

**THE INDEPENDENT OMBUDSMAN IN A DEMOCRACY,
GOVERNED BY THE RULE OF LAW**

by

Dr. Marten Oosting

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International Ombudsman Institute
Room 205 D Weir Library, Faculty of Law
University of Alberta, Edmonton, Alberta, T6G 2H5, Canada.

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The location chosen for this Third Asian Ombudsman Conference is quite unique. Macau: a region where different cultures have intermingled for centuries, now preparing to adapt to new conditions, optimistic that its special character will be preserved in the next millennium. These characteristics make apt surroundings for an international meeting of ombudsmen, as I hope to make clear.

First of all, however, I should like to thank Dr. de Mendonça Freitas for offering to host this Third Asian Ombudsman Conference. I am particularly grateful for his inviting me to represent the International Ombudsman Institute here and to participate in the conference as his guest. It gives me great pleasure to welcome you all on behalf of the world community of ombudsmen. I am convinced that all the ingredients of a successful conference are present here in Macau, and I look forward to the presentations and debate.

The ombudsman as an institution has taken hold rapidly over the past few decades and now exists in some eighty countries spread over all the continents of the world. It takes many different forms, partly related to constitutional and political, as well as economic differences between countries. As this diversity increases, the question of the integrity of the ombudsman as a concept becomes more interesting and more compelling. In origin, this concept has several essential features that make up the greatest common denominator, regardless of the name given to the office and other external features. But are these characteristics truly universal? Could any country have an ombudsman, whatever its constitutional and political setup, or are there certain preconditions? I should like to examine this question in greater detail. I shall begin by dwelling on some of the characteristics of the ombudsman as an institution, and especially the one I deem most essential for every ombudsman institution—independence.

The ombudsman is an institution set up for members of the public; its *raison d'être* is to help protect ordinary people from the government. Any other role that it may fulfil, such as enhancing the quality of government, is subordinate to its primary task—to be the Defender of the People, the institution's superbly chosen name in Spain. The government—necessarily—is invested with special powers, and has numerous monopolies. This makes people dependent on it in countless ways, a dependency that may vary according to social position and circumstances. So members of the public must be able to count on the government performing its tasks correctly. That governments cannot always be relied upon to do so is universally acknowledged as a fact of life.

This brings me to the central responsibility of every ombudsman—to foster good governance in the interests of the general public. Good governance means a government that unconditionally respects the rules of the national and international legal order, especially in the realm of human rights, and that strives to fulfil its responsibilities properly in the service of the general public, free from corruption. If the ombudsman is to do a good job, the right of every

* National Ombudsman of the Netherlands; President of the I.O.I. Address given at the Opening Ceremony of the Third Asian Ombudsman Conference Macau, May 4, 1998.

member of the public to contact him must obviously be safeguarded beyond all doubt. People must also be assured that they can go to the ombudsman without any fear of reprisals from the government. Furthermore, it is essential that the ombudsman's existence should be well publicized, and that he himself should have the means, and the will, to make his presence known. And finally, the ombudsman must be able to operate completely independently of the government bodies within his area of competence.

The ombudsman's independence has several facets, relating to the office itself and the person who holds it. As far as the office is concerned, it must furnish a solid basis—preferably on the basis of the Constitution—and assurances of continuity. Safeguards are needed to ensure that the ombudsman is not part of any other authority within the state, let alone subordinate to it. This means that the ombudsman must not be bound by any external instructions in his work other than the *National Ombudsman Act* or an equivalent piece of legislation, and that, as an external supervisory body, he may not be a part of supervisory structures or mechanisms such as those that exist in numerous situations within the government itself. It also means, for instance, that the confidential information passed on to the ombudsman in the course of his work is not accessible to others. The government and its officials must be under an obligation to give the ombudsman all the assistance he requires for his investigation, and their cooperation must be enforceable if needs be. The law must give the ombudsman the necessary powers in this respect. The independence of the ombudsman as an investigative agency is enhanced if he is also empowered to launch investigations on his own initiative. Furthermore, he must be assured of the financial and personnel resources needed to perform his job properly.

In any case, the ombudsman's independence should also mean that he is at liberty to address the general public and to make his presence felt in society without his actions being subject to approval of any kind. In this connection, the ombudsman must be free to perform an educational role, if he sees fit, informing the public of their rights *vis-à-vis* the government and the ways in which they can enforce them. Finally, the ombudsman must also be free to make his findings public without permission from any source, even when these findings are disagreeable to the government body under scrutiny.

