

# Characteristics of Ombudsman Institution in Indonesia Compared with Ombudsman Institution in Sweden, United Kingdom, France, and Netherlands\*

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## Abstract

Indonesia, as a democratic state of law, performs state management based on the principle of rule of law and the principle of democratic state. One aspect of the implementation of the rule of law and democracy is the provision of legal protection for the public and their participation in the public administration, including supervision on the government. In order to achieve this, an Ombudsman institution was established by Indonesian Government in 2000. This institution is intended as a public supervision agency to improve the protection of the rights of the public in obtaining public services, justice, and prosperity. There are currently over one hundred countries in the world with Ombudsman institutions as their government supervision. Every ombudsman institutions have their own unique traits, which is also the case with the Ombudsman institution in Indonesia. This paper discusses the characteristics of the Ombudsman institution in Indonesia and its comparison with some of the Ombudsman institutions of other countries—such as Sweden where the Ombudsman originated, the Netherlands, the United Kingdom, and France. The writer chooses ombudsman institutions of those countries for their big influence in shaping the Ombudsman models that exist today.

**Keywords:** government supervision, governmental bodies, maladministration, ombudsman, public complain.

## Karakteristik Lembaga Ombudsman di Indonesia Dibandingkan dengan Lembaga Ombudsman Swedia, Inggris, Perancis, dan Belanda

### Abstrak:

*Indonesia sebagai negara hukum yang demokratis menghendaki agar penyelenggaraan negara didasarkan pada prinsip rule of law dan prinsip negara demokratis. Salah satu aspek dari pelaksanaan negara hukum yang demokratis tersebut adalah adanya perlindungan hukum bagi masyarakat serta partisipasi masyarakat dalam penyelenggaraan negara, termasuk dalam rangka pengawasan pelaksanaan pemerintahan. Untuk mencapai hal tersebut, Pemerintah Indonesia sejak tahun 2000 telah membentuk lembaga Ombudsman. Lembaga ini dimaksudkan sebagai lembaga pengawasan publik untuk meningkatkan perlindungan hak-hak masyarakat guna mendapatkan keadilan dan kesejahteraan yang lebih baik. Saat ini ada lebih dari seratus negara di dunia telah memiliki lembaga ombudsman sebagai lembaga pengawasan pemerintahan dengan karakteristik atau ciri-ciri tersendiri. Makalah ini membahas karakteristik lembaga Ombudsman di Indonesia dibandingkan dengan beberapa lembaga Ombudsman di negara-negara lain, yaitu dengan Swedia sebagai negara asal dari Ombudsman, Inggris, dan Perancis. Lembaga ombudsman*

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PADJADJARAN Jurnal Ilmu Hukum Volume 3 Nomor 1 Tahun 2016 [ISSN 2460-1543] [e-ISSN 2442-9325]

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*di beberapa negara tersebut dipilih karena lembaga ombudsman tersebut sangat mempengaruhi model Ombudsman yang ada di dunia saat ini.*

**Kata kunci:** pengawasan pemerintahan, lembaga negara, maladministrasi, ombudsman, aduan publik.

## A. Introduction

As with many other countries in the world, Indonesia today has an Ombudsman institution. This institution was formed in the reformation era, precisely in 2000 by the Presidential Decree Number 44 of 2000 with the name of National Ombudsman Commission (Presidential Decree 44/2000). Prior to 2000, the Indonesian people did not recognize the institution; therefore the establishment of the institution could not be separated from the ideals of the reformation at that time to create a clean government administration free from corruption, collusion, and nepotism.<sup>1</sup> In addition, the ombudsman institution in Indonesia was established with the aim of strengthening the supervisory institution of society as it was considered incapable of creating a clean government and good governance. Law Number 37 of 2008 on Ombudsman of The Republic of Indonesia (Law 37/2008) states that the Ombudsman Institution was formed as an internal supervision carried out by the government itself if the performance of the government does not meet the expectations of society, both in terms of objectivity and accountability.

Before the National Ombudsman Commission was established, complaints from the public was submitted to each agency and handled by its respective officials, creating a condition in which the public wasn't able to get adequate protection. The establishment of the Ombudsman in Indonesia was also intended to overcome the obstacles faced by the public during the time period when complaints on public servants could also be done through court. However, the settlement through the court takes a long time and costs a lot, whereas complaints filed through ombudsman does not require any cost and a long period of time.

As previously mentioned, Ombudsman Commission in Indonesia was formed through the Presidential Decree 44/2000 before officially known today as the Ombudsman of the Republic of Indonesia (ORI) based on Law 37/2008. Based on the provisions in Law 37/2008, ORI has its own distinctive characteristics compared to other Ombudsman institutions in other countries. To further elaborate the characteristics, the writer has done research on other ombudsmans, such as the Swedish Ombudsman; the Dutch Ombudsman; the Ombudsman of England; and the French Ombudsman.

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<sup>1</sup> In the Indonesian language, the term corruption, collusion and nepotism called "Korupsi", "Kolusi", and "Nepotisme" or abbreviated as "KKN".

## B. Short History on the Establishment of Ombudsman in Indonesia

The National Ombudsman Commission in Indonesia was precisely formed on March 10<sup>th</sup>, 2000 through the Presidential Decree 44/2000. The establishment of this institution was motivated by a desire to create good governance which is both transparent and free of corruption, collusion, and nepotism—as demanded by the society during the reformation.<sup>2</sup> The establishment of the Ombudsman Institution in Indonesia was also intended to improve the governance supervision of the state and to ensure the protection of public rights.<sup>3</sup>

President Abdurrahman Wahid<sup>4</sup> was among those who aspire the establishment of the Ombudsman Institution in Indonesia. It was then realized by forming the Assessment Team for the Establishment of Ombudsman Institution. The team was formed under the instruction of Presidential Decree Number 55 on December 8<sup>th</sup>, 1999 and followed by the Presidential Decree on Ombudsman 2000. Through this presidential decree, the President formed the institutional structure of the Ombudsman and also set the personnel composition of the National Ombudsman Commission, which consists of one chairman, one vice chairman, and seven members.<sup>5</sup>

After its establishment, the National Ombudsman Commission immediately carried out its duties by receiving complaints from the public. Within four months after the establishment, ORI received no less than 800 complaints.<sup>6</sup> This proves that the presence of an Ombudsman Institution in Indonesia was well received by the public. Seeing the prospect of the Ombudsman Institution, the Government then strengthened the legal basis of ORI by replacing Presidential Decree 44/2000 with Law 37/2008. By this law, the legal basis of the the Ombudsman becomes more powerful and it also changed the name of the Ombudsman institution in Indonesia from the National Ombudsman Commission to ORI. Aside from the change in name, there was also an affirmation regarding the status, principles, and goals of Ombudsman Institution in Indonesia. Furthermore, Law 37/2008 also confirms the rights and powers of the Ombudsman and binding power of recommendation and others.

