THE OMBUDSMAN: ITS EFFECTIVITY AND VISIBILITY AMIDST BUREAUCRATIC ABUSE AND IRREGULARITY*

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More than a decade after its formal adoption in the Philippines[1], the *Ombudsman*, otherwise known as the *Tanodbayan*, is still struggling for popular recognition as a viable institution. Much of the optimism and enthusiasm that attended its establishment have considerably waned. On the other hand, a palpable feeling of alienation, apathy and helplessness on the part of the people in their relation with government – a deplorable condition, the alleviation of which is a foremost concern of the *Ombudsman* – continues to grow.

It may not be fair nor appropriate, at this point in time, to judge the experiment as a failure. Those who have not lost faith in the institution will surely plead for more time for it to eventually succeed and gain public recognition and confidence. If it works in Sweden where the concept originated[2] and continues to flourish in other countries which subsequently adopted it,[3] one might argue that the Ombudsman institution has a fairly good chance of thriving and prospering as well in the Philippines. But time, unfortunately, is a luxury the country can ill afford at this critical juncture of its political history.

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[1]The 1973 Constitution mandated the National Assembly to create an Office of the Ombudsman to be known as *Tanodbayan*. However, it was only on June 11, 1978 that President Ferdinand E. Marcos, exercising his legislative power under the previous charter, issued Presidential Decree No. 1487 which established the Office of the *Tanodbayan*.

[2]The Office of the *Justitieombudsman* was created by the SWEDISH CONSTITUTION OF 1809.

[3]Ombudsman offices in the national or local levels exist in the following countries: Australia, Austria, Canada, Denmark, Fiji, Finland, France, Germany, Ghana, Great Britain, Northern Ireland, Guyana, India, Israel, Italy, Jamaica, Mauritius, The Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Philippines, Portugal, Sudan, Sweden, Switzerland, Tanzania, Trinidad and Tobago, United States of America and Zambia. *See* ANNUAL REPORT OF THE *TANODBAYAN* (Ombudsman), 1981.

The perception that, so far, the *Ombudsman* has not convincingly demonstrated its capability to fully or effectively perform its constitutional role as the "Protector of the People" is not difficult to understand. As a legal institution, it is intended to provide protection to the people's rights against all forms of bureaucratic abuse and irregularity. In theory, the *Ombudsman* is to act as some kind of a Watchman over the law's Watchmen. He has an active, not a passive role for he can act on his own initiative without waiting for a complaint from an aggrieved party.[4] The prevalent impression, however, is that he is not vigorously exercising this prerogative. Consequently, he is unable to maximize his effort in bringing about reforms in the public service. This prerogative cannot be overstressed especially since he is not a mere prosecutor of public servants. Equally, if not more important is his specific duty to "determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the government and make recommendations for their elimination and the observance of high standards of ethics and efficiency."[5]

To enable the *Ombudsman* to function effectively, he has been conferred with sufficiently vast investigatory and prosecution powers.[6] And yet, through all the years of unmitigated graft and corruption in government, the *Ombudsman* has not been clearly visible to the public eye. One is tempted to say that either the Watchman is not watching vigilantly enough or if he is, and therefore must be discovering widespread bureaucratic wrongdoing, he seems somehow to fail in applying the full force of his powers as evidenced by the numerous investigations and prosecutions which, as can be gathered from media reports, mostly involve minor functionaries of government.

It is against this backdrop of poor visibility and effectivity that a second sober look at the institution should be taken. The continuing scenario of widespread bureaucratic anomalies and the *Ombudsman's* negligible impact on the drive for good government bring to fore the fundamental question raised when its adoption was first considered several years ago: Is the *Ombudsman* institution workable in the Philippines?

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[4]CONST., art. XI, sec. 13 (1); REP. ACT No. 6770, sec. 15 (1).

[5]*Id.*, at art. XI, sec. 12, sec. 13 (7); REP. ACT No. 6770.

[6]*Id.*, at art. XI, sec. 13; REP. ACT No. 6770, sec. 15.

THE SWEDISH EXPERIENCE

The creation of the *Tanodbayan* was inspired by the Swedish *Justitieombudsman* a praiseworthy governmental institution which was constitutionally recognized in Sweden as early as 1809.[7] However, despite the antiquity of the institution, there does not appear to be a sufficiently wide understanding in the Philippines of the workings of the Swedish *Ombudsman*. Considering that many of the characteristics of the Philippine *Ombudsman* were principally derived from the *Justitieombudsman*, a familiarity with the Swedish experience will undoubtedly contribute to a fuller understanding and appreciation of the problems confronting our own *Ombudsman* institution.

