consider the desirability of introducing legislation along the lines of the United Kingdom Tribunal and Inquiries Act 1958; and 5. to report to the Government the conclusions of the Committee. Parliament of the Commonwealth of Australia. (1971). *Commonwealth Administrative Review Committee*. p.1.

[23] Ibid 103.

[24] Ibid 71.

[25] Robin Creyke and John McMillan, "Administrative Law Assumptions…Then and Now" in R. Creyke and J. McMillan (eds). (1998). *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* p.6-8.

[26] Ibid 6.

[27] Ibid 7.

[28] Ibid 7-8.

[29] Parliament of the Commonwealth of Australia. *Commonwealth Administrative*…op., cit. p.91-5, 115-116.

[30] Ibid. p. 45.

[31] Ibid 54.

[32] Ibid 93.

[33] Ibid.

[34] Ibid.

[35] Creyke, R. & McMillan, J. op., cit. p. 3.

the Parliament, and 'to avoid creating further delay in the administrative process'.[36] For this purpose, McMahon established two committees, including the Bland and Ellicott Committees.[37] The issue of an Ombudsman was urgently discussed by the Bland Committee, after Whitlam announced the desirability of establishing an Ombudsman under a Labour government.[38]

The Bland Committee, however, did not fully accept the Kerr Committee's recommendations and suggested significant changes, in particular in regard to the function of the General Counsel for Grievances. The Bland Committee took the view that Australia should adopt the classical model of an Ombudsman, mirroring the New Zealand Ombudsman.[39] According to this model, the Ombudsman's main task is to investigate complaints and to make recommendations to departments and agencies. The Committee therefore did not adopt the Kerr report in relation to the second function of the General Counsel for Grievances: advising complainants of their rights before courts or tribunals or proceeding on their behalf.[40] Further, the Bland Committee stressed the investigation of individual complaints as a central function of an Ombudsman. This was despite the fact that it saw procedural improvement as, to a certain extent, another advantage of an Ombudsman.[41] More importantly, the Bland Committee proposed to limit the Ombudsman's jurisdiction.

The Whitlam government introduced a Bill on the Commonwealth Ombudsman into the Parliament in March 1975 after receiving the first report of the Bland Committee.[42] This Bill was the first part of the package of what came to be called the new administrative law, enacted during 1976-1977.[43] However, the Parliament was devolved in November 1975 resulting in delay of the debate on the Ombudsman Bill.[44]

In 1976, the Fraser government introduced a Bill that was similar in substance to the previous Bill.[45] It adopted the Bland report with some changes, especially in the matter of the jurisdiction of the Ombudsman. These included:

"[a] less restrictive approach to review of matters of policy…; the inclusion of jurisdiction over many contractual, commercial and trading arrangements, jurisdiction in relation to administration in the territories; and a discretion to review complaints for which there existed another right of appeal, objection or review".[46]

In March 1977, the Prime Minister appointed Professor Jack Richardson as the first Commonwealth Ombudsman.

4. Discussion and Analysis

The establishment of the Ombudsman offices in Australia and Indonesia were generally based on the same theme, but in different contexts. Both countries mostly relate the Ombudsman to the concept of administrative justice, good governance, the principle of the rule of law, and democracy. In particular, the two countries place the Ombudsman as an external complaint handling office in order to provide alternative handling system for the aggrieved persons.

[36] Ibid.
[37] Ibid.
[38] The Parliament of the Commonwealth of Australia, *Review*…. op., cit. p.8.
[39] Ibid 9.
[40] Ibid.
[41] Ibid 10.
[42] Ibid 11.
[43] Ibid.
[44] Ibid.
[45] The Commonwealth Ombudsman's Office. (1997). Twenty years of the Commonwealth Ombudsman 1977 – 1997. p. 10.
[46] The Parliament of the Commonwealth of Australia. *Review*…. op., cit. p.11.

Although the introduction of the Ombudsman in the two counties shares similar theme, however, the context is quite different. The urgent need to conduct an overhaul administrative system and administrative law in Australia was the major reason behind the introduction of the Ombudsman. In doing so, the extensive discussion regarding the need for an Ombudsman in Australia was inspired by two important factors. The first was intense debate on the issue of a complaint-handling institution in Britain during the 1950s and the early 1960s. The second was the introduction of an Ombudsman scheme in New Zealand in 1962, as the first English-speaking country and Commonwealth member to adopt such a scheme. Interestingly, it was state governments that most keenly adopted the Ombudsman scheme, in the early 1970s. After long and critical consideration made by three Committees (Kerr, Bland and Ellicott), the Federal government finally established the Ombudsman in 1976, through an Act of Parliament, as part of a package for the introduction of the new administrative law system in Australia.

Unlike Australia, the introduction of the NOC was due to the desire of President Wahid in regard to good governance, regardless that the initial proposal of having an ombudsman had been the idea of Habibie's administration. The Wahid government, however, failed to provide solid argumentation in particular in regard to two major issues, namely legal and institutional aspects. In terms of legal aspect, President Wahid was obviously reluctant to use statute, although he understood that a strong legal base in the form of a statute was necessary for a new office. To solve this problem, he then decided giving an additional mandate for the NOC to prepare a bill. From the point of view of institutional aspect, it is clear that unlike Australia, there was no comprehensive institutional design on how to place the NOC within the Indonesian administrative system. Moreover, discussion about local ombudsman was also absent. Thus, the Wahid government seemed to emphasize on political aspect, rather than legal as well as institutional aspects. In this regard, Ibrahim Assegaf correctly argued that the NOC was an impromptu product of the President that could have been used to enhance the Wahid administration's legitimacy, both at national and international levels, by increasing the President's profile on legal reform.[47]

Another different context is also found in the changing status of the NOC to become the ORI through the enactment of a new legal base that was carried out in 2008. Since the beginning the Australian Ombudsman has had a statutory basis as the Australian Government places it within the administrative scheme. Thus, the Ombudsman has been recognised as a fundamental institution in realizing administrative justice in Australia. This argument was absent in Indonesia.