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<sup>2</sup> Komisi Ombudsman Nasional, *Ombudsman Indonesia: Masa Lalu, Sekarang dan Masa Mendatang*, Jakarta: Ombudsman, 2002, p. 2.

<sup>3</sup> See Article 1 to 15 of Presidential Decree Number 44 of 2000 with the name of National Ombudsman Commission (Presidential Decree 44/2000).

<sup>4</sup> President Abdurrahman Wahid, is the fourth President of the Republic of Indonesia that replaces Prof. Dr. BJ Habib. Since independence on August 17, 1945, Indonesia so far has had seven presidents, namely Ir. Sukarno, General Suharto, Prof. Dr BJ Habib, KH. Abdurrahman Wahid, Megawati Sukarnoputri, Bambang Yudhoyono and Joko Widodo.

<sup>5</sup> Komisi Ombudsman Nasional, *Loc.cit.*

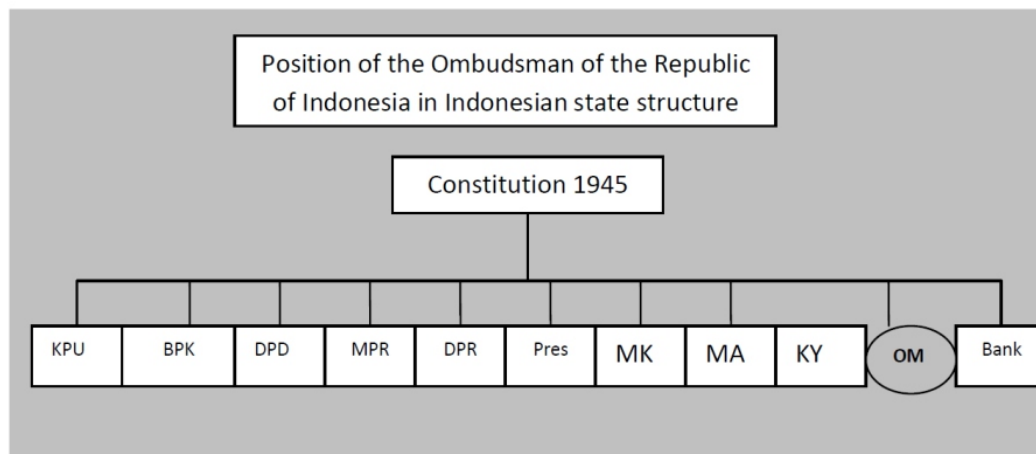
<sup>6</sup> *Ibid.*

### C. Characteristics of The Ombudsman of the Republic of Indonesia

In elaborating the characteristics of ORI as regulated in Law 37/2008, several considerations will be taken into account, such as: the position of ORI in the state system; the process of recruitment in ORI; the term of office; as well as the functions, duties, powers, jurisdictions, and complaints submitted to ORI.

#### 1. The Position of the Ombudsman in the Constitutional Structure of the Republic of Indonesia

One characteristic of ORI that is not evident in other countries is its position as an independent state institution. This means that the Ombudsman institution in Indonesia has an equal position with other state institutions and is not part of other state institutions.<sup>7</sup> ORI is not a device or a part of the executive branch as other Ombudsman Institution in countries with executive ombudsman system. ORI is also not a parliament instrument unlike Ombudsman institutions in countries with parliamentary Ombudsman models. ORI is an independent state agency with impartiality in carrying out its duties. This is consistent with the provisions of Article 2 of Law 37/2008 which states: "Ombudsman Institution is a state organ which has independent character, has no organic relationship with other State organs and public agencies, and is free from the intervention of other authorities in performing its duties and power." The position of the Ombudsman of the Republic of Indonesia in the Indonesian state structure is further described by this diagram:



Description:

1. KPU = Komisi Pemilihan Umum (Electoral Commission)
2. BPK = Badan Pemeriksa Keuangan (State Auditing Board)
3. DPD = Dewan Perwakilan Daerah (Regional House of Representatives)

<sup>7</sup> In Indonesia, according to the Constitution in 1945, there are 10 State institutions, each of which stands alone and run the power of the state by 1945.

4. MPR = Majelis Permusyawaratan Rakyat (The People's Consultative Assembly)
5. DPR = Dewan Perwakilan rakyat (House of Representatives)
6. Pres = Presiden (President)
7. MK = Mahkamah Konstitusi (Constitutional Court)
8. MA = Mahkamah Agung (Supreme Court)
9. KY = Komisi Yudisial (Judicial Commission)
10. OM = Ombudsman Institution
11. Bank = Bank Sentral (Central Bank)

## **2. The Process of Appointment, Dismissal, and Terms of Office of Ombudsman**

Under Law 37/2008, the procedures for the appointment of Ombudsman are as follows:<sup>8</sup>

- The chairman, vice chairman, and ombudsman members are elected by the House of Representatives based on the candidates nominated by the President;
- Prior to the submission of the list of ombudsman candidates to the House of Representatives, the President commissions a selection committee of ombudsman candidates. The selection committee consists of governmental elements, law practitioners, academicians, and community representatives;
- Within the period of 15 (fifteen) working days as in the receipt of names of candidates from the selection committee, the President submits 18 (eighteen) names of ombudsman candidates to the House of Representatives;
- The House of Representatives elects 9 (nine) candidates consisting of chairman, vice chairman, and ombudsman members within the period of 30 (thirty) effective working days as noted in the receipt of the Presidential nomination;
- The candidates for chairman, vice chairman, and ombudsman members are submitted by the House of Representatives within 15 (fifteen) working days of the Presidential endorsement; and
- The President shall endorse the appointment of the elected candidates as specified under paragraph (3) at the latest within 14 (fourteen) effective working days as instructed by the receipt from the House of Representatives.