From a comparative viewpoint, Sweden's *Ombudsman* has the decided advantage of operating under conditions which are most conducive to its effectivity. The confidence and respect accorded to him by administrators and citizens alike is so great that, invariably, his recommendations are followed. The high public esteem enjoyed by him is undoubtedly due in part to the admirable qualities of the persons who have acted as ombudsman since the institution was established some one hundred eighty years ago. The Swedish Constitution simply requires that the *Ombudsman* be one of "known legal ability and outstanding integrity".[8] On this point, it has been observed that: "those finally chosen have had solid professional capabilities that were unlikely to have been noticed by the public at large; as one parliamentary leader put it, 'The man we select does not lend distinction to the office; the office distinguishes him'."[9] It is noteworthy that, in our own jurisdiction, the Constitution as well as Republic Act No. 6770, otherwise known as *The Ombudsman Act of 1989*, require that the *Ombudsman* be a person "of recognized probity and independence."[10] In addition to being a member of the legal profession, he must not have been a candidate for any elective office in the immediately preceding election, and he must have been a judge or engaged in the practice of law in the Philippines for at least ten years.[11]

The Swedish *Ombudsman*, unlike his counterpart in the Philippines, functions within a parliamentary form of government. This

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[7]For a comprehensive study on this subject, *see* GELLHORN, *The Swedish Justitieombudsman*, 75 YALE L. J. 1-58 (1965).

[8]CONST. OF SWEDEN, art. 96, as officially translated in English by THORELL, THE CONSTITUTION OF SWEDEN (1954) cited in Gellhorn, *id.*, at 9.

[9]GELLHORN, *supra* note 7, at 9.

[10]CONST., art. XI, sec. 8; REP. ACT NO. 6770, sec. 5.

[11]*Id.*

matter must be highlighted because in Sweden, the Parliament is constitutionally forbidden to conduct investigations of specific administrative acts.[12] This is a striking contrast to what goes on in our jurisdiction where, under a presidential form of government, both chambers of the legislature are frequently engaged in investigations. Theoretically undertaken in aid of legislation, these congressional inquiries are, more often than not, mainly focused on the past conduct of public officials. While it can not be said that investigations of this type are without any beneficial effects, from the standpoint of the *Ombudsman*, the effect on its public image, unintended though it may be, is quite damaging. Indeed, these legislative investigations tend to overshadow or relegate to the background the investigatory power of the *Ombudsman*. This, in turn, contributes significantly to its poor visibility to the citizenry.

The environment under which the Swedish *Ombudsman* functions is best illustrated by the unique character of public administration in Sweden. The *Ombudsman*'s exercise of authority has been aptly described as individualistic owing to the minimal ministerial or parliamentary control over it. Responsibility for the implementation of the law rests mainly on administrative agencies known as "central administrative boards" which supervise or regulate various areas such as social welfare, prisons, health, housing, social insurance, forestry, fisheries and agriculture.[13] It is enlightening to note the comments of a keen observer of the *Justitieombudsman* on the efficacy of the Swedish system of public administration:

> How, one may well ask, can this individualistic system of public administration, perhaps well suited to a day when communities were scattered, communication were slow, and problems were few, meet the needs of a highly organized society? In part it does so simply because the individuals within the system are well educated, conscientious and uplifted by professional morale; *Sweden has long had a thoroughly justified pride in its able and honorable public servants*. Furthermore, for all the folklore about "the stubborn Swede," willful adherence to opinion is not commonplace among officials; they seek consensus rather than dissent and are therefore receptive to other officials' views even when not, in theory, forced to accept them.

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[12]Art. 90 of the Swedish Constitution states that "matters relating to the appointment and removal of officials, the decisions, resolutions, and judgments of the executive or judicial authorities ... shall in no case or manner be subject to consideration or investigation by the Riksdag, its chambers or committees, except as literally prescribed in the fundamental laws." cited in GELLHORN, *supra* note 7, at 4.

[13]GELLHORN, *supra* note 7, at 4.

> *Thirdly, to a degree far beyond the usual, Swedish officials function in the proverbial goldfish bowl. Their files are, with stated exceptions, open to the press and the public at large, so that reckless or too highly personalized patterns of action can perhaps be discerned and criticized more readily than in other countries;* even papers bearing upon matters still under consideration are available to inquirers. Fourthly, since each official must apply the law as he understands it, care is taken to draft statutes that cannot admit of many diverse readings, and the "legislative theory" of each bill is carefully compiled so that doubts will not later arise about the intended purposes of a new law; explicit statutory detail reduces the area of administrative choice and thus the risk of administrative aberration, but, perhaps offsetting this virtue, it increases the administrative rigidity sometimes denounced as "bureaucratic inflexibility". Fifthly, statutes sometimes explicitly authorize the issuance of regulations or general instructions that will diminish the range of individual officials' choice. Finally, individual administrators' judgments are, in varying degrees, subject to review by others, first within their own official establishment (such as a central administrative board) and then by appeal to the king, that is, to the cognizant minister."[14]

The widely acknowledged efficient and honest civil service in Sweden, as well as the unusually transparent manner by which its bureaucracy functions are worth emphasizing. Given these favorable conditions, it is easy to see why the Ombudsman is able to do a creditable job. Sweden, to be sure, is not immune to graft and corruption. But whatever bureaucratic wrongdoings there are, they are not of the magnitude that will unduly overwhelm or burden the Ombudsman to the extent of adversely affecting the quality of his performance.