As power change happened in 2004 in Indonesia, and there was an urgent need to enhance the NOC, the House of Representative used its right of initiative to propose Bill on Ombudsman. The main aim was to empower the Ombudsman with adequate powers so that it is able to carry out its function at the optimum level. In this context, it is obvious that the House of Representative was far more responsive in comparison to the executive arm of government to conduct reform on the Indonesian Ombudsman system.

To what extent the design of the Ombudsman system in Australia and Indonesia does work well will be discussed in the following part.

[47] Assegaf, I. *Legends of the Fall: An Institutional Analysis of Indonesian Law Enforcement Agencies Combating Corruption* in Lindsey, T & Dick, H. (eds). (2002). *Corruption in Asia: Rethinking Governance Paradigm*. Sydney: Federation Press. p.137

4.1. The Operation of the Ombudsman

4.1.1. Indonesia[48]

Discussions in this part will not cover the whole aspect of both the NOC and ORI's operation, but rather it will highlight some important works that give rise to people's appreciation toward the Ombudsman in relation to external compliant-handling system in Indonesia.

(1) The NOC

As mentioned before, the NOC was established through Presidential Decree No. 44 of 2000. Art. 2 of the Decree said that The National Ombudsman was an independent public supervisory institution, based on the principles of Pancasila and had powers to clarify, monitor or investigate based on public reports regarding State action, including the judiciary, with respect to the public service. In addition, Art. 4 of the same Decree regulated the following tasks:

a. increase public awareness of the Ombudsman;
b. coordinate and/or cooperate with government institutions, universities, non-governmental organizations, experts, practitioners, and professional organizations;
c. take any necessary measures to follow up reports or information concerning misconduct by the state organizations in implementing their duties and in serving the public; and
d. produce a Bill concerning the National Ombudsman.

Based on the two important articles above, it is clearly seen that the NOC not only had powers in relation to its "core function", namely supervision toward public service, but it also had other functions that I call as "non-supervisory" function. The latter include increasing public awareness of the Ombudsman; coordinating or cooperating with government institutions, universities and other relevant institutions; as well as making a Bill on the National Ombudsman. The NOC's former function reflected the model of classical ombudsman. In 1974 the International Bar Association defined a classical ombudsman as:

"An office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports."[49]

Interestingly, Anita Stuhmcke refers the classical model as "The Reactive Ombudsman Model" (the ROM), an institution that focuses on individual-complaint handling by which it is "primarily client-oriented office, designed to secure individual justice in the administrative state".[50] In the early operation, the NOC indeed, had shown this kind of model as at the time, most complaint were lodged by aggrieved persons. In 2005, for instance, SS reported a case of undue delay by the Office of Metro Jaya Police toward his reported case No. 1656/K/V/2005/SPK Unit 1 dated May 18th, 2005 in which the police failed to follow

[48] This is an expanded version from materials about the operation of the NOC and the ORI which based on my PhD thesis titled "The Indonesian Ombudsman System and Good Governance: 2000-2005" at Faculty of Law, the University of Melbourne, 2011, p.129-138, p.143-154, p.253-254. Some parts have also been published in Susi Dwi Harijanti. (2014). "The evolution of the Indonesian Ombudsman system". *Int. J. Public Law and Policy* 4(1): 40-44. Some additional materials, however, have been included, in particular dealing with the recent development of the ORI.

[49] Stuhmcke, A. (2012). "The evolution of the classical ombudsman: a view from the antipodes". *Int.J.Public Law and Policy* 2(1): 84

[50] Ibid.

up the realization of arresting the accused person. [51] According to the NOC investigation, the Metro Jaya Office actually already handed over the case to the Sukabumi Police Office of West Java Province on September 16th, 2005 as it examined that the locus of the case felt within the Sukabumi Office jurisdiction. However, SS never received detail information regarding the development of the case, and this led to filing of complaint to the NOC. In response, the NOC sent an official letter for clarification to the Chief of the Metro Jaya Police Office. Since there was no response from the Police, then the NOC made its recommendation on December 21st, 2006 asking the Police to provide clear and detail information on the development of the case to SS. In reply, the Police of Sukabumi Office gave an official answer that the case already handed over to public prosecutor.

In addition to "supervisory function", the NOC also had powers relating to "non-supervisory function" reflecting from its tasks to increase public awareness concerning the NOC; to coordinate and cooperate with government institutions, universities and other relevant institutions; and finally, to prepare a Bill on the Ombudsman. Although the non-supervisory function is not a "core business" of the NOC, it does enable the NOC to make a contribution to good governance and administrative justice. Through promotion of the Ombudsman concept, mandate and working mechanisms, for example, the NOC can stimulate public awareness and consciousness of their rights to have fair and transparent services from the government administration. In short, the NOC can introduce the right to good administration to the public. Once the public are aware of their rights, they can directly "speak up" when unfair services occur. If they lodge complaints about this unfair treatment to the NOC, it can follow up the complaints by conducting clarification, investigation and making recommendations as to the necessary steps to resolve the unfair treatment to the agencies.

The promotional function is also important as the concept of ombudsman and how it works is relatively new for most Indonesian people. This is as a result of the use of the term "ombudsman". As Sujata states, the early period of the NOC's operations was marked by questions, among others, as to whether the Ombudsman was necessary and even as to what the Ombudsman actually was. By being clear on the NOC's mandate, it is hoped that the people will not seek solutions beyond the NOC's capacity. In this regard, the people themselves serve a selective function in the sense that they can select the appropriate institution to deal with their problem. This should prevent the NOC being "flooded with complaints", since prospective complainants have sufficient background knowledge regarding the NOC's mandate. It should then follow that the NOC can concentrate on the investigation of cases that fall under its jurisdiction.