In accordance with the provisions of Article 17 of Law 37/2008, the elected chairman, vice chairman, and ombudsman members will hold the office for a period of 5 (five) years and may be re-elected only for 1 (one) term.

## **3. Function and Duties**

An Ombudsman institution has the function to supervise the administration of public services executed by the state officials and public officials both central and

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<sup>8</sup> See Article 14 of Law Number 37 of 2008 on Ombudsman of The Republic of Indonesia (Law 37/2008).

regional, including the State Owned Enterprise, Regional Government Enterprise, State Owned Legal Person, as well as private sector or individuals assigned to administer certain public services.<sup>9</sup> The Ombudsman members have the following duties:<sup>10</sup> a) to receive grievance on presumption of maladministration in the administering of public services; b) to conduct substantial investigation of the grievance; c) to follow up the grievance under the jurisdiction of Ombudsman Institution; d) to conduct their own motion investigation to the presumption of maladministration in the administering of public services; e) to conduct coordination and cooperation with other state organs or public agencies as well as non-governmental organizations and individuals; f) to develop networks; g) to conduct the prevention of maladministration in the administering of public services; and h) to conduct other tasks as mandated by the law.

#### **4. Jurisdiction and Basic Complaint**

As mentioned in Article 1 paragraph 1 of Act 37/2008, ORI has the authority to oversee the implementation of public service established by the organizers of state and government. Organizers of the state are officials who run the function of public services whose main duty is related to government administration as stipulated by laws and regulations. The definition for state officials included here are State-Owned Enterprises, Regional Government Enterprises, State Owned Legal Person, as well as private sector entities or individuals assigned to administer public services whose source of partial or whole funds originated from the state budget and/or regional government budget.

On the other hand, ORI receives complaints or reports indicating practice of maladministration from the public through a submission. The definition of maladministration according to Law 37/2008 is:

“the behavior or act against the law, exceeding the authority, using power for purposes other than those which become the objective of such power—including ignorance or negligence of legal obligation in administering public services as conducted by the State Officials and Public Officials which inflict damage to the community and/or individual, both materially and immaterially.”

#### **D. Comparison of the Ombudsman Institutions of the Republic of Indonesia and Ombudsman Institutions of Other Countries**

To further clarify the mechanism of the Ombudsman Institution in Indonesia, the following will explain the Ombudsman Institutions in several countries as comparison. Countries that are used as comparison here are Sweden, the United

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<sup>9</sup> See Article 7 of Law 37/2008.

<sup>10</sup> See Article 8 of Law 37/2008.



Kingdom (UK), France, and the Netherlands. The indicators used for the comparison are as follows: the legal basis of establishment; the name of the Ombudsman Institutions; duties; jurisdictions; their position in the governmental system; the terms of office of the Ombudsman Institutions; and their recruitment process.

### **1. The Ombudsman Institution in Sweden**

#### **a. The legal basis, background, purpose, and goals of Ombudsman Institution in Sweden**

Swedish Ombudsman is known as a Parliamentary Ombudsman Institution and is the parent of the classical ombudsman system. Its construction is based on the 1809 Swedish Constitution and its settings are contained in the Swedish Instrument of Government of 1974. Further arrangements are also made in the Act of Parliament (*Riksdag*) of 1990 and Act of Instruction to the Parliamentary Ombudsman in 1986.

According to Claes Eklundh (a former Chief of Swedish Ombudsman) there are two important factors that encouraged the establishment of ombudsman institution in Sweden, which are: the importance of the principle of law in the Swedish government and the combination of the independence of the Swedish government system with the principles of criminal liability. While the main purpose of the Ombudsman by Claes Eklundh is to protect the principles of law and to protect the rights and freedoms of individuals as specified in the constitution, it also guarantees that courts and government in conducting their duties will act objectively, impartially, and not violating the rights or freedom of citizens in their service for the community.<sup>11</sup>

Based on its history as stated beforehand, the Ombudsman Institution in Sweden is formed to protect the people from lawlessness and violation of rights by state officials—particularly by judicial officers and government employees; to ensure the enforcement of the law; and to ensure that the state administrators do their job well, especially in providing services for the public.

#### **b. Duty**

Concerning the Swedish Ombudsman duty outlined in Article 6 of Chapter 12 in the Swedish Instrument of Government of 1974 states: “The Riksdag shall elect one or more Ombudsmen to supervise under instructions laid down by Riksdag the application in public service of laws and other statutes. An Ombudsman may initiate legal proceedings in the cases indicated in these instructions.” From this article, it can be seen that the main duty of the Ombudsman is to oversee the implementation of laws and regulations of the civil service in accordance with the instructions set by the *Riksdag* (Parliament). Therefore, it can be said that the Swedish Ombudsman is a device for the Parliament to carry out the supervision. Thus, the Swedish Ombudsman occupies a position under the Swedish Parliament.

<sup>11</sup> Claes Eklundh, "The Swedish Parliamentary Ombudsman System", *Paper presented at The International Conference Addis Ababa*, 18-22 May, 1998, p. 373.

According to Claes Eklundh, the duty of an ombudsman is to supervise, on behalf of the Parliament (*Riksdag*), the implementation of laws, and decisions of judges and other officials. Meanwhile, Kent M. Weeks concludes that in principle, the task of the Swedish Ombudsman is to supervise the observance of laws and statutes as applied by the courts and by public officials and employees.<sup>12</sup>

In agreement with the argument of Kent M. Weeks, Jan-Erik Lane states that the Swedish Ombudsman oversees the legal validity of the actions of state officials by filing a lawsuit to the court if violations of the laws and regulations of the country occur. Jan-Erik elaborates that:<sup>13</sup> "The Swedish Ombudsman is the ombudsman of Parliament, *Riksdagen*. He/she looks after the legality of actions by all civil servants of the state and shall prosecute any individual of them who breaks the laws and regulation of country". Therefore, the task of an ombudsman is to conduct surveillance on behalf of the *Riksdag* on the implementation of law by government officials and the judiciary, especially those who provide services to the public.