In the Philippines, our *Ombudsman* is not as fortunate as his Swedish counterpart. While the Constitution stresses the accountability of public officers and exhorts all public officers and employees to serve the people with utmost responsibility, integrity, loyalty and efficiency, we have yet to claim a well-managed bureaucracy that is not plagued by corruption and is supported by a corps of efficient and honorable public servants. With the kind of bureaucracy that we have at present, we can certainly appreciate the difficult task that the Constitution has assigned to the Office of the *Ombudsman*.

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[14] *Id.*, at 6-7 (emphasis supplied).

The scope of the Swedish *Ombudsman's* power covers both investigation and prosecution. All public officials and employees are within his jurisdiction including members of the Supreme Court or the Supreme Administrative Court who, under the Constitution, are subject to impeachment by the *Ombudsman.*[15] Exempted from his power are the cabinet ministers who can be impeached only upon the initiative of Parliament. Government corporations engaged in economic operations are likewise outside the *Ombudsman's* reach and he exercises limited powers in so far as local government affairs are concerned.[16]

A comparison of the disciplinary authority of the Philippine and Swedish *Ombudsman* reveals striking differences. Our law provides that:

> The Office of the *Ombudsman* shall have disciplinary authority over all elective and appointive officials of the government and its subdivisions, instrumentalities and agencies, including members of the cabinet, local government, government-owned or controlled corporations and their subsidiaries, except over officials who may be removed only by impeachment or over members of congress, and the judiciary.[17]

As specified in the Constitution, the officials who may be removed from office by impeachment are the President, the Vice-President, the members of the Supreme Court, the members of the constitutional commissions, and the *Ombudsman* himself.[18] As mentioned earlier, cabinet ministers and government corporations engaged in economic operations are outside the reach of the Swedish *Ombudsman.* In our jurisdiction, they are within the disciplinary authority of our *Ombudsman.* On the other hand, while members of the Supreme Court or the Supreme Court Administrative Court of Sweden are subject to impeachment by the *Ombudsman,* the members of the Philippine Supreme Court, together with the President, Vice-President and the members of the constitutional commissions are expressly excluded from the scope of authority of the Philippine Ombudsman.

As in Sweden, our *Ombudsman* possesses investigatory and prosecution powers. But here the similarity ends. While the *Justitieombudsman* has, for many years, tended to emphasize the giving of admonitions or reminders to erring administrators rather than outright

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[15]SWEDISH CONST., art. 101.
[16]GELLHORN, *supra* note 7, at 12-13.
[17]REP. ACT NO. 6770, sec. 21.
[18]CONST., art. XI, sec 2.

prosecutions, the opposite is true in the case of our *Ombudsman*. As consistently reflected in annual reports,[19] the main thrust of the *Ombudsman's* activities has been his role as the people's Watchman. In a way, this is unfortunate because the prosecution of offenses, while concededly necessary in the effort to weed out undesirable public servants, is but one of the many functions of the Ombudsman. Engrossed in the prosecution of public officials, his other functions get considerably less attention.

The admonition, rather than the prosecution of officials who have committed not so dangerous or highly deplorable mistakes has, in the Swedish mind, the salutary effect of influencing not only the erring administrator but also those whose future conduct are guided accordingly. In part the practice has succeeded because the well-reasoned opinion that usually goes with the admonition, serves as a discernible threat that court prosecution will be commenced if and when the admonition is disregarded.[20] Quite naturally, an administrator would prefer an admonition to a prosecution.

Notwithstanding its value as a tool for instituting reforms in the bureaucracy, it must be mentioned that the practice of giving admonitions has not been spared its share of criticisms. It has been said that civil servants "stand in the pillory not only for grave faults but also for minor lapses which are in fact more or less excusable."[21] Moreover, the effect of this practice on the development of initiative and enthusiasm in the civil service has been questioned. In this regard, the following remarks from a ranking civil servant merit attention:

> My observation over the years has been that the men who are trying hardest to get things done are the ones most likely to be criticized. We have suggested that the *Ombudsman* look at a man's whole record before prosecuting or denouncing him, because that would provide some basis for

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[19]The cases prosecuted by the Ombudsman include violations of Rep. Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act; violations of Title 7, Book Two of the Revised Penal Code which cover felonies committed by public officers and employees, such as frauds and illegal exactions, infidelity in the custody of prisoners, infidelity in the custody of public documents and other malfeasances and misfeasances in office; crimes committed by public officers in relations to their office and violations of Rep. Act No. 1379 (Law on Unexplained Wealth), otherwise known as an Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee.