The position of the person appointed ombudsman also needs statutory safeguards to ensure independence. Thus a fixed term of office must be laid down, making it impossible for him to be dismissed before this term expires. Or, in the event that he can be dismissed prematurely, special procedural and substantive conditions must be enshrined in statutory provisions, to guard against any political or administrative influence that might prejudice the independence of the ombudsman's office. The rank of the ombudsman must not be subordinate to that of the leadership of the bodies that he is empowered to investigate. In many countries the ombudsman is appointed by parliament; in some by the head of state. However the appointment procedure may be set up, the institutional safeguards for independence will be undermined if there is any possibility of party political considerations leading to bias—or the appearance of bias—in the person appointed. It is equally important to guard against making an appointment that waives or dilutes the necessary professional qualifications. In this respect all that can be done, once a sound selection procedure is enshrined in the law, is to hope that the responsible authority will act wisely. The ombudsman himself, of course, must endeavor to steer clear of any conduct that could undermine his impartiality or public confidence in him in this regard. He must never use his office to pursue his own personal interests, for instance, in connection with his future career.

This is by no means a list of requirements. They are essential, however, to ensure that the ombudsman can perform his responsibilities effectively; in such a way that the public can have confidence in him and know how to reach him. All these requirements come under the heading of “independence”. In the By-laws of the International Ombudsman Institute, the independence criterion has acquired special significance as a requirement for membership.

It is important to see the ombudsman not only in his direct relationship, from his position of independence, with the bodies he is empowered to investigate, but also in relation to the wider political environment in which he has to work. I believe that the institution of the ombudsman can only develop healthily and, in the final analysis, can only function as it should, if this environment is a democratic state governed by the rule of law. What does this mean?

In a democracy, the public comes first. The people are the ultimate bearers of the sovereignty of the state. In a democracy, the people determine, in open and free elections, who is to be entrusted with administrative responsibility. Democracy means a culture in which every individual matters and is respected. In a democratic system it is taken for granted that government bodies must account externally—in particular to parliament—for the way in which they perform their duties. For this, it is essential that open government is safeguarded. Free and pluralist news media play an essential role in this external accountability of government.

A state governed by the rule of law means that the government not only creates laws, but is then bound by them itself. In such a state, the government is expected to respect and safeguard the rights of ordinary people. This is most obvious in the case of human rights. Where the rule of law holds sway, the exercise of government authority is not determined by tradition or the charisma of political leaders but by the law. In these countries, public offices are created by law; their powers are granted and their working methods regulated by law. Courts of law check whether the government performs its duties in accordance with the law, all courts being independent of bodies entrusted with government tasks.

Looking at all these features collectively, a democratic state governed by the rule of law means a system in which there is a dynamic balance of power between the different powers operating within the state, as expressed by the well-known concept of checks and balances. In such a system, it is quite normal—and quite safe—to criticize the government. The ombudsman exists as an element of this system, as one of the supervisory bodies that monitors the executive, in the interests of the general public. The results of this supervision enhance the quality of the executive and support parliament in its own supervisory task.

I have already said that I believe that the institution of the ombudsman presupposes an environment that meets the criteria, as I have enumerated them, of a democratic state governed by the rule of law. But by linking the ombudsman and a particular political system in this way, I certainly do not mean to imply that the ombudsman can only function in a country whose government displays no shortcomings. In such surroundings an ombudsman would be superfluous; but this notion, of course, is a mere utopia.

To rule out any misunderstanding, I should therefore like to say straight away that the concept of a democratic state governed by the rule of law is, up to a point, an open concept. Just as both elements of this concept—democracy and the rule of law—may in practice manifest themselves in diverse ways, the composite may also assume a variety of appearances. Indeed, the diversity is immense, depending on factors such as whether the country is an old or relatively new democracy, and on its size. The level of economic development also helps to determine

what such a state looks like in a specific situation. We see the diversity of democracies as we travel around the world: for instance from a developing country such as India—frequently called the largest democracy in the world—to a country with a flourishing economy like Switzerland, with its traditional grassroots democracy. Likewise, the rule of law in the often vulnerable situation following the end of a dictatorship, in which the judiciary may still bear the clear imprint of the *ancien régime*, will be very different from that in a country with a long tradition of high-quality monitoring of the government by a strictly independent judiciary. Such diversity is reflected in a similar diversity between the ombudsman institutions in the countries concerned.