### c. Appointment of the Ombudsman

As stated in Article 6 of Chapter 12 in the Swedish Instrument of Government 1974 mentioned above, the members of the Swedish Ombudsman are appointed by the Parliament, while the number of ombudsman members appointed by the Parliamentary is regulated by the *Riksdag* Act. At this moment, there are four (4) members in the Swedish Ombudsman, one of whom acts as the Chairman of the Ombudsman. The appointment of the Chief Ombudsman is conducted separately from the appointment of other members.<sup>14</sup>

Swedish Ombudsman members are elected for a period of 4 (four) years and can only be dismissed by the Parliament. Each ombudsman members are not members of any political party and are only responsible to the Parliament,<sup>15</sup> as such they also must gain the support of the members of parliament. The Swedish Ombudsman has a close relationship with one of the Commission in the Parliament, the Constitutional Commission, as the Commission also oversees and supervises the Ombudsman.<sup>16</sup>

<sup>12</sup> Kent M. Weeks, *Ombudsman Around the World A Comparative Chart*, Berkley: Institutes of Government Studies, University of California, 1978, p. 105.

<sup>13</sup> Jan-Erik Lane, "The Ombudsman in Denmark and Norway", in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, Amsterdam: IOS Press, 2000.

<sup>14</sup> See Article 10 of Chapter 8 in The *Riksdag* Act 1990.

<sup>15</sup> Claes Eklundh, "The Inception and Development of the Parliamentary Ombudsman in Sweden", *Paper presented at the National Seminar: The National Ombudsman and the Local Governance organized by the National Ombudsman Commission*, Surabaya, 6 Juli 2000, p. 2-3.

<sup>16</sup> Constitutional Commission in the Swedish system of government is one of the 16 kinds of commission appointed by Parliament. Sixteen Commissions are: 1. Committee on the Constitution (CoC); 2. Committee on Finance (FiC); 3. Committee on Taxation (TaC); 4. Committee on Justice (JC); 5. Committee on Civil Law Legislation (CLC); 6. Committee on Foreign Affairs (FoC); 7. Committee on Defense (DC); 8. Committee on Social Insurance (SiC); 9. Committee on Health and Welfare (HWC); 10. Committee on Cultural Affairs (CuC); 11. Committee on Education (EC); 12. Committee on Transport and Communication (TrC); 13. Committee on



#### d. Jurisdiction and Basic Complaints

The jurisdiction of the Swedish Ombudsman originally is fixated on the institutions of government and judicial bodies at the national level. However, since 1957 it had expanded to include all government institutions, both at central and local levels except over the members of the Regional Representatives Council.<sup>17</sup> As of now, the Swedish Ombudsman has the power over government agencies at central and local levels and over the officials or persons who carry out the functions of government with the exception of the ministers and members of the *Riksdag* or officials appointed by direct election.<sup>18</sup> Thus, the Swedish Ombudsman has a rather broad scope of authority, covering almost all governmental aspects and affairs in the entire country in 4 (four) different sectors.

Under the provisions of Article 60 of the Swedish Instrument of Government 1974 as it has, it appears that the reason for the public to submit complaints to the ombudsman is related to violations of the law, particularly in providing services to the community. The reason for the complaint is also the reason for assessment (*toetsingsgrond*) of an ombudsman in assessing the actions and/or decisions of government and/or the judiciary. Based on the description above, it can be concluded, that the characteristics of the Swedish Ombudsman are as follow:

**Table 1. Characteristics of the Swedish Ombudsman**

1. Name	Parliamentary Ombudsman
2. The first establishment	1809
3. Legal basis	The Constitution of 1809, the Instrument of Government of 1974, the <i>Riksdag</i> (Parliament) Act 1990; Act of Instruction to the Parliamentary Ombudsman (last in 1986)
4. Appointment of the Ombudsman	Parlement ( <i>Riksdag</i> )
5. Term	4 (four) years
6. Duty	Overseeing the implementation of the law by the courts, officials and government employees; conducting investigations; and prosecutions ahead of the Court
7. Jurisdiction	Covers judges and judicial bodies, governmental bodies at central and local level; and officials or persons who carry out the functions of government, except the minister, member of the <i>Riksdag</i> ; or officials appointed by direct election
8. Basic complaints	Violations of the law.
9. Position	An instrument of the Parliament ( <i>Riksdag</i> ) or Parliamentary Ombudsman

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Agriculture (AC); 14. Committee on Industry and Trade (ITC); 15. Committee on Labour Market (LC); and 16. Committee on Housing.

<sup>17</sup> Kent M. Week, *Op.cit.*, p.106.

<sup>18</sup> Swedish Institute, *The Swedish Ombudsmen*, 2000, p. 1.

## 2. The Ombudsman Institution in the United Kingdom

### a. History and Basic Establishment

UK is the first major country in Europe to adopt the ombudsman system. Ombudsman Institution in the UK was first established on April 1<sup>st</sup>, 1967 based on the Parliamentary Commissioner Act of 1967. The establishment of the Ombudsman Institution in the UK began from the realization of the research results listed in WHYATT report published in 1961.<sup>19</sup> Officially, UK does not use the term Ombudsman, rather using the term Parliamentary Commissioner for Administration<sup>20</sup> (PCA). However, the term Ombudsman is more popular in UK than the PCA.<sup>21</sup>

According to Paul Effendi Lotulung, PCA is the extension of the Parliament. It is like the eyes and ears of the Parliament.<sup>22</sup> However, the PCA is an independent institution, where their performances are independent from the Parliament as well as the government. Also, the members of the PCA are not members of the Parliament, but they occupy the position of high officials of the House of Commons.<sup>23</sup> PCA is also not an executive power nor an 'apple' or 'administrative appeal' institution.<sup>24</sup>

### b. The Process of Appointment and Dismissal of Ombudsman

In accordance with the provisions of Parliamentary Commissioner Act of 1967, PCA members are appointed by the King/Queen or the Prime Minister after consultation with the chairman of the opposition party and chairman of the Select Committee.<sup>25</sup> The term of office of a member of the PCA is not clearly specified. However, it is limited by the age of 65 years. A PCA member also can be dismissed at any time by the Queen when or if he no longer shows good behavior, but it can be done only on the basis of the agreement of both rooms in Parliament (House of Lords and the House of Commons).<sup>26</sup> A PCA member can also be dismissed at any time if there is a medical condition under which the PCA is no longer able to perform his functions—an example would be physical or mental disability. Should that happen, the Queen then declare vacant status and appoint a person as a temporary

<sup>19</sup> See Article 1 of Parliamentary Commissioner Act 1967.