In regard to jurisdiction, Art. 2 of the Decree said that the NOC had powers to clarify, monitor or investigate state action, including the judiciary relating to public service. However, Art. 9 (a) of the Decree clearly broadened the NOC's jurisdiction to include clarification and monitoring misbehavior and misconduct of the government's apparatus and the judiciary when they delivered public service. These broader mandates could create problems for the NOC. In the absent of Code of Ethics and Code of Conduct at the time, the NOC indeed, would have no guidance in doing so. In other words, there was no adequate ground of supervision.

In terms of the NOC's powers, it is interesting to note that the Decree further elaborated general powers of clarification, monitoring and investigation into detail in

[51] Ombudsman Republik Indonesia. (2009). *Ombudsprudensi*. Jakarta: Ombudsman Republik Indonesia. p. 113-114.

Art. 9 which specifically dealt with the powers of the NOC's Sub-Commission of Clarification, Monitoring and Investigation. These powers included:

a. to clarify or monitor government apparatus and the judiciary according to the reports and information regarding the alleged deviation in serving the public, behavior and conducts which are contrary to their legal obligations.
b. to request assistance, cooperate and/or coordinate with other relevant apparatus in carrying out clarification or monitoring.
c. to investigate officers or functionaries, who have been reported by the public and other relevant parties, in order to obtain information according to the provision of the regulations and legislation in force.
d. to deliver the results of clarification, monitoring or investigation with opinion and recommendations to the relevant institution and/or the legal enforcer for further action.
e. to take other measures in order to reveal the deviation made by the state organizer.

The main important question arises from the above is that to what extent those powers had made the NOC was able to carry out its mandates effectively? I would argue that the effectiveness of the NOC's operation would depend on the NOC interpretation towards its powers governed by Art. 9. This is mainly because the drafter of the Decree used a very general way in drafting the norms. This, then, could invite liberal interpretation made by the NOC. For instance, the Decree did not specifically give power to the NOC to conduct investigation based on its own motion. However, the NOC could argue that it had such a power based on its interpretation toward its power to "take other measures in order to reveal the deviation made by the state organizer".

To make its operation run well, basically, the NOC divided its working procedure into two types. The first related to processes for dealing with complaints submitted by complainants, and the second related to responses from the investigated parties. There were no significant differences between the two procedures. In practice, however, the most critical issue regarding working procedure was the absence of a "formal" standard of investigation process relating to cases initiated by the NOC.

Investigation based on the Ombudsman's own initiative is regarded as an important device for the Ombudsman, as it needs no written complaint from the public to initiate it. In the case of the Swedish Ombudsman, several resources can be used to make initial inquiries, such as newspapers, radio or television. However, the majority of cases arise from observations made during inspections. It was likely that the NOC would also use newspapers, radio or television, as resources for investigations based on its own initiative. Additional resources for such investigations were information from whistle blowers, research, and individual cases that have systemic problems. Thus, the NOC had a tremendous degree of discretion to decide whether or not to conduct an investigation.

The whole process of the implementation of the NOC's mandates could be divided into five main stages, ranging from registration to monitoring the implementation of recommendation. With regard to procedures of complaint submission, the NOC provided greater flexibility for the aggrieved persons to file their complaints, using direct and indirect oral and written complaints. In principle, all complaints should be made in writing. The NOC would, if necessary, provided an officer (usually an assistant of the Ombudsmen) to assist a complainant formulating his/her oral petitions into a written submission. Should this be the case, at least two witnesses should sign the written complaint together with the complainant. Each complainant could also submit their complaint by e-mail, fax or telephone. Complaints using the latter

method, however, were regarded as preliminary complaint, so further acts were still required, in the sense that a complainant should still file his/her complaint in writing. Major hurdles to the telephone method usually related to the identity of a complainant and the accuracy of a complaint.

Once the NOC had satisfied with all requirements of admission, including administrative requirements and the examination on matter of jurisdiction, the NOC conducted clarification and/or investigation. In doing so, the NOC interviewed both parties: the complainant and the reported officer or institution. This was a critical stage by which the NOC should be able to collect all necessary and relevant data that would be used to make report of investigation. The process of clarification or investigation was ended with the analysis of investigation findings. In addition to the investigation process itself, the analysis of investigation findings, in my opinion, played a significant role in providing depth analysis needed for further action. More importantly, the analysis also constituted review criteria used by the Ombudsman and his/her assistants by which they decided whether or not maladministration had occurred.

The next stage was making a recommendation. There were four types of recommendation at the time in which each recommendation had its own purpose. This included: (1) to solve the complainant's case; (2) to propose sanctions; (3) to prevent maladministration, and (4) to change process or system. The final stage of the whole process was monitoring the implementation of recommendation. In so doing, the NOC sent the recommendation to the concerned institutions or officers, and they had three months from the sending date of the NOC's recommendation, to provide a response. If he/she failed to respond within that time, the NOC would send a second letter addressed to higher rank authority requesting his/her reply regarding such a recommendation. The NOC took the final step of sending the letter to the highest rank authority within the respective institution, namely the Minister, who had the authority to sanction his/her subordinates if they rejected the NOC's recommendations.

