

LEGAL PROBLEMS OF THE AUTHORITY OF THE OMBUDSMAN INSTITUTION IN THE CONSTITUTIONAL SYSTEM OF THE REPUBLIC OF INDONESIA

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Abstract

Legal Problems of the Authority of the Ombudsman Institution in the Constitutional System of the Republic of Indonesia. The purpose of this study is to analyze: What is the position of the Ombudsman of the Republic of Indonesia in the constitutional system of the Republic of Indonesia? How is the Ombudsman of the Republic of Indonesia in the authority of law enforcement in Indonesia. The research method used is empirical juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) The position of the Ombudsman of the Republic of Indonesia in the constitutional system of the Republic of Indonesia is that the Ombudsman is one of the additional state institutions or *secondary* or *extra auxiliary* institutions, namely state institutions formed outside the constitution in this case the 1945 Constitution. Thus, the Ombudsman answers the demands of the community for the creation of democratic principles in every administration of government through an accountable, independent, trustworthy and free from political interference. 2) The non-regulation of the Ombudsman in the constitution in this case the Constitution creates a loophole for the position of the Ombudsman in the constitutional system of the Republic of Indonesia that there is no guarantee that the Ombudsman institution as a state institution is permanent and not easily dissolved, except by amending the State Constitution of 1945. In relation to the duties and authorities of the Ombudsman, the Ombudsman's recommendations are more than ordinary advice to Government Officials or State Administrators on what should be done to improve the services complained by the community, both case-by-case and systematic. So the Ombudsman's recommendation is not a *legally binding court decision*, it does not mean that it can be simply ignored, because there are other binding mechanisms that protect the Ombudsman's recommendation, besides moral binding, namely political attractiveness

Keywords: Problematic, Law, Authority, Institution, Ombudsman, Constitutional System.

INTRODUCTION

Background

In the administration of government, one of the tasks of the government in the administration of government is to improve public services. One of the institutions that oversees public service providers is the Ombudsman of the Republic of Indonesia (hereinafter referred to as the Ombudsman). With regard to state equipment, when connected with the 1945 Constitution, it clearly distinguishes the branches of state power in the legislative, executive, and judicial fields which are reflected in the functions of the MPR, DPR, DPD, President and Vice President, as well as the Supreme Court, Constitutional Court, and Financial Audit Board as the main state institutions.¹

Based on Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia Article 1 point 1, the Ombudsman of the Republic of Indonesia, hereinafter referred to as the Ombudsman, is a state institution that has the authority to oversee the implementation of public services both organized by state and government administrators including those organized by State-Owned Enterprises (BUMN), Regional-Owned Enterprises (BUMD), and State-Owned Legal Entities (BHMN) as well as private entities or individuals who are tasked with carrying out certain public services whose funds are partly or fully sourced from the state budget and/or regional revenue and expenditure budget. The Ombudsman is closely related to two things, namely, public services and *good governance*.²

The Ombudsman as a supervisory body for public service providers in carrying out its role to support *good governance*, carries out its duties by receiving reports / complaints from every Indonesian citizen or resident against allegations of maladministration committed by state administrators.³ The Ombudsman has an important role in the realization of good governance principles in the framework of public *services*.⁴

The Ombudsman functions to oversee public administration organized by the organizers and the government both at the central and regional levels. In terms of examination of reports, there is also a fundamental change because the ombudsman is given great authority and has subpoena power; recommendations, investigations, and criminal sanctions for obstructing the Ombudsman in handling reports.⁵

Objectively the Ombudsman in Indonesia needs an adequate juridical foundation, it is important because it will strengthen the operational basis of the Ombudsman's existence in Indonesia. Politically, the position of the law is vulnerable and easy to replace or repeal. This has resulted in some people doubting the independence of the Ombudsman. State administrators also became less appreciative of the Ombudsman. They consider the oversight mandate given to the Ombudsman its legal basis to be weak. The Ombudsman, in exercising its authority, does not have the authority to prosecute or impose sanctions on reported agencies, but provides recommendations to agencies to make *self-corrections*. The nature of the Ombudsman's recommendations is non-binding and cannot be forced to execute⁶

The authority of the Ombudsman as stipulated in Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia is still considered very limited, especially in resolving reports of maladministration in the provision of public services. These maladministration matters are one of the causes for the emergence of inefficient, bad and inadequate government.⁷ not to mention the authority of the Ombudsman which sometimes still clashes with other supervisory institutions that can weaken the Ombudsman's mechanism, so that the Ombudsman cannot carry out its duties and authority optimally.

The absence of regulation in the Ombudsman Law on the position of mandatory Recommendations or other strict action for Reported Persons who do not implement the Ombudsman Recommendations is a problem in itself. Then in terms of supervising authority, there is no limit to the Ombudsman in supervising the implementation of public services and there is no limit to which organizers.⁸

Problem Statement

1. What is the position of the Ombudsman of the Republic of Indonesia in the constitutional system of the Republic of Indonesia?
2. How is the Ombudsman of the Republic of Indonesia in the authority of law enforcement in Indonesia?