<sup>20</sup> *Ibid.*

<sup>21</sup> Frank Stacey, *The British Ombudsman*, Oxford: Clarendon Press, London, 1971, p. 9; Check also Norman Lewis and Patrick Birkinshaw, *When Citizens Complain Reforming Justice and Administration*, Buckingham-Philadelphia: Open University Press, 1993, p. 11.

<sup>22</sup> Paulus Effendi Lotulung, *Beberapa Sistem Tentang Segi Kontrol Terhadap Pemerintah (Edisi ke-II dengan Revisi)*, Bandung: Citra Aditya Bhakti, 1993, p. 32.

<sup>23</sup> Stephen C. Neff and Eric Avebury, "Human Rights Mechanisms in The United Kingdom", *Paper presented at The International Conference Addis Ababa*, 18-22 May, 1998, p. 571.

<sup>24</sup> Philip S. James, *Introduction to English Law*, Eleventh edition, London: Butterworths, 1985.

<sup>25</sup> Check in Article 1 (2) and (3), Article 3A *Parliamentary Commissioner Act 1967*; Refer also the explanation by Roy Gregory and Philip Giddings, "The United Kingdom Parliamentary Ombudsman Scheme", in Roy Gregory and Philip Giddings (eds), *Op.cit.*, p.23; Paulus Efendi Lotulung, *Op.cit.*, p.33.

<sup>26</sup> Article 1 (3) of Parliamentary Commissioner Act 1967.

replacement for a maximum of twelve months from the declaration of vacancy.<sup>27</sup>

### **c. Duty**

The duties of PCA are specified in the Parliamentary Commissioner Act 1967 and the Code of Practice on Access to Information Government of 1994. According to the Parliamentary Commissioner Act 1967, the task of PCA is to: "...deals with complaints from members of the public that they have suffered injustice because of Maladministration by government departments or certain other public bodies". Meanwhile, according to the Code of Practice on Access to Information Government of 1994, the task of PCA is to:<sup>28</sup> "...deals with complaints about problems in obtaining access to official information."

In carrying out its functions, the PCA does not receive complaints directly from the public, but from members of the Parliament. After the public passes their complaint to the members of the Parliament, the members will submit further investigation to PCA. In this regard, it is appropriate if the Ombudsman in UK is said to be an extension of the Parliament, or like the eyes and ears of the Parliament—which hears and sees firsthand the complaints that occur in society. PCA shall also annually provide reports to the Parliament (in this case: the House of Commons) on all its work to resolve the complaints or disputes between the people and the Government.<sup>29</sup>

### **d. Jurisdiction**

According to Article 1 (1) Parliamentary Commissioner Act of 1967, the PCA has the authority to conduct investigations against governmental departments or other agencies carrying out functions on behalf of the government. The list attached to the Parliamentary Commissioner Act 1967 narrows down the government agencies under PCA's jurisdiction which can be changed at any time.

However, not all administrative matters can be investigated by the PCA because there are some exceptions. For example, they cannot examine government actions involving foreign relations, government actions conducted outside the UK, etc.<sup>30</sup> PCA also has the discretion to refuse to deal with a case if it considers that there are not sufficient grounds for the complaint or if it considers the issue to be outside of its responsibility. It has no right to criticize the policy, or check out the benefits of discretionary decisions taken by the department without any involvement of maladministration.

### **e. Basic Complaints**

The basis of public complaints is what is known as maladministration, a term which is actually not defined in the legislation. When doing the discussion of the planned

<sup>27</sup> Article 1 (3) of Parliamentary Commissioner Act 1967.

<sup>28</sup> Article 4 and 5 of Parliamentary Commissioner Act 1967.

<sup>29</sup> Article 10 of Parliamentary Commissioner Act 1967.

<sup>30</sup> See Section 5 of Parliamentary Commissioner Act 1967; See also MP.Jain, "Administrative Law of Malaysia and

formation of PCA in October 1966, Chairman of the House of Commons, Richard Crossman, suggested an idea of action called *maladministration*, namely: bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness, and others.<sup>31</sup>

According to Roy Gregory, in the context of administrative actions (administrative action), the definition of maladministration is:<sup>32</sup>

"...assorted human error, mistakes and oversights; giving misleading advice and inaccurate information; failing to impart information or to provide adequate explanations; the misapplication of departmental rules and instruction; peremptory or inconsiderate behaviour; and unjustifiable delay".

While according to M.P. Jain, the term 'maladministration' includes corruption, bias, unnatural discrimination, wrong procedure, violence, and misleading. Maladministration does not include the implementation of an illogical policy, unless caused by incorrect administration which does not consider the relevant factors. M.P. Jain also states that the term maladministration includes not only poor decisions but also defects in the process of making decisions.<sup>33</sup>

From the above explanation, it can be concluded that the characteristics of Ombudsman in the UK (Parliamentary Commissioner for Administration) are as follow:

**Table 2. Characteristics of the UK Ombudsman**

1. Name	Parliamentary Commissioner for Administration
2. The first establishment	April 1 <sup>st</sup> , 1967
3. Legal basis	Parliamentary Commissioner Act of 1967
4. Appointment of the Ombudsman	Appointed by the Queen on the advice of the Government. May be terminated at any time at the request of both chambers in Parliament.
5. Term	There is no specific time limit but an age limit of 65.
6. Duty	Investigation of public complaints about the injustice caused by maladministration by the government or institutions running the task on behalf of the government. Complaints submitted by members of the Parliament.
7. Jurisdiction	Checking governmental agencies or other institutions that perform the function of government. There is no authority as a public prosecutor. Not arbitrary conduct an examination of local government officials and the military.
8. Basic complaints	Maladministration.
9. Position	A Parliamentary Ombudsman, the right hand Senator.