(2) The ORI

Realizing the urgent need to establish a better complaint-handling system in the public sector through a stronger legal base, the House of Representatives together with the President finally agreed on the issuance of a new legal basis for the Indonesian Ombudsman, that is Law No. 37 of 2008 on September 9th, 2008. The main reason behind the introduction of such a new basis has been clearly stated in the Elucidation which says:

"In order to optimize function, task, and authority of the National Ombudsman Commission, it is important to introduce Law on the Ombudsman of the Republic of Indonesia as a stronger and clearer legal base. This is in line with the People Consultative Assembly Decree No. VIII/MPR/2001 regarding Policy Recommendation on the Prevention and Eradication of Corruption, Collusion, and Nepotism through which it directs the establishment of the Ombudsman based on a statute".

With the passage of Law No. 37 of 2008, the title of the NOC was changed to the ORI. Thus, the Ombudsman was no longer classified as "the executive Ombudsman", but rather based on "a statutory scheme".

The new legal base offers a number of significant changes. Firstly, it gives more mandates for the ORI. Art. 6 definitely regulates that the ORI focusses on controlling public services that are carried out by state and government institutions, including state-owned companies, local government-owned companies, private companies, and individuals who deliver certain public services under the funding of either national or local budget system. Moreover, Art. 7 (h) expands the ORI's jurisdiction by stating that the Ombudsman may carry out "additional tasks granted by other statutes". In this

regard, the most relevant statute is Law No. 25 of 2009 concerning Public Services by which it grants additional mandate for the ORI through Art. 50 para (5) to act as an adjudicator in addition to a mediator or conciliator. As a result, the ORI now is able to conduct a specific adjudication regarding compensation in the case mediation and conciliation fail to reach "agreement" from a complainant and a reported institution.

Secondly, the new Law provides greater and specific powers and tasks. Unlike the Decree, Law No. 37 of 2008 formulates powers of the ORI more specific. This can be seen, for example, in Arts. 7 and 8, and other articles relating to the process of complaint-handling found in Chapter VII regarding Mechanism of Investigation and Completion of Reports. Based on Art. 7 (d), the ORI now can carry out investigation on its own motion in order to investigate the alleged of maladministration in public services. Interestingly, the ORI also has preventive function in which Art. 7 (g) allows the ORI to do every effort to prevent maladministration.

In terms of power, the ORI has powers to publish its recommendations for the sake of public interests;[52] to provide proposals for improving and enhancing organization and/or procedures of public service to the President, governors/mayors/regents or other head of state or government institutions;[53] and to provide proposal for amending laws and regulation in order to prevent maladministration to the House of Representative, the Local House of Representatives, the President, and/or governors/mayors/regents.[54] Surprisingly, the new Law also grants fundamental power for conducting investigation to the ORI, namely power of "subpoena" which is stated in Art. 31. To obtain effective investigation, the ORI has power to conduct in situ investigation,[55] and in doing so, the investigator may carry out this power without prior notification to the reported officers or institutions.[56]

Thirdly, one of the most fundamental change made by the new Law is that matter of compliance toward the ORI's recommendations.[57] Law No. 37 of 2008 explicitly regulates that the reported officers and their higher supervisors have an obligation to comply with the ORI's recommendations. The administrative sanction is imposed on those who do not make reports regarding the implementation of the ORI's recommendation within 60 days of the acceptance of recommendation by the higher supervisor of the reported officer.[58] If the higher supervisors of the reported officers fail to implement the ORI's recommendation, the new Law allows the ORI making reports to the House of Representatives as well as the President and can publish in detail about their disobedience.[59]

Fourthly, Law No. 37 of 2008 provides greater protection. Art. 10 of Law No. 37 of 2008 guarantees the Ombudsman's immunities in a sense that the Ombudsman cannot be arrested, detained, interrogated or even brought before courts in relation to implementation of its mandates. Moreover, Art. 46 para (2) of the same Law states that the title "Ombudsman" is only used by those who meets the criteria of an Ombudsman which determined by the Law. Thus, the use of the title Ombudsman by those who does not satisfy the criteria of an Ombudsman is illegal.

Fifthly, the application of criminal sanction. Art. 44 of Law No. 37 of 2008 says that imprisonment and fine will be applied for those who obstruct the process of investigation conducted by the ORI.

[52] Art. 8 (g) of Law No. 37 of 2008
[53] Art. 8 para (2)a of Law No. 37 of 2008
[54] Art. 8 para (2)b of Law No. 37 of 2008
[55] Art. 28 para (1)b of Law No. 37 of 2008
[56] Art. 37 of Law No. 37 of 2008
[57] Art. 38 para (1) of Law No. 37 of 2008
[58] Art. 39 of Law No. 37 of 2008
[59] Art. 38 para (4) of Law No. 37 of 2008

Finally, the changes also occur in relation to the ORI's organizational structure. Art. 43 of Law No. 37 of 2008 paves the way to the establishment of the ORI's representative offices if they are deemed "necessary". Consequently, the existing local Ombudsmen that had been established, such as in Yogyakarta, should be redesign according to the new Indonesian Ombudsman system governed by Law No. 37 of 2008. To resolve the problem, Art. 46 para (1) states that the use of Ombudsman title that does not fall within the ambit of Law No. 37 of 2008 should be changed within two years after the promulgation of this Law. Interestingly, Law No. 25 of 2009 regarding Public Service regulates that it is a compulsory to establish the ORI's representative offices within three years after the official promulgation of Law on Public Service.[60] Three aspects should be considered in establishing such representative offices, including: effectiveness, efficiency, and workload.[61]

With those significant changes, it is expected that the ORI is able to enhance administrative justice, not only through individual complaints but also through investigation based on its own motion. The recent work has demonstrated. In its press release on March 24th, 2021 Yeka Hendra Fatika on behalf of the ORI said that there would be a maladministration potential in relation to government decision on rice import in 2021. It is mainly because all necessary indicators do not justify the urgency to conduct such import, in particular dealing with the estimated national rice production as well as the national rice price.[62]

[60] Art. 46 paras (3) and (4) of Law No. 25 of 2009 concerning Public Service.