THEORETICAL FRAMEWORK

1. Surveillance Theory

Literally grammatically, the word "control" means supervision, examination and control. George R. Terry defines control as determining what has been achieved, evaluating and implementing corrective actions, if necessary, ensuring results are in accordance with the plan.⁹ Supervision is the process of activities that compare what is carried out, carried out, or carried out with what is desired, planned, or ordered. The results of surveillance have legal consequences, but most are political, administrative (administrative, organizational, managerial, operational), or technical-functional.¹⁰

Meanwhile, in terms of state administrative law, supervision is defined as "the process of activities that compare what is carried out, carried out, or held with what is desired, planned, or ordered. In the context of building public government management characterized by *good governance*, supervision is an important aspect to keep government functions running as they should. In this context, supervision becomes as important as the implementation of *good governance* itself. In relation to public accountability, supervision is one way to build and maintain the legitimacy of citizens on government performance by creating an effective supervision system, both internal control and *external control*. In addition to encouraging community supervision (*social control*).¹¹

2. Authority Theory

Authority or authority is a term commonly used in the field of public law. But there is actually a difference between the two. Authority is what is called "formal power", power derived from power granted by law or legislature from executive or administrative power. Therefore, it is the power of a certain group of people or power over a certain field of government or government affairs that is unanimous. While authority is only about a certain part of authority. Authority is the right to give orders, and the power to ask is obeyed.

According to Bagir Manan, authority in the language of law is not the same as power (*macht*). Power simply describes the right to do or not to do. In law, authority at once means rights and obligations (*rechten en plichten*).

Right contains the notion of power to self-govern (*zelfregelen*) and *self-manage* (*zelfbesturen*), while horizontal obligation means the power to administer government as it should. Vertical means the power to run the government in an orderly bond of government of the country as a whole.

Theoretically, the authority derived from the laws and regulations is obtained through two ways, namely attribution, and delegation of authority in the form of delegation and mandate. Attribution is the authority attached to a position. In the review of constitutional law, this attribution is shown in the authority possessed by government organs in running their government based on the authority established by lawmakers. These spark plugs refer to the original authority on the basis of the constitution (UUD) or laws and regulations.¹²

RESEARCH METHODOLOGY

This type of research is a type of research that is juridical normative or legal research that is normative. Normative juridical legal research or normative legal research is research that discusses legal history and comparative law.¹³ more about normative legal research, namely research that has the object of study of rules or legal rules. Normative legal research examines legal rules or regulations as a system building related to a legal event. This research was conducted with the intention of providing legal argumentation as a basis for determining whether an event has been true or false according to law.¹⁴

The type of research that the author uses in the preparation of this writing is normative legal research or literature, namely legal research carried out by examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Normative legal research or literature includes research on legal principles, research on legal systematics, research on the level of verbal and horizontal synchronization, legal history and legal comparison.¹⁵

RESEARCH RESULTS

A. The position of the Ombudsman of the Republic of Indonesia in the constitutional system of the Republic of Indonesia

The presence of the Ombudsman in the lives of Indonesian people is a dream for every citizen, this is because this institution is one of the institutions that control the actions of government officials, in addition to being a public service institution.¹⁶The implementation of public services is one of the objects of the Ombudsman in conducting supervision.¹⁷

The Ombudsman is an institution that actually originated in Sweden, which today has developed in such a way, that all over the world there have been various kinds. From the way of appointment, there is an Ombudsman appointed by the Head of State, some are appointed by the House of Representatives. The purpose of the Ombudsman institution is to be able to provide access to the general public who feel disadvantaged as a result of poor service practices in the relevant institution.¹⁸

In our constitution Article 1 paragraph (3) states that, "The State of Indonesia is a state of law". It has been expressly stated in the constitution as the highest law that Indonesia is a state of law. The spirit to place the law as the spearhead of this legal reform, in principle, has the aim that the law can take its role as the commander of democratic reform.¹⁹

The regulation regarding the Ombudsman as a state institution that oversees the implementation of public services is a state institution that is not regulated in the 1945 Constitution. Its birth was carried out by law in order to supervise the performance of the state and government apparatus and accommodate public complaints. In Law No. 37 of 2008 Article 1 says, "The Ombudsman of the Republic of Indonesia, hereinafter referred to as the Ombudsman, is a state institution that has the authority to supervise the implementation of public services both organized by state and government administrators including those organized by State-Owned Enterprises, Regional-Owned Enterprises and State-Owned Legal Entities as well as private entities or individuals assigned the task of carrying out certain public services Some or all of the funds are sourced from the State Budget and/or Regional Revenue and Expenditure Budget."