[20]GELLHORN, *supra* note 7, at 12.

[21]HERLITZ, *Swedish Administrative Law: Some Characteristic Features*, 3 SCAND. STUD. IN LAW 89, 124 (1959), cited in GELLHORN, *supra* note 7, at 49.

> determining whether or not he really is a bad actor. But the *Ombudsman* says this is none of his business; he is interested only in the act, not the actor. The effect of this is that officials who want to be sure not to get into trouble do not try to find the quickest and simplest ways to do their jobs, but the safest. I have rarely heard of anyone who was held up before the public as a horrible example because he was not being vigorous enough. Nowadays the civil service needs vigor, but it isn't really encouraged to have it.[22]

From the police, an important area of concern for the Swedish *Ombudsman*, comes yet another critical commentary,

> A policeman has to act on the spur of the moment. Of course if you are sitting at a table afterward, with plenty of time to look at the laws and regulations, you may be able to show that he didn't have a chance to make a long study; he had to react quickly. I heartily agree that the *Ombudsman* ought to be constantly in every policeman's mind, a part of his conscience. But I don't think that the policeman ought to feel that a heavy hand is always about to fall on him. I am afraid that that is what is happening. Sometimes policemen are not doing their whole duty, not because of laziness or bad discipline or anything like that, but simply because they are playing it safe.[23]

These observations appear to have some merit. They can not simply be dismissed as the wild imaginings of administrators who are biased against the work of the *Ombudsman*. Such criticisms show that while the practice contributes to sound public administration, it has, at the same time, a potential for bringing about the undesirable, though certainly unintended, consequence of dampening initiative and enthusiasm in the civil service.

There are many other factors which directly or indirectly have a bearing on the effectivity of the Swedish Ombudsman. We cannot pause to consider all of these, but for our purposes, it may be sufficient to highlight the following: First of all, there are other watchmen sharing the Ombudsman's powers and functions. These are: (1) the Chancellor of Justice who is known in Sweden as the *Justitiekansler* and sometimes referred to as the King's Ombudsman,[24] (2) the Military Ombudsman,

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[22]*Id.*, at 51.

[23]*Id.*

[24]The Chancellor of Justice occupies a non-political and independent post for life. Unlike the Ombudsman, he does not report to Parliament but he submits a report

who is the second parliamentary Ombudsman created in 1915 to deal with military affairs,[25] and (3) the Public Prosecutors.[26] With all of these watchmen working side by side with the *Justitieombudsman,* his workload is considerably lightened. Secondly, the traditional inspection of public offices and courts by the *Ombudsman,* although it has been subjected to criticisms, achieves positive results.[27] Finally, there is a cordial relationship between the Ombudsman and the Swedish press. This kind of a relationship is important. A supportive press may not only provide the necessary publicity to his findings and recommendations, it may also provide the stimulus for a vigorous and enthusiastic exercise of his power. Oftentimes, investigations conducted on his own motion are triggered by newspaper stories and editorials.[28]

The Philippine Antecedents of the Ombudsman

From a legal perspective, the domestic roots of the present Ombudsman can be traced to the various Executive Orders which were issued by previous Presidents creating offices to receive complaints against erring public servants. For over two decades, from 1950 to 1971, five Presidents established such agencies with varying names.

The first agency that was established through executive fiat was the Integrity Board of President Elpidio Quirino which was created on May 25, 1950 by Executive Order No. 318. This was followed by President Magsaysay's Presidential Complaints and Action Commission (PCAC) which was created by Executive Order No. 1 issued on December 30, 1953. Soon thereafter, on March 17, 1954, he issued Executive Order No.

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nominally to the King. However, like the Ombudsman, he possesses investigatory and prosecution powers. Oftentimes, the activities of these two watchmen overlap. On this point, the following comment of Professor Gellhorn is noteworthy: "If one were to ask why two men one called *Justitieombudsman* and one called *Justitiekansler*, should do exactly the same work in exactly the same way affecting exactly the same people, but without even a tenuous structural link between them, the only possible response would be Justice Holmes': `Upon this point a page of history is worth a volume of logic'." GELLHORN, *supra* note 7, at 36 citing N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[25]The *Militieombudsman* exercises the same general powers as the *Justitieombudsman.*

[26]The prosecution of judges and of high officials is within the jurisdiction of the Ombudsman and the Chancellor of Justice. However, as to the rank and file in the civil service, the public prosecutors have the same prosecution power as the Ombudsman. *See* GELLHORN, *supra* note 7, at 39.