[61] Elucidation of Art. 46 para (4) of Law No. 25 of 2009 concerning Public Service.

[62] "Ombudsman RI: Ada Potensi Maladministrasi". (25 March 2021). *Kompas*, p.1

4.1.2. Australia

As mentioned above, the Ombudsman Act 1976 created the statutory office of the Commonwealth Ombudsman. The Act came into force on 1 July 1977. However, the operation of the Ombudsman is governed by a number of Commonwealth and ACT laws. The most important of these are the Ombudsman Act 1976; Ombudsman Regulation 2017, Freedom of Information Act 1982; the Complaints (Australian Federal Police) Act 1981; the Telecommunications (Interception) Act 1979; Public Interest Disclosure Act 2013, and the ACT's Ombudsman Act 1989 and Freedom of Information Act 2016.[63]

The Ombudsman has two major roles, [64] in addition to its roles as the Taxation Ombudsman and the Defence Force Ombudsman to investigate complaints from individuals, groups or organisations affected by the defective administration of Australian government officials and agencies; and to undertake investigation based on its "own initiative".[65] The first role involves resolving disputes between government and citizens.[66] The second relates to the role of the Ombudsman in improving the quality of public administration. [67] Professor John McMillan, the Ombudsman states, however, that the Ombudsman has another role, namely "to conduct periodic inspections of law enforcement records relating to telephone interception, surveillance and

[63] The Commonwealth Ombudsman. "Legislation"https://www.ombudsman.gov.au/Our-responsibilities/our-legislation-Cached-30 Jan 2016. visited 27 March 2021

[64] S5 (1) of The Ombudsman Act 1976.

[65] The Commonwealth Ombudsman. (2004). Annual Report 2003-2004. p.9

[66] Roger Douglas. (2002). *Douglas and Jones's Administrative Law*. Sydney: Federation Press. p.189.

[67] Ibid.

controlled operations". [68] In 2005, the Ombudsman Act 1976 was amended and the Australian Ombudsman also performs function in relation to immigration and detention. As a result, it uses title "Immigration Ombudsman".[69]

Philippa Smith, the former Ombudsman of the Commonwealth, has suggested another role for the Ombudsman. This is to "stimulate an environment of debate by agencies and consumers as to what standards of service and decision making should be expected in the public sector".[70] She considers that this additional role has been important in accordance with 'the best practice standards and client rights' adopted by the Ombudsman through its Charter of Client Service.[71] This Charter sets out the standard of service of the Ombudsman as well as rights of clients.[72]

The Ombudsman Act 1976 provides for the Ombudsman to investigate complaints related to 'matter[s] of administration' taken by a government agency.[73] This Act determines the Ombudsman's jurisdiction generally by reference to type of agency,[74] such as a "department"; and "prescribed authority". These terms are then defined. For example, the definition of "prescribed authority" includes a body established for a public purpose under a statute. This body is subject to few particular exemptions, such as banks and airlines. The Ombudsman can act on a complaint lodged by a member of the public, or on his or her own motion. Excluded from the Ombudsman's jurisdiction are complaints in relation to the following

a. action taken by a minister. Advice or recommendation given to a minister or the manner in which a department or authority has implemented ministerial decision is not excluded;
b. action that constitutes a proceeding in Parliament;
c. action taken by a justice or judge of a court. Administrative action of a court official is not excluded); and
d. certain actions in relation to government employment.[75]

S5(1) of the Ombudsman Act 1976 limits the jurisdiction of the Ombudsman, to only include 'matter[s] of administration'. Unfortunately, none of the provisions of the Act define such a term. It is believed that this term was deliberately formulated so that the Ombudsman could widely construe it.[76] However, 'the general attitude of the Ombudsman is to press jurisdiction to the limit', which has resulted in jurisdictional disputes with some agencies.[77] At the Federal level, most disputes have been resolved without bringing them before the court.[78] On some occasions when an agency declines to acknowledge the Ombudsman's jurisdiction, it accepts and deals with a complaint because "to do so is good administration".[79]

[68] John McMillan, 'Key Features and Strengths of the Ombudsman Model – National Ombudsman Commission of Indonesia (Keynote Address at Seminar and Training on Local Ombudsman, Medan and Yogyakarta, 22 and 25 June, 2004) 7 <http://www.ombudsman.gov.au/publications_information/speeches/indonesia-features_strengths-june04.pdf>, visited on 5 September 2005.

[69] The Commonwealth Ombudsman. "Legislation" https://www.ombudsman.gov.au/Our-responsibilities/our-legislation-Cached-30 Jan 2016. visited 27 March 2021

[70] Roger Douglas. loc. cit.

[71] Ibid.

[72] See http://www.comb.gov.au

[73] S5(1) of the Ombudsman Act 1976.

[74] Roger Douglas. loc. cit.

[75] S5(2) of the Ombudsman Act 1976.

[76] The Parliament of the Commonwealth of Australia. (1992). *Review of the Office of the Commonwealth Ombudsman*. p.36.

[77] Pearce, D. *Ombudsman in Australia* in Gregory, R & Giddings, P. (eds). (2000) *Righting Wrongs: The Ombudsman in Six Continents*. Amsterdam: IOS Press. p. 96.

[78] Ibid.

[79] Ibid.

As mentioned above, the Ombudsman's jurisdictions have been expanded to include matters not related to its traditional mandate. As Katrine Del Villar argues, these additional tasks confront the Ombudsman with two opposite facts.[80] On the one hand, they reflect the success of the Ombudsman in handling complaints.[81] On the other hand, they can also "be perceived as somewhat ad hoc".[82] More importantly, several issues should be taken into account when the authority grants additional jurisdiction for the Ombudsman.