In Law of the Republic of Indonesia No. 37 of 2008 concerning the Ombudsman of the Republic of Indonesia in Article 2 states, "That the Ombudsman is a state institution that is independent and does not have an organic relationship with state institutions and other government agencies and in carrying out its duties and authorities is free from interference from other powers".²⁰

The purpose of establishing the Ombudsman is to help create and/or develop conducive conditions in carrying out the eradication of corruption, collusion, and nepotism through community participation. The purpose of establishing an Ombudsman is also to improve the protection of people's rights to better public services, justice, and welfare. To realize this goal, the Ombudsman is given the main task, among others, to take steps to follow up reports or information regarding irregularities by state administrators in carrying out their duties and in providing public services.²¹

The purpose of establishing an ombudsman institution is also stated in Law No. 37 of 2008 in consideration letter c says that: "By taking into account the aspirations that develop in society in order to realize an effective and efficient state and government administration apparatus, honest, clean, open and free from corruption, collusion, and nepotism, it is necessary to establish an ombudsman institution of the Republic of Indonesia." From there it is very clear that the Ombudsman is present in order to meet the needs of the community in protecting the right to public services that are effective and efficient, honest, clean, open and free from corruption, collusion, and nepotism.

From the point of view of constitutional law, from the provisions of Law No. 37 of 2008 Article 1, it can be seen that the Ombudsman is expected to have an equal position with state institutions such as; President, People's Consultative Assembly (MPR), House of Representatives (DPR), Audit Board (BPK), Supreme Court (MA), Constitutional Court (MK), Judicial Commission (KY), General Elections Commission (KPU).²²

The system of division of state power based on the 1945 Constitution after the fourth amendment no longer adheres to hierarchical structural principles but is functional and aligned, interrelated with each other and can control each other (*check and balances system*), so the Ombudsman has an equal position with other state institutions.²³

The Ombudsman's checks function is a typical administrative function, that is, an inspector function (in the administration of public administration) that can move in many directions, including *vertical checks* upwards. The functions of conventional state institutions, namely executive, legislative and judicial functions require a permanent inspector function as a *counterpart* (balancing element) in strengthening the implementation of democracy and constitutionalism.²⁴

Under these conditions, objectively the Ombudsman in Indonesia urgently needs an adequate juridical foundation. Laws made by the legislature and Presidential Decrees alone are not strong enough to serve as a juridical basis for the position of the Ombudsman in Indonesia. Politically, the position of Laws and Presidential Decrees is vulnerable and easy to replace or repeal. This has resulted in some people doubting the independence of the Ombudsman.²⁵

State institutions that are formed outside the constitution are often referred to as *extra auxiliary* state institutions. The emergence of *state auxiliary institutions* is also intended to answer the demands of the community for the creation of democratic principles in every administration of government through accountable, independent, trustworthy and free from political interest. thus the position of the Ombudsman as a state institution in the constitutional system of the Republic of Indonesia is independent, independent, and free from interference from other powers.

The ombudsman also has no organic structural relationship either as a superior or subordinate of another institution. In carrying out its duties and authorities, it is free from interference from other powers. Because the Ombudsman is a state institution, not a government institution. So that it is truly an institution that is structurally, functionally, and financially independent.²⁶

The position of the Ombudsman institution in the Indonesian constitutional system can be said to be equal and not under the influence of any power and is independent like other independent state institutions. The Ombudsman is also one of the supporting institutions that can be said to be very vital in fulfilling the state's function in realizing state goals, namely social welfare or public interest.

The Ombudsman is one of the additional state institutions or secondary institutions, namely state institutions established outside the Constitution. State institutions whose formation is outside the Constitution are often called additional state institutions or secondary state institutions, in the sense that they are state institutions that are not contained in the constitution, but are formed through laws, and their existence is facultative, that is, there can be or is not at all will not cause a state to be unable to carry out its functions.²⁷

In order to encourage an effective and professional judicial system, the Ombudsman can be given the function to monitor the conduct of independent trials (on the basis of public complaints) and be active in the process of appointing Supreme Court justices and other authorities in order to maintain and uphold the honor, nobility, dignity, and conduct of judges. With the scope expands the authority of the Ombudsman, which is in line with the naming and functioning of his powers.²⁸

To reach the duties and functions of supervision, as well as accommodate community complaints to the regions, by Law Number 37 of 2008, the Ombudsman is given the freedom to form regional representatives or with other terms that exist now must gradually be integrated into an extension (representative) of the Ombudsman of the Republic of Indonesia. Thus supervision will be well structured and coordinated regarding standards, mechanisms, procedures, facility support and others. The existence of the Ombudsman of the Republic of Indonesia in the Indonesian constitutional system according to the concept of power sharing in principle acts as a state institution that carries out the function of supervision of public services organized by state administrators. With such duties and functions, the existence of the Indonesian Ombudsman is very vital in fulfilling the protection and welfare of the community as part of state goals. As contained in the implementation of the principles of *Good Governance*.²⁹