To acknowledge this diversity, however, is not to say that the ombudsman's surroundings are irrelevant. In other words, I would not wish to suggest that the ombudsman, with the basic features I have described, could be a viable institution in any country, regardless of the constitutional and political situation. If the ombudsman is to function properly as an independent institution, this does indeed make certain minimal demands on the democracy of which it is a part. In an environment where it is insufficiently recognized that the government exists to serve the people, and where it is not taken for granted that executive government officials must uphold the rule of law, or that government bodies have continuous external accountability, the existence of an independent ombudsman will easily be experienced as a threat to existing interests and positions of power within the government. The ombudsman will have his work cut out for him in such surroundings, to say the least. Approaching the ombudsman will pose risks for the general public, while the ombudsman himself will find it difficult, if not impossible, to perform his investigation and to find a listening ear in the government for his views and recommendations. This means that the ombudsman's role as protector of the public is under pressure, making it hard for him to build up and maintain credibility. Some ombudsmen do indeed have to work in such circumstances, reliant on the support of those who, like themselves, are dedicated to developing their country as a democracy governed by the rule of law. The pressure under which they have to perform their responsibilities may even be such that their personal safety, or that of their family, is at stake. I have great respect for these colleagues' dedication to performing their task with credibility, while upholding their independence.

My message comes down to the following. There is an interplay between the ombudsman and the democratic state governed by the rule of law within which he operates: on the one hand, the ombudsman as an institution presupposes, to a certain extent at least, the rule of law within a democracy, and on the other hand, his work helps to maintain the rule of law and democracy and develop it further.

It would be fair to ask whether these reflections on democracy and the rule of law—however much I have tried to nuance my views—do not testify to prejudice, to a vantage point too greatly influenced by the context of the kind of countries in which the modern institution of the ombudsman has largely evolved, such as certain democracies with flourishing economies in Northern and Western Europe, and New Zealand, Australia and Canada. Coming as I do from the Netherlands, it is not up to me to answer this question, as my reply would be open to the same charge of bias. My main aim in making these remarks is to contribute to a debate that I consider to be of great importance within the International Ombudsman Institute and that must not, therefore, be avoided. After all, the ombudsman institution has spread from the countries I have just mentioned to many countries with very different traditions, to new democracies, where the rule of law is new and sometimes extremely vulnerable, and to developing countries, where corruption appears to cleave to government like rust to iron. I should have said, perhaps, that

agencies have started up in such countries, calling themselves “ombudsman” or some similar name, and have sought to join the world community of ombudsman institutions as represented by the International Ombudsman Institute. At every fresh request for membership, the Board of Directors of the I.O.I. faces the same difficulties of assessing whether the institution concerned, taking its surroundings into account, has enough in common with the basic concept of the ombudsman for the request to be granted. In making this assessment, the I.O.I.’s task is not to hold rigidly to a concept that is of sole relevance to the rule of law in prosperous democracies nor, at the same time, to hold the door so wide open as to erode the common principles of the ombudsman’s profession. This would ultimately undermine the foundations of this organization for those who practise the same profession. In a number of cases, associate membership has proven to be a good solution, creating ties with institutions that were interested in collaborating with and within the I.O.I. but did not yet meet the criteria for voting membership.

I began by saying that Macau is an excellent place for a conference of ombudsmen: a society forged from the meeting of different cultures, and an area optimistic of retaining its identity in a period of transition. This links up with the development of the ombudsman’s institution in different parts of the world. For other countries to adopt what was originally a Scandinavian blueprint also meant a meeting of different cultures, and this has created a certain diversity in the ombudsman’s institution. While this development continues, it is the I.O.I.’s task to watch over the identity and integrity of the institution. These must not be allowed to become so blurred that the concept of the ombudsman loses its distinctive features. For the I.O.I. as a whole, the Board of Directors has a special responsibility in this respect, as do those who constitute a regional branch of the I.O.I.

I should like to wish the Asian Ombudsman Association inspiration and strength in fulfilling this responsibility. You may rest assured that your fellow ombudsmen in other regions are following your work with the greatest of interest.

In particular, I should like to wish the High Commissioner Against Corruption and Administrative Illegality (the Ombudsman of Macau) and his staff every success in the coming years in continuing to fulfil his important duties for the people of Macau.