First, it is important that the basic role of the Ombudsman not be in danger.[83] In this sense, the authority should ensure that the public will not view the Ombudsman as the government's agency.[84] If the public regard the Ombudsman as an agent of the government then, undoubtedly, the original purpose of the establishment of the Ombudsman is "being lost".[85] Second, the authority should provide adequate resources necessary for the performance of the additional jurisdictions, so the Ombudsman does not need to cut funding for its core business.[86] Third, it is important for the Ombudsman to have an adequate amount of expertise in relation to its additional functions.[87] Without this, the Ombudsman will have difficulties in fulfilling the functions assigned to it.

Commenting on the Ombudsman's additional roles, Dennis Pearce points out that, in some cases, the Ombudsman's success in its traditional complaint-handling has not been replicated in its additional jurisdictions.[88] Katrine Del Villar further reinforces Pearce's opinion by arguing:

"Concerns have been expressed that the conferral of additional jurisdiction may compromise ombudsmen's reputation for impartiality and independent investigation, by conferring functions without the resources necessary to carry them out properly, and, in some circumstances, by giving ombudsmen a monitoring role without the ability to investigate".[89]

In regard to powers and procedures of investigation, one of the main characteristics of the Ombudsman around the globe is that it relies on persuasion to resolve matters. Further, it only produces recommendations, and therefore has no power to reverse decisions. The Ombudsman can investigate an administrative action based on a written complaint or on its own initiative, although only a few self-initiated actions have been conducted so far.[90] Upon receiving a complaint, the Ombudsman will examine as whether this matter falls within its jurisdiction. Even where it does so, however, the Ombudsman has the discretionary power refuse to conduct an investigation, based on a particular ground, such as:

a. the complaint is made more than 12 months after a decision;
b. the complaint is frivolous, vexatious, or not in good faith;
c. the complainant does not have a sufficient interest in the subject matter of complaint;
d. an investigation is not warranted having regard to all circumstances

[80] Villar, K. D.. (2002). "Who Guards the Guardians? Recent Developments concerning the Jurisdiction and Accountability of Ombudsmen". *AIAL Forum* 36: 27.
[81] Ibid.
[82] Ibid.
[83] Pearce, D. op., cit. p.137.
[84] Ibid.
[85] Ibid 138.
[86] Ibid.
[87] Ibid.
[88] Villar, K. D. op., cit. p.27.
[89] Ibid 26.
[90] McMillan, J. *Australia* in Caiden, G. E. (ed). (1983). *International Handbook of the Ombudsman: Country Survey*. Westport: Greenwood Press. p5.

e. there are alternative remedies available to the complainant.[91]

Several additional grounds have been included by the amendments to the Ombudsman Act in 1994.[92] These include complaints in relation to a commercial activity of a department or authority; and in a situation where the Ombudsman is of the opinion that the complaint would be more effectively resolved by the industry Ombudsman for the particular industry.[93] Complaints about Telecom (now Telstra), for example, are likely to fall into the latter category.[94] Recently, the Ombudsman has referred most new complaints to the Telecommunication Industry Ombudsman for investigation.[95] This is despite the fact that Telecom still falls within the Ombudsman's jurisdiction.[96]

Although the Ombudsman may refuse to investigate a complaint, on the ground of the availability of alternative remedies, the Ombudsman does not apply this discretionary power automatically. Rather, it considers a number of issues, such as the circumstances of the case; the nature and cost of the alternative remedy and its ability to provide adequate redress; and the ability of the complainants to pay for a case.[97]

Once the Ombudsman is satisfied that a complaint falls within its jurisdiction, it begins to investigate this complaint through preliminary inquiries.[98] In this way, the Ombudsman may contact the complainant for further information. It also contacts the department or agency concerned, informing them about the case and asking them to respond. Many complaints have been resolved by this mechanism. However, if the matter cannot be resolved using preliminary inquiries, the Ombudsman can decide to investigate using a formal investigation, which is governed by s8 of the Ombudsman Act 1976.

S8 of the Ombudsman Act 1976 gives the Ombudsman wide powers of investigation. Before commencing an investigation, it must inform the head of the relevant agency.[99] However, according to the former Commonwealth Ombudsman, Dennis Pearce, the 'clumsiness of this requirement is ameliorated by a power to enter into a standing arrangement with an agency as to the manner of informing the agency in relation to a class of action to be investigated'.[100]

The Ombudsman can ask any person to give evidence or to produce a document for an investigating officer. Failure to comply is an offence.[101] S9(4) of the Ombudsman Act 1976 states that a person cannot refuse to supply information, produce a document, or answer a question on either the basis of incrimination or because of a secrecy obligation in another statute.

For the purpose of investigation, the Ombudsman can enter premises and inspect any documents kept on such premises.[102] It can also ask a person to attend before it under oath or affirmation.[103] The Ombudsman Act gives protection to the Ombudsman not to be sued.[104] The Act also guarantees the protection from civil actions for complainants.[105]

Once the investigation is resolved, the Ombudsman makes a draft report, which is then forwarded to both the complainant and

[91] S6 of the Ombudsman Act 1976.
[92] Douglas, R. op., cit, p.192.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid 193.
[97] Ibid.
[98] See s7A of the Ombudsman Act 1976.
[99] S8(1) of the Ombudsman Act 1976.
[100] Pearce, D, op., cit, p.96.
[101] S36(1) of the Ombudsman Act 1976.
[102] S14 of the Ombudsman Act 1976.
[103] S13 of the Ombudsman Act 1976.
[104] S33 of the Ombudsman Act 1976.
[105] S37 of the Ombudsman Act 1976.

department or agency, in order to invite their comments. This mechanism ensures procedural fairness. Moreover, this draft report has an important role as it contains the investigation findings as well as the Ombudsman's proposed redress for aggrieved complainants.