Singapore", *Malayan Law Journal*, Third Edition, 1997, p. 818; Norman Lewis and Patrick Birkinshaw, *Op.Cit.*, p.131; Check also Paulus Effendi Lotulung, *Op.Cit.*, p. 34; See also <http://www.parliament.ombudsman.org.uk>.

<sup>31</sup> Roy Gregory and Philip Giddings (eds), *Op.cit.*, p.28.

<sup>32</sup> *Ibid.*

<sup>33</sup> MP. Jain, *Op.cit.*, p.819; Some examples maladministration by PCA can be found at: <http://www.parliament.ombudsman.org.uk/>. See also: Sir William Wade, *Administrative Law*, Sixth Edition, Oxford: Clarendon Press, 1998.

### 3. The Ombudsman Institution in France

#### a. The Legal Basis and Background Formation

Initially, France did not want to establish an Ombudsman Institution, since it considered the supervision of the French Government was good. However, infected by the Ombudsman fever in the early 1970's when a lot of states around the world adopted the Ombudsman institution originating from the Scandinavian states, France finally also established an Ombudsman institution with the name *Mediateur de La Repubilque*.<sup>34</sup> Its establishment was performed by *Loi* or Act No. 73-6 on January 3<sup>rd</sup>, 1973. This Act has been amended several times, most recently by Law No. 92-125 on February 6<sup>th</sup>, 1992. Unlike in Sweden where Ombudsman Institution is set out in the Constitution, France Ombudsman is regulated by a *Loi* or legislation. The establishment of *Mediateur* (intermediaries) was pioneered by a prominent politician, M. Poniowski, who later became the Minister of the Interior in the reign M. Chirac and M. Barre between 1974 and 1977. M. Poniowski was always outspoken in the fight for the establishment of the Ombudsman. One of his famous expressions which later became the background of the establishment of an Ombudsman Institution in France is:<sup>35</sup>

"The French administration is often heartless, haughty, and convinced that it embodies the sovereign. Sprung directly from the past and having largely taken shape under the monarchy, it is riddled with monarchical attitudes. It does not regard itself as a public service but as a master ordering subjects abbots"

#### b. The Process of Appointment and Dismissal of Ombudsman

According to the provisions of Article 2 and 3 of Act No. 73-6 of 1973 the *Mediateur* members are appointed for a term of six years and can be terminated at any time by a decision of the Council of Ministers at the proposal of the Chairman of the Supreme Court or Supreme Courts consisting of the Council of State, Court of Appeals, and Court of Accounts.<sup>36</sup>

#### c. Duty and Jurisdiction

As stipulated by section 1 of Act No. 73-6 of 1973, the *Mediateur* has a specific task to investigate complaints from the public that are submitted by the members of the Parliament on the implementation of state organs or functions related to the public service. The duties include the services provided by large state owned companies such as the Post, Telecommunications, France Airline, and others. *Mediateur* is also authorized to receive complaints against members of the military.<sup>37</sup> The jurisdiction

<sup>34</sup> Monique Pauti, "The Ombudsman in France", in Roy Gregory and Philip Giddings (eds), *Op.cit.*, p. 15.

<sup>35</sup> L. Neville Brown and John S. Bell, *French Administrative Law*, Oxford: Clarendon Press, 1995, p. 32.

<sup>36</sup> See also the explanation Kent M. Weeks, *Op.cit.*, p. 88.

<sup>37</sup> Monique-Pauti, "The Ombudsman in France", in Roy Gregory and Philip Giddings (eds), *Op.cit.*, p. 180; See also Article 1 Act No. 73-6 of 1973.



of *Mediateur* is reflected in the provisions of Section 1 of Act No. 73-6 of 1973 which states:

"The *Mediateur* of the French Republic, an independent authority, shall, under the conditions laid down in this Act, receive complaints concerning the working of government offices, local authorities, public establishments and any other bodies vested with a public service mission, in respect of their dealings with the public".

Based on the provision above, *Mediateur* has the authority to examine public complaints about the actions of government offices in the central and regional levels and agencies of government who work in the field of public services both at central and local levels.

#### d. Basic Complaints

Basic assessment of *Mediateur* is called the malfunction of organs of the state or an organization's deviating from its public service mission, when the organization does not function in accordance with its public service mission that includes things like: negligence, carelessness, delay, incompetence, inaptitude, stubborn refusal to admit mistakes, turpitude, arbitrariness, tardiness and others.<sup>38</sup> France does not recognize the term Maladministration as adopted in UK or the principle of legality as adopted in Sweden or other Nordic countries.

If the France Ombudsman system is to be compared with other previously mentioned systems, there are differences with the system in Sweden and the UK, namely the authority of the *Mediateur* as a mediator in resolving the conflict between citizens and government. Thus, *Mediateur* is also given the authority to carry out the settlement of the dispute (*despute*). In addition, the appointment is not made by the Parliament as in Sweden, or by the Head of State as in the UK, but by the Council of Ministers, Prime Minister of the Council of Ministers together with the Cabinet, and the President of France.

From the above explanation, it can be concluded that the characteristics of France Ombudsman (*Mediateur de La Repulique*) are as follow:

**Tabel 3. Characteristics of the France Ombudsman**

1. Name	<i>Mediateur de La Repulique</i>
2. The first establishment	April 1 <sup>st</sup> , 1973
3. Legal basis	<i>Mediateur</i> Law 1973 which came into effect on January 3 <sup>rd</sup> , 1973 (has been amended three times, in 1976, 1989 and 1992)
4. Appointment of the Ombudsman	Appointed by the Council of Ministers, the Cabinet, and the President of France.
5. Term	Six years and may at any time be replaced or terminated by a decision of the Minister with the approval of the Council of State, the Court of Appeal, and the Court of Accounts.