[27]For a balanced discussion on the merits and demerits of the Ombudsman's inspection system, *see* GELLHORN, *supra* note 7, at 22-31.

[28]*Id.*, at 31-34.

19 superseding Executive Order No. 1 and created the Presidential Complaints and Action Committee. There appears to be no special significance that can be attached to this new body, except, perhaps, that the term "Commission" was changed into "Committee". When it was President Carlos P. Garcia turn, the agency he created on July 15, 1958, through Executive Order No. 306, was called the Presidential Committee on Administration Performance Efficiency (PCAPE). He, likewise, issued Executive Order No. 378 on February 18, 1960 which created the Presidential Anti-Graft Committee (PAGCOM). This investigative body was short-lived. On December 2, 1961, PAGCOM was abolished by Executive Order No. 457.

Under the administration of President Diosdado Macapagal, a Presidential Anti-Graft Committee was formed by Executive Order No. 4 issued on January 18, 1962. This was followed by the Presidential Agency on Reforms and Government Operations (PARGO) which was established on January 7, 1966 by President Ferdinand E. Marcos through Executive Order No. 4. PARGO was soon replaced by the Presidential Complaints and Action Office (PCAO). On October 2, 1967, however, President Marcos revived PARGO. Less than three years later, on February 8, 1970, Executive Order No. 208 converted PARGO into the Complaints and Investigation Office (CIO). By virtue of a Presidential Decree,[29] this office continued to exist notwithstanding the creation of the *Tanodbayan* pursuant to the mandate of the 1973 Constitution.

All of these agencies were doomed to failure at the very moment of their creation primarily because they were not free from political pressures. There was, to begin with, no leeway for political independence. Being creations of the Chief Executive, they were completely under his control and he could abolish them at his own will.

Republic Act No. 6028, otherwise known as the Citizen's Counselor Act of 1969, was the first legislative attempt to establish an Ombudsman in the Philippines. This law was intended "to protect and better safeguard the constitutional right of the people to petition the government for redress of grievances; and to promote higher standards of efficiency in the conduct of government business, and in the administration of justice for better service to the citizens".[30] The citizen's Counselor was empowered to conduct an investigation either on his own initiative or on complaint regarding any administrative act of a government agency when, in his opinion, such act may be any of the

[29]PRES. DECREE No. 1501, issued on June 11, 1978.
[30]REP. ACT No. 6028, sec. 2.

following: (1) unreasonable, unjust, oppressive or improperly discriminatory, even though in accordance with law; (2) under a mistake of law or fact, partly or wholly; (3) without adequate statement of reasons; (4) based on grounds that are improper or irrelevant; (5) done inefficiently; (6) in conflict with law; or (7) otherwise erroneous.[31] It is interesting to note that, for some reason, this law was never implemented.

In the 1971 Constitutional Convention, the overwhelming desire of the delegates to create an Ombudsman was clearly evident. Twenty-seven resolutions were introduced, all of them endorsing the adoption of the Ombudsman institution in the Philippines. The Committee on Constitutional Bodies consolidated these resolutions into one Committee Resolution which recommended the establishment of an independent Ombudsman Commission.[32]

Martial law was declared on September 21, 1972 and, shortly thereafter, President Marcos issued the controversial Proclamation No. 1102 certifying that the people overwhelmingly ratified the new Constitution. The validity of Proclamation No. 1102 was challenged in the landmark case of *Javellana v. Executive Secretary*[33] but the Supreme Court, in a 6-4 vote, declared that there was no further judicial obstacle to the new Constitution being considered in force and effect. Under the 1973 Constitution, the National Assembly was mandated to " create an Office of the *Ombudsman*, to be known as *Tanodbayan*, which shall receive and investigate complaints relative to public office, including those in government-owned or controlled corporations, make appropriate recommendations, and in case of failure of justice as defined by law, file and prosecute the corresponding criminal, civil, or administrative case before the proper court or body."[34] It was only on June 11, 1978, however, that President Marcos, exercising his legislative power under the Constitution, issued Presidential Decree No. 1487 which created the Office of the *Tanodbayan*. This decree was subsequently revised by Presidential Decree No. 1607 dated December 10, 1978 and Presidential Decree No. 1630 issued on July 18, 1979.

After the historic events of February, 1986, popularly referred to as the EDSA People's Power Revolution, a new Constitution was again drafted. This time, however, the 1987 Constitution was overwhelmingly ratified by the people. In contrast to the previous charter, the 1987

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[31] *Id.*, at sec. 12.