The Ombudsman Act does not specify particular type of redress. Rather, it gives flexibility as to the nature of any recommendation that the Ombudsman wants to include in its report. Diggens identifies four categories of remedies for defective administration through the Ombudsman case work:[106]

a. that an apology be made to the complainant,
b. that an explanation be given for the action which precipitated the complaint,
c. that action be taken to change the particular administrative process or legislative provision that generated the complaint, and finally,
d. that a sum of money be paid as compensation for the disadvantage suffered by the complainant.[107]

In the case that the department or agency fails to make a response, the report is finalised. If the Ombudsman is not satisfied with the response to its report, there are a number of ways for it to ensure that the authorities pay attention. Sections 16 and 17 of the Ombudsman Act 1976 give power to the Ombudsman to make a report to the Prime Minister and the Parliament, if it considers that appropriate action has not been made by a department or agency. However, the Ombudsman rarely carries out these powers.[108]

In practice, there has been debate as whether the Ombudsman should be equipped with a determinative power, that is the power "to compel an agency to accept and act on recommendations".[109] Some argue that the Ombudsman should have this power, in order to ensure compliance with the Ombudsman's recommendation. For those who support the idea of determinative power, this power was essential in order to avoid a situation that would "compromise investigations and the ultimate outcome of complaints".[110] Moreover, the introduction of this power "would expedite ordinary complaints and would provide an effective remedy against recalcitrant agencies". [111] More importantly, the determinative power was needed where an appropriate remedy took the form of monetary payment.[112]

In contrast, the opponents provided a number of arguments against determinative power. First, they stated that the major role of the Ombudsman is an oversight body, which cannot substitute an administrative decision.[113] A second argument stated:

"the Ombudsman may not always be right, or there may not be one right answer, because the Ombudsman reviews matters of administration in which decisions are taken on the basis of an exercise of judgement".[114]

The Commonwealth Ombudsman made it clear to the Senate Committee in 1991 that he was not seeking determinative power. This was because he believed such powers to be 'a fundamental reversal of everything that ombudsmen had been about in the past'.[115] Other arguments included the view that

[106] Diggens, R. J. (1989). *The Commonwealth Ombudsman: His Contribution to Administration and the Law*. LLM Thesis, Monash University. p.115.
[107] Ibid.
[108] Douglas, R. op., cit. p.196.
[109] See for example, The Parliament of the Commonwealth of Australia, *Review*…. op., cit. p.24-9; and Douglas, R. op., cit. p.197-8.
[110] The Parliament of the Commonwealth of Australia, *Review*…. op., cit. p.26.
[111] Ibid.
[112] Ibid.
[113] Ibid 25.
[114] Ibid.
[115] Ibid.

determinative power would result in a more rigid, cautious attitude towards the Ombudsman; that the process would tend to become adversarial rather than conciliatory; and that the current system operates satisfactorily by emphasising resolution rather than legalities. [116] The Senate Committee eventually decided to refuse granting a determinative power for the Ombudsman. It was "not persuaded that determinative powers are either necessary or desirable".[117]

4.2. Discussion

The above discussions on the operation of the Ombudsman in Indonesia and Australia have demonstrated a number of similarities and differences. The ORI and the Australian Ombudsman share similar goals that reflected in two major functions, namely redress and control. The first function gives the Ombudsman a role in dispute resolution through which it plays as an independent and impartial institution to settle "dispute" between citizens and the government. The second function can be carried out by the Ombudsman through the implementation of investigation on its own motion with which the Ombudsman may be able to improve administrative system in both countries.

Another similarity relates to the legal basis. The ORI and the Australian Ombudsman have been established through statutory basis. This reveals that both countries recognize the importance of the Ombudsman in securing better quality of public service. For this, a stronger legal basis is a must in order to secure the existence of the institution as well as its independency and impartiality. Having statutory basis also means that the ORI and the Australian Ombudsman have strong support from the House of Representatives and the Parliament as representation of the people.

Apart from those similarities, the operation of the Ombudsman offices in Indonesia and Australia provides several differences in regard to the design of the Ombudsman scheme and mandates, to name a few. The Indonesian Ombudsman scheme is definitely different from the design of its Australian counterpart. In Indonesia, as the historical background of the establishment of the NOC and the ORI had been discussed, the systematic design of the Ombudsman system is absent, in particular dealing with the NOC. Australian experience shows different practice. From the very beginning, the Australian Ombudsman is comprehensively designed within Australian administrative law scheme. In regard to mandates, the expanded model of the Australian Ombudsman is, indeed, as result from several "forces". Chris Field explains:

"One certainly is the growth of the state and concomitant need for the oversight of this growth. Indeed, over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. The Honourable Robert French AC, former Chief Justice of the High Court of Australia, has described a 'galloping growth in regulation' including a 'growth of less visible soft law' in the form of administrative guidelines. Indeed, even in those areas of deregulation and privatisation that may have removed jurisdiction from classical Parliamentary Ombudsmen, this jurisdiction has often been taken up by private sector Ombudsmen".[118]

[116] Ibid 25-6.
[117] Ibid 27.
[118] Chris Field. "The Ombudsman in the 21st Century". This commentary is an edited version of a speech delivered in the opening plenary session of the 11th World Conference of the International Ombudsman Institute, Bangkok, Thailand, 13-19 November 2016<http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/131116- Ombudsman-WA-IOI-Conference-2016-Evolution-of-Ombudsmanship.pdf>

Moreover, Field states:

"Another noteworthy component of this change in the scope of the role of government has been the response of the modern state to the changed socio- political environment in which it exists. This is particularly observable in the growth of the coercive powers of government and the desire by citizens to ensure that these powers are performed with integrity, transparency and accountability".[119]

In regard to the ORI, Law on Public Service can now become an adjudicator in the case of compensation if disputes cannot be resolve through mediation and conciliation. Indeed, this is a new challenging role for the ORI since it requires a quite different method of works.