B. Ombudsman of the Republic of Indonesia in law enforcement authority in Indonesia

Service to the community and law enforcement are also carried out in the context of state administration and government is an inseparable part of efforts to create a better, cleaner and more efficient government (*clean and good Governance*) in order to improve welfare and create justice and legal certainty for all citizens as referred to in the Constitution of the Republic of Indonesia Year 1945.³⁰

The non-regulation of the Ombudsman in the constitution in this case the Constitution creates a loophole for the position of the Ombudsman in the constitutional system of the Republic of Indonesia that there is no guarantee that the Ombudsman institution as a state institution is permanent and not easily dissolved, except by amending the State Constitution of 1945. Objectively the Ombudsman in Indonesia needs an adequate juridical foundation, it is important because it will strengthen the operational basis of the Ombudsman's existence in Indonesia.³¹

Hendra Nurtjahjo also sees the importance of the Ombudsman as stipulated in the 1945 Constitution, reasoning: "**First**, it is important for the Ombudsman to be a primary institution to achieve state goals. The purpose of forming a state organization and its apparatus is to serve citizens. Citizens deserve good administrative services through good governance.

Good administrative services through good governance can take place with intensive supervision of complaining citizens through the Ombudsman. **Second**, the Ombudsman's supervisory norms can be categorized as basic norms in the structure of state legal norms (*legal orders*) which are the main substance of the constitution.

The element of supervision is a fundamental and inherent element in the management of an organization, including state organizations. Third, the existence of the Ombudsman contributes a permanent balancing role to conventional branches of power. Bureaucracy of executive, judicial, and legislative institutions requires external security because bureaucracy or administrative processes are an essential part of an institution.³²

The importance of the Ombudsman arrangement in the structure of state institutions regulated in the 1945 Constitution is based on legal arguments:

- a) The Ombudsman Institute is a public service supervisory institution that aims to realize the welfare of the people who have been aspired to by the founding fathers of the Unitary State of the Republic of Indonesia.
- b) There is a guarantee that the Ombudsman institution is a permanent state institution and is not easily dissolved, except by amending the 1945 Constitution.
- c) Make a match between the structure of the Ombudsman institution and the substance of public services that are the object of its supervision which has been regulated in the provisions of the basic norms of the 1945 Constitution.
- d) Further strengthen legitimacy structurally as a state institution so that the legal products it decides will also be more likely to be obeyed by the state apparatus it faces.

Increasing the quality and quantity of tasks that must be carried out by local governments, consequently the need for a more intensive and effective supervision system to correct the occurrence of maladministration practices, which can be carried out by unscrupulous local government officials in exercising their authority. This requires that the function of the Ombudsman, both National and Regional, to supervise the government is increasing, both in terms of quantity and quality of supervision.

The increase in supervision of the Ombudsman in terms of quantity is a consequence of the expansion of government functions (*besturen*). Both National and Regional Ombudsman is one of the subsystems of the supervision system carried out on state administrative officials in the regions. The increasing quantity of government affairs that must be carried out by local governments, has the potential to cause maladministration that harms the people, if local government officials commit administrative actions that violate the rules and principles of the implementation of government functions. The public has the right to make complaints related to the occurrence of maladministration that occurs provided that reports that may be handled by the Ombudsman must be clearly identified (the Ombudsman does not serve canned mail), The substance reported is the authority of the Ombudsman, The report is accompanied by chronological and brief data, Submitted in simple language, does not have to use legal language. After that, the Ombudsman conducts an examination of reports from the community.³³ regarding the supervisory mechanism by the ombudsman, according to the provisions of article 25 of Law No.37 of 2008 concerning the Ombudsman of the Republic of Indonesia, states that:

- a. The ombudsman examines the reports referred to in article 24
- b. In the event that the report referred to in paragraph (1) contains deficiencies, the ombudsman notifies the reporter in writing to complete the report;
- c. The reporter must complete the report file no later than 30 (thirty) days from the date the reporter receives notification from the ombudsman;
- d. In the event that the report is not completed within the time referred to in paragraph (3), the reporter is deemed to withdraw the report.

Furthermore, the provisions of article 26 state:

- a. In the event that the report file referred to in article 25 is declared complete, the ombudsman immediately conducts a substantive examination;
- b. Based on the results of the substantive examination referred to in paragraph (1), the ombudsman may determine that the ombudsman:
 1. Not authorized to continue the examination; or
 2. Authorized to continue the examination³⁴

Law No. 37 of 2008 in Articles 7 and 8 regulates the duties and authorities of the Ombudsman of the Republic of Indonesia. The Ombudsman of the