[32] *See* THE 1971 CONSTITUTIONAL CONVENTION COMMITTEE REPORT ON THE OMBUDSMAN.

[33] 50 SCRA 30 (1973).

[34] 1973 CONST., art. XIII, sec. 6.

Constitution directly created the independent Office of the *Ombudsman* and specified its powers, functions and duties. Inasmuch as the Constitution provides that the Office of the Ombudsman shall "exercise such other powers or perform such functions or duties as may be provided by law,"[35] Congress subsequently enacted Republic Act No. 6770 otherwise known as *The Ombudsman Act of 1989*. This law, *inter alia*, provides for the functional and structural organization of the Office of the *Ombudsman*.

ESSENTIAL CHARACTERISTICS OF AN OMBUDSMAN AND THE OMBUDSMAN ACT OF 1989

The concept of the *Ombudsman* as guardian of the people's right to seek government assistance for redress of grievances and as a vehicle to promote high standards of integrity and efficiency in government has gained recognition and acceptance in many countries. Expectedly, however, the different political, social, cultural, and even economic environment existing in these countries have compelled them to adopt the institution with modifications to suit their own peculiar needs and requirements. In the case of the Philippines, the scope of the disciplinary authority of our *Ombudsman* significantly differs from that of his Swedish counterpart. In fact, in many other countries, the power to prosecute has been withheld from their *Ombudsmen*.[36]

Notwithstanding the variations in the actual implementation of the concept in the countries that have adopted it, it is widely accepted that for an institution to function effectively as an *Ombudsman*, it must possess the following essential or constitutive characteristics: (1) political independence, (2) accessibility and expedition, (3) investigatory power, and (4) absence of revisory jurisdiction.[37] The question raised earlier regarding its viability in the Philippines should now be addressed by considering the relevant provisions of *The Ombudsman Act* in light of these characteristics.

In terms of political independence, our *Ombudsman* appears to be, at least from a purely theoretical standpoint, sufficiently insulated from political pressure or influence. The Constitution itself has created "the independent Office of the *Ombudsman*."[38] Under the law, there are a

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[35]CONST. art. XI, sec. 13(8).

[36]*See* THE 1971 CONSTITUTIONAL CONVENTION COMMITTEE REPORT ON THE OMBUDSMAN.

[37]*Id.*

[38]CONST., art. XI, sec. 5.

number of provisions which are designed to ensure the political independence of the *Ombudsman*. In addition to the rather strict qualification requirements mentioned earlier, certain prohibitions and disqualifications are specified:

> The *Ombudsman*, his Deputies and the Special Prosecutor shall not, during their tenure, hold any other office or employment. They shall not, during said tenure, directly or indirectly practice any other profession, participate in any business, or be financially interested in any contract with, or in any franchise, or special privilege granted by the government or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office. They shall not be qualified to run for any office in the election immediately following their cessation from office. They shall not be allowed to appear or practice before the Ombudsman for two years following their cessation from office.[39]

Regarding security of tenure, it is noteworthy that the *Ombudsman* is one of the few constitutionally favored officials who can be removed from office only on impeachment for and conviction of culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.[40] He has the same rank as the Chairman of a Constitutional Commission and his salary cannot be decreased during his term of office,[41] which is seven years without reappointment.[42] He is authorized to appoint, in conformity with the Civil Service Law, all officers and employees of his office, including those of the Office of the Special Prosecutor.[43] And finally, the Ombudsman enjoys fiscal autonomy.[44]

Accessibility and the capability to act expeditiously are distinctive hallmarks of a true *Ombudsman*. He may be politically independent, and he may have the appropriate or necessary powers, but for as long as he is not within the reach of the ordinary citizen, he is not likely to function productively. The same may be said of his capability to act expeditiously on matters brought to his attention. If provisions are not made to enable

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[39]REP. ACT NO. 6770, sec. 9.
[40]CONST., art. XI, sec. 2; *Id.*, at sec. 8.
[41]REP. ACT NO. 6770, sec. 6.
[42]*Id.*, at sec. 7.
[43]*Id.*, at sec. 11(5).
[44]CONST., art. XI, sec. 14; *Id.*, at sec. 38.

him to act with dispatch and flexibility, he will surely be unable to satisfy the expectation of complaining citizens that their grievances will be speedily redressed.