5. Conclusion

The proliferation of an Ombudsman throughout the world, in particular for 50 years have been caused by a number of reasons, as Mary Seneviratne puts succinctly as follows:

"One explanation is the expansion of state activity…, the new concern for the protection of human rights, and the growth of public education and participation… Ombudsmen came to be seen as useful in helping to meet the problem of an expanded bureaucracy in the modern welfare state, the activities of which had grown in range and complexity. The increase in the powers of discretion given to the executive side of government led to a need for additional protection against administrative arbitrariness, particularly there was often no redress for those aggrieved by administrative decisions".[120]

The development of the Indonesian and Australian Ombudsman systems has indeed reflected what Seneviratne argues. Although both systems have operated in some different characteristics, including forms of government and state,[121] but the two have already shown similar goal, namely: providing means for the people in order to enhance access to administrative justice that can lead to better public service. Again, this is in line with Seneviratne's argument that says "administrative justice is not only concerned with providing remedies for citizens' grievances. It is also concerned to improve administrative practice, and thus provide better service".[122]

The most important lesson from the development of complaint-handling system in Indonesia and Australia, in my opinion, relates to the fact of "difference, dynamism and disjuncture".[123] "Difference" refers to various and different political life; dynamism highlights the speed process of social changes; and "disjuncture" describes side effects, contradictions and conflicts that appear as a response to such changes.

Those three facts (difference, dynamism, and disjuncture) indeed can be shown from the historical background of the establishment of the Ombudsman and the operation of both systems. Indonesia has showed the changing title from the NOC to the ORI and thus leads to the changing of basic scheme from the executive Ombudsman governed by presidential decree to become The Ombudsman with a stronger statutory scheme. Australia, however, from the very beginning, has firmly

[119] Ibid.

[120] Seneviratne, M. op., cit. p. 10-11

[121] Indonesia applies presidential system of government whereas Australia is a parliamentary system of government. In terms of form of state, Indonesia is a unitary state, conversely, Australia is a federal state.

[122] Seneviratne, M. op., cit. p. 74

[123] Goldblatt, D. *Politics and governance in the Asia Pacific: history and thematic overview* in Richard Maidment, et., al (eds). (1998). *Governance in the Asia Pacific*, London, New York: Routledge in association with the Open University. p. 2.

governed its Ombudsman by statutory base. The changes of the status or the changes of the Ombudsman scheme in Indonesia, particularly, have been driven by the increase demand for better quality of public service as a result of rapid social changes, in particular dealing with human rights awareness. Most Indonesian people are now aware of their procedural rights in public service that finally "forces" the Government to promulgate two important legislations dealing with, namely Law on Public Service and Law on Government Administration. Australia has shown different practice in a way that social change has been responded by expanding the mandates of the Commonwealth Ombudsman resulting in the evolution of the Ombudsman. Stuhmcke labels this kind of model as "Variegated Ombudsman Model". [124] The Ombudsman Act 1976 established the Australian Ombudsman as having a core focus upon individual complaints and also as having a systemic role of suggesting reform and improvement to government administrative systems. [125] Today, the Australian Ombudsman performs separately titled roles of Australian Capital Territory Ombudsman, Defence Force Ombudsman, Taxation Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman and Overseas Student Ombudsman.[126]

As difference and dynamism occur quite diverse in Indonesia and Australia, consequently disjuncture in both countries has also shown different practices. In Indonesia, in 2010, there was a petition filed to the Constitutional Court asking the constitutionality of Art. 46 paras (1) and (2) of Law No. 37 of 2008 concerning the Ombudsman of the Republic of Indonesia and Art. 1 no. 13 of Law No. 25 of 2009 concerning Public Service. As mentioned above, Art. 46 paras (1) and (2) limit the use of the title. The petitioners argued that the prohibition of using the title "Ombudsman" by other (such as local ombudsman, private ombudsman) was in contravention with Art. 28D paras (1)[127] and (3)[128] and Art. 28C para (2)[129] of the Amended 1945 Constitution. The Constitutional Court through Decision No. 62/PUU-VIII/2010 was in favor of the petitioners.

In Australia, the side effects of rapid social changes that lead to the evolution of the Ombudsman, as argued by Stuhmcke, have been occurred as a result of three major reasons. [130] Firstly, the Australian Ombudsmen fit to adapt their jurisdiction. Every Ombudsman in each Australian levels of government – Federal, State, and Territory – "had its own unique requirements and the model introduced in every jurisdiction was a deliberate and considered choice". [131] Secondly, as a result of expansion of its function, there is a need from the Ombudsman to have additional powers. In doing so, how an office is managed is very much a matter of the personal style and working methods of the incumbent Ombudsman. [132] Thirdly, the growth of the Ombudsman functions reflects acceptance and trust from other institutions within Australian jurisdiction.[133]

The Ombudsman offices are now almost two decades old and four decades old in Indonesia and Australia, respectively. The development of these two offices has indeed

[124] Stuhmcke, A. op., cit. p86
[125] Ibid.
[126] Ibid.
[127] "Every person has the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law".
[128] "Every citizen has the right to obtain equal opportunities in government"
[129] "Every person has the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state".
[130] Stuhmcke, A. op., cit. p.91-93
[131] Ibid. p. 91
[132] Ibid. p.92
[133] Ibid. p.93

shown the ability of the Ombudsman to make necessary adaption to environmental operation. In other words, discussion about comparative analysis of the two Ombudsman offices has confirmed "the adaptability of the evolving nature of the Ombudsman institution and has demonstrated how it will continue to maintain its relevance",[134] as an important compliant-handling system in the public sector.

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