<sup>38</sup> *Ibid.*, p. 182.



6. Duty	Investigating complaints submitted by members of parliament on the implementation of the functions of organs of state or government.
7. Jurisdiction	Not arbitrarily assesses the performance of the judiciary
8. Basic complaints	Malfunction or the failure to run the functions that should be performed by government organs, especially the negative properties in the service to the community, such as: negligence, carelessness, delay, incompetence, inaptitude, stubborn refusal to admit mistakes turpitude, arbitrariness, tardiness and others.
9. Position	Shaping the mixture, the Parliamentary Ombudsman by the Executive Ombudsman.

#### 4. The Ombudsman Institution in the Netherlands

##### a. The Legal Basis and Background Formation

The Dutch Ombudsman, called *Nationale Ombudsman*, was formed in the 1981 with the *Nationale Ombudsman Act*. However, between 1801 and 1805 the Netherlands already had a watchdog agency to government officials named *Nationale Syndicat* whose duties are similar with the Ombudsman.<sup>39</sup> Historically, establishment of the Ombudsman for the Dutch with Danish model was proposed in 1969. At that time, the Dutch government submitted a memorandum to propose to the Dutch Parliament (*Tweede Kamer*) who held a separate agency to oversee public complaints against the behavior of employees and government officials. During the same period, there was also the Commission in Parliament (*Staten General*) who had long ago received and discussed complaints. The presence of the Ombudsman was intended to further strengthen the parliamentary overseeing system. Then in 1976, a draft legislation to establish an Investigation Commissioner was proposed. In 1980, the name was changed to *Nationale Ombudsman* and finally the *Nationale Ombudsman Act* was passed on February 4th, 1981.<sup>40</sup>

The formation of an Ombudsman institution in the Netherlands originated on a need for a way to investigate how should the Government of the citizens operates in certain things, and because it is necessary to hold position of National Ombudsman.<sup>41</sup> At the time of change of the Dutch Constitution in 1999, Article 78a of Chapter 4 on the *Nationale Ombudsman Law* declares the existence of the institution. It marks the presence of constitutional grounds for the Ombudsman Institution which was previously only regulated by the *Nationale Ombudsman Act*.

<sup>39</sup> Sunaryati Hartono, "Fungsi Ombudsman: Fungsi Ombudsman dan Pelaksanaan Hak-hak Asasi Manusia", *Paper presented in Seminar about Ombudsman in democratic State, hosted by National Legal coaching Agency - Department of Justice*, in collaboration with the International Center for Legal Cooperation of the Netherlands, Jakarta, August 23 to 24, 1999, p. 5.

<sup>40</sup> *Ibid.*; See also Marc Hertogh, "The National Ombudsman of the Netherlands", in Roy Gregory and Philip Giddings (eds), *Op.cit*, p. 273.

<sup>41</sup> Refer to the Preamble of *Nationale Ombudsman Act* 1981.

Paragraph 1 of Article 78a of Dutch Constitution specifies that *Nationale Ombudsman* investigates (*onderzoek*) upon request or on its own initiative on behavior (*gedragingen*) government agencies (*Bestuurs organen*) prescribed by or under any law. Paragraph 1 of Article 78a of Dutch Constitution further states:<sup>42</sup> "The National Ombudsman shall investigate, on request or of his own accord, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to Act of Parliament." Under the current provisions of the Dutch Constitution, *Nationale Ombudsman* is given a very high position in par with the three (3) highest State Instruments (*Hoge Collages van Staat*): the *Staten-General* (Parliament), the *Raad van State* (the Supreme Advisory Council), and the *Netherlands Court of Audit* (Audit Board).

#### **b. The Process of Appointment and Dismissal of Ombudsman**

Formally, the *Nationale Ombudsman* is an agency independent from the government influence. The Ombudsman members are appointed and elected by the *Tweede Kamer* of the *Staten-General* (Parliament) upon the recommendation of the deputy chairman of the Supreme Advisory Council (*Raad van State*), Chairman of the Supreme Court (Supreme Court), and Chairman of the Audit Board (*Netherlands Court of Audit*) (Article 78a of Dutch Constitution and Section 2 of the *Nationale Ombudsman Act 1981* as amended on 12 May 1999). Therefore, the appointment is done not by the Queen (Crown), but rather by a committee or group of Senior Officials. Thus, the Dutch Ombudsman is a parliamentary ombudsman (Parliamentary Ombudsman).

*Nationale Ombudsman* is appointed for a term of six years with the possibility of being terminated for a variety of reasons mentioned, among others, in Section 3 of the *Nationale Ombudsman Act* as follow: reaching the age of 65 years, no longer able to carry out duties due to illness or disability, exposed to criminal penalties by a court decision that has permanent legal force.<sup>43</sup>

#### **c. Duty**

The main task of an Ombudsman in the Netherlands is to conduct an investigation of the actions of government agencies in the *Nationale Ombudsman Act* called administrative bodies. What is meant by the term administrative bodies are: "Ministers; Royal Commissioners and Mayors. Any other body entrusted with public authority in the Netherland ..." <sup>44</sup> Ombudsman in the Netherlands also act as the last means of legal protection for the people. Its role is very different from the judges. The Ombudsman cannot assess the 'legitimacy' terms from the command/authorities, but whether government officials had acted decently

<sup>42</sup> Translation quoted from Sunaryati Hartono, *Op.cit.*, p. 3.

<sup>43</sup> The *Nationale Ombudsman*, *A Brief Introduction The National Ombudsman of the Netherlands*, (Booklet 6th edition), October 1999, p. 6-7.

<sup>44</sup> See Article 1a point 1 *Nationale Ombudsman Act 1981*.

(respectably) in dealing with citizens.<sup>45</sup>

To maintain the independence, neutrality, and objectivity of the Ombudsman Institution in carrying out its duties, the Ombudsman Institution is prohibited to serve in certain positions in the country. According to the provisions in Section 5, of the *Nationale Ombudsman Act*, the Ombudsman members may not: a) be a member of a public body for which elections are prescribed by law; b) hold public office for which he receives a fixed salary or remuneration; c) be a member of a permanent government advisory body; d) act as an advocate, solicitor, or notary. Nevertheless, the Ombudsman is allowed to make contact with the investigated individuals, either through written letter or verbal communication through telephone and interviews during performance of its duties.