What has just been said becomes even more significant when viewed in the context of present political and economic conditions. Concededly, we have a burgeoning bureaucracy which is not as efficient and honest as we want it to be. On the other hand, there is widespread poverty among the people. These factors complement each other in making the task of the Ombudsman a difficult but, nevertheless, a challenging one. No documentation is needed to show that poverty effectively prevents access to the judiciary. To a poor man, the idea of going to court to vindicate his right is, more often that not, meaningless. The judicial process is not only cumbersome and time consuming, it is also expensive. If the courts are not easily within his reach, it becomes all the more imperative that the Ombudsman be readily accessible to him. The Ombudsman institution has a universal appeal precisely because of its great potential for controlling abuses and irregularities in government through the efforts of a People's Guardian to whom aggrieved citizens can easily turn to for relief. These factors complement each other in making the task of the Ombudsman especially difficult but, nevertheless challenging.

The law is not wanting when it comes to making the Ombudsman accessible to the people and giving him enough flexibility to act expeditiously. Accordingly, while the Ombudsman, the Overall Deputy, the Deputy for Luzon, and the Deputy for the Armed Forces hold office in Metro Manila; the Deputy for the Visayas, and the Deputy for Mindanao hold offices in Cebu City and Davao City, respectively. The Ombudsman is authorized to transfer their stations within their respective geographical regions, if public interest so requires.[45] Moreover, the Ombudsman may establish offices in municipalities, cities and provinces outside Metro Manila under the immediate supervision of his deputies if in his opinion such offices are necessary.[46] To further maximize his accessibility, complaints from any source in whatever form concerning official acts or omissions shall be received and acted upon immediately.[47] In this connection, it must be pointed out that all letters, mail matters and telegrams sent through government facilities containing complaints are free of charge, with the only limitation that the same not exceed one hundred fifty words.[48] All these provisions, together with his prerogative

[45]REP. ACT NO. 6770, sec. 12.
[46]*Id.*, at sec. 28.
[47]*Id.*, at sec. 26(2).
[48]*Id.*, at sec. 37.

to investigate and prosecute on his own initiative, aims to bring the Ombudsman within the reach of the ordinary citizen while enhancing his capability to act expeditiously.

Another essential characteristic embodied in the *Ombusman Act* is the grant of investigatory power. The new law takes a step further by conferring upon the *Ombudsman* not only the power to investigate but also the power to prosecute on his own initiative or upon complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient.[49] In addition, any officer or employee of the government or any subdivision, agency or instrumentality thereof, as well as any government-owned or controlled corporation with original charter can be directed by him, either upon complaint or on his own motion, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.[50] Complementing these powers is his authority to issue *subpoena* and *subpoena duces tecum*, take testimony, and examine and have access to bank accounts and records.[51] He can cite for contempt and seek the assistance of any government agency in the performance of his duties.[52] In the exercise of his investigatory power, he may enter and inspect the premises of any office, agency, commission or tribunal; examine and have access to any book, record, file, document or paper; and conduct private hearings with both the complainant and the respondent official.[53]

It must be noted, however, that while anybody can complain to the Ombudsman, the invocation of his powers may not necessarily give rise to an investigation. He has the discretion not to investigate if he is of the opinion that: (1) an adequate remedy is available to the complainant in another judicial or quasi-judicial body; (2) the subject matter of the complaint is outside of his jurisdiction; (3) the complaint is trivial, frivolous, vexatious or made in bad faith; (4) the complainant has no sufficient personal interest in the subject matter of the grievance; or (5) the complaint was filed a year after the occurrence of the act or omission complained of.[54] If used soundly or judiciously, it will allow him more time to attend to his duties and responsibilities under the law.

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[49] *Id.*, at sec. 15(1).
[50] *Id.*, at sec. 15(2).
[51] *Id.*, at sec. 15(8).
[52] *Id.*, at secs. 15(9), 33.
[53] *Id.*, at sec. 23(3).
[54] *Id.*, at sec. 20.

The fourth and final essential feature of an Ombudsman institution pertains to the absence of revisory jurisdiction. This simply means that the Ombudsman can not modify or overturn decisions of administrative agencies performing rule-making or adjudicative functions. He may not exercise the functions of an appellate or reviewing court. This characteristic makes the *Ombudsman* institution particularly unique and contributes, in no small measure, to its success. Reviewing decisions of administrative agencies is, by itself, a full-time and highly demanding task that is best left outside its area of concern. *The Ombudsman Act* recognizes the importance of not granting revisory jurisdiction to the *Ombudsman*. Consequently, in defining its powers, functions and duties, review of the decisions of administrative agencies is excluded.

CONCLUSION

The threshold question raised earlier was: Is the Ombudsman institution workable in the Philippines?

We have seen that, from a strictly theoretical point of view, the *Ombudsman Act* satisfies the requirements of a successful *Ombudsman* institution. Its provisions embody the essential or constitutive characteristics of an authentic Ombudsman. But this law was enacted only recently. Thus, it is not fair to say that sufficient time has lapsed to enable us to determine its impact on the performance of the Ombudsman. One might suggest, however, that more than a decade of operation should be enough time to warrant an objective and, perhaps, final appraisal of the viability of the Ombudsman institution in the Philippines. This suggestion could be deemed reasonable if passage of time were the only consideration. The fact, however, is that for ten years the Ombudsman was functioning under a previous enabling statute which was significantly different from the present law. This point must be emphasized because it can not be discounted that the law has a bearing on the quality of the Ombudsman's past performance.

It is in the matter of political independence as an essential precondition for a successful Ombudsman that significant differences can be discerned between the past and the present. Placing more emphasis on this essential characteristic, the present Constitution has directly created the Office of the *Ombudsman*, in contrast to the 1973 Constitution which simply mandated the National Assembly to establish the office. Moreover, the present charter included the Ombudsman in the short list of officials who can be removed from office only through impeachment. On the other hand, under Presidential Decree No. 1630, the third in a series of

presidential decrees dealing with the creation of the Office of the *Tanodbayan*, the President had the power to remove the *Tanodbayan* upon his determination that the latter has become incapacitated or has been guilty of neglect of duty or misconduct. Another substantial difference is that under the *Ombudsman Act*, the *Ombudsman* enjoys fiscal autonomy whereas Presidential Decree 1630 did not provide for such autonomy.

Ultimately however, the perception that, thus far, the Ombudsman's role as the Protector of the People has not been satisfactorily performed can be reversed by adopting measures designed to correct perceived shortcomings.

Foremost in the agenda for reform is the need to underscore the functions of redressing grievances and introducing measures to promote an honest and efficient bureaucracy. Wittingly or unwittingly, the Ombudsman has projected the image of a Grand Prosecutor. While the power to prosecute is concededly important, especially in the Philippines where graft and corruption appear to be a chronic ailment, there is certainly much more to an Ombudsman institution than merely prosecuting crooks in government. In fact, the power to prosecute can be withheld, as in the case of some countries, without destroying the essence of the Ombudsman institution. Persuasion, investigation, criticism and publicity are, after all, the main weapons of the Ombudsman.

There is, likewise, an urgent need for a more assertive and vigorous exercise of the powers of the Ombudsman. There is no reason why he cannot function effectively under a presidential form of government notwithstanding the overzealousness of the legislature in conducting investigations that often encroach on the jurisdiction of the Ombudsman. It is noteworthy that the law grants him "primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over at any stage from any investigatory agency of Government, the investigation of such cases."[55] Congress, of course, may not be denied its prerogative to conduct investigations in aid of legislation, but this does not necessarily mean that when an act or omission of a public official can be the subject of an investigation either by Congress or the Ombudsman, the Ombudsman should not take the lead in exercising his investigatory and prosecution powers. Even without a complaint, he is expressly empowered by law to investigate and prosecute on his own initiative. To some extent, the poor visibility of the Ombudsman can be attributed to his failure to vigorously

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[55] *Id.*, at sec. 15(1).

assert his power to investigate the major scandals that have rocked the government.

The inspection of official establishments and the admonition of erring public servants are traditional practices that have been put to good use by the Swedish Ombudsman. Despite criticisms directed to these practices, they have produced positive effects. To reiterate an important point, the admonitions have been found to influence not only the erring administrator but also those whose future conduct are guided accordingly. Inspections, on the otherhand, serve as a deterrent to administrative wrongdoing and keep public servants constantly alert. There is no reason why these practices should not be given sufficient emphasis by our own Ombudsman in the exercise of his powers.

The Ombudsman institution cannot be fully effective without the support of a free, vigilant and critical press. As mentioned earlier, publicity is one of the Ombudsman's effective weapons. Indeed, giving wide publicity to matters related to his investigations can be a powerful deterrent to all forms of bureaucratic abuse and irregularity. Moreover, a supportive press can stimulate him to vigorously exercise his powers. In other countries, it is not rare for the Ombudsman and the press to establish and maintain a cordial relationship of mutual cooperation. This means that, subject only to reasonable limitations, the files and documents of the Ombudsman are made, as much as possible, fully transparent to the press in order for the latter to regularly and objectively publicize matters related to investigations of this nature.

It is appropriate, perhaps, to end this lecture with a note of guarded optimism. We must consciously avoid romanticizing the Ombudsman as a knight in shining armor who can single-handedly wipe out evils in government. In truth, the *Ombudsman* is not a *Super-Watchman* who can provide solutions to all the problems spawned by our burgeoning bureaucracy. Nevertheless, this realization should not make us unduly pessimistic about the capabilities of our Ombudsman. The legislature has just crafted a law that clearly enhances his role. With a heightened sensitivity to the lessons of the past and with a firmer resolve to use his powers more assertively, it is not unreasonable to expect the Ombudsman to substantially contribute to the cause of good government.