#### **d. Jurisdiction**

Until now, the authority of the Ombudsman in the Netherlands is limited to the actions of ministers, in so far as it relates to the execution of the tasks required under the legislation related to the Police, the Commissioner from the Queen in the Province, and the Mayor. An act of an employee, conducted during the execution of its functions, is considered as an act from the administrative agency where he serves. An ombudsman is also not authorized to perform an inspection of an action, if it is open to appeal or has not received confirmation, or also if a judge has to say a decision.<sup>46</sup>

Ombudsman institution in the Netherlands is one of several kinds of legal protection agencies.<sup>47</sup> The main task of the *Nationale Ombudsman* is investigating the actions and behavior as well as the performance of government agencies, and assessing the behavior to improve the government. This investigation is based on a complaint, or conducted at the initiative of the Ombudsman members themselves. The authority of the Ombudsman includes the investigation of the behavior of ministers, police officers, and other bureaucrats to the board of (rector) university. Examination of ministers, police officers, and other bureaucrats by the Ombudsman is not solely based on the rule of law, but rather is based on considerations of propriety, decency, and balance (*behoorlijkheid, redelijkheid en evenwicht van belangen*).<sup>48</sup>

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<sup>45</sup> *Ibid.*

<sup>46</sup> Philipus M. Hadjon (et. al.), *Pengantar Hukum Administrasi Indonesia*, Yohyakarta: Gadjah Mada University Press, 1994, p. 304.

<sup>47</sup> A full description of the Ombudsman institution in the Netherlands can be found in some of the literature, including: E. Helder, *Ombudsman en administratieve Rechtsbescherming*, Universiteit Twente, Faculteit der Bestuurskunde, 1989; J.B.J.M. Ten Berge, *Bescherming tegen de Overheid*, Nederlands Instituut voor Sociaal en Economisch Recht NISER, 1995, pp. 309-325; J.G. Brouwer and A.E. Scelder, *A Survey of Dutch Administrative Law*, Ars Aequi Libri-Nijmegen, 1998, p. 86.

<sup>48</sup> Sunaryati Hartono, *Op.cit.*, p. 7; See also G.H. Addink, "The Functions and the Competencies of The Dutch Ombudsman", *Paper presented at Ombudsman Workshop*, Faculty of Law, University of Airlangga, Surabaya, 5-7 Oktober 2000, p. 3-5.

In addition to overseeing the function of executive power (except the Head of State), *Nationale* Ombudsman also oversees judicial authorities in carrying out of their duties even without authorization to interfere with the case investigation by a judge. If the judge has allegedly received bribes, or does not provide equal opportunities to both parties who are deliberately stalling the inspection, then *Nationale* Ombudsman may send a letter to the President of the Court who examines the complaint in question. The Court answered the letter *Nationale* Ombudsman with mentioning what actions have been taken against the errant judges. If a police officer or prosecutor does not behave to an accused or a witness or his family, they can also send a petition to the *Nationale* Ombudsman.<sup>49</sup>

Notwithstanding that, *Nationale* Ombudsman is not authorized to conduct an interrogation if it is related with general government policy or regulation binding. *Nationale* Ombudsman also cannot examine the behavior (behavior) of municipal employees (Municipal),<sup>50</sup> because the township is allowed to set up their own Ombudsman.

#### e. Basic Complaints

Ombudsman in Netherlands is different from the Ombudsman in countries such as the UK which judges the criteria of maladministration, or in Sweden whose assessment is based on the violation of law and human rights. *Nationale* Ombudsman's assessment is focused on the behavior of government officials, which is based on propriety (proper or not proper). It is expressly stated in Article 26, point 1 of *Nationale* Ombudsman Act: "The Ombudsman shall determine whether or not the administrative authority acts properly in the matter under investigation". Regarding this, Philip M. Hadjon explains, that the Ombudsman does not concern itself with the protection of the law in the real sense, but tests the actions based on the norm of decency.<sup>51</sup>

From the above explanation, it can be concluded that the characteristics of *Nationale* Ombudsman are as follow:

**Tabel 4. Characteristics of the Netherland Ombudsman**

1. Name	Nationale Ombudsman
2. The first establishment	January 1 <sup>st</sup> , 1982
3. Legal basis	<i>Nationale</i> Ombudsman Act, 1981, since March 25, 1999 by the Dutch Constitution (Chapter 4, Article 78a)
4. Appointment of the Ombudsman	House of Commons, upon the recommendation/recommendation of the deputy chairman of the Council of State, the Supreme Court ( <i>Hoge Raad</i> ) and Chairman of the <i>Algemene Rekenkamer</i> (Netherlands Court of Audit)

<sup>49</sup> Sunaryati Hartono, *Loc.cit.*

<sup>50</sup> J.G.Brouwer and A. E., Schilder, *Loc.cit.*

<sup>51</sup> Philipus M. Hadjon (et. al.), *Op.cit.*, p.303.

5. Term	Six years, may be dismissed at any time by the lower house in accordance with the reasons regulated by the law.
6. Duty	Conducting investigations on the behavior of government officials and employees (administrative authority) deemed inappropriate.
7. Jurisdiction	Just checking complaints on government behavior, but there is no authority as a public prosecutor. Possessing no arbitrary acts of the trial judge overseeing attitude of Parliament and the Council of State.
8. Basic complaints	Proper action or " <i>behoorlijkheid</i> ", or decent behavior.
9. Position	Parliamentary Ombudsman

### E. Conclusion

From the description it is known in advance that the Ombudsman of the Republic of Indonesia has its own characteristics that are not similar with the Ombudsman in other countries such as Sweden Ombudsman, English Ombudsman, French Ombudsman and Dutch Ombudsman. The differences are associated with the name of the institution, means of appointment, authority, basic settings, tenure, and institutional status in each country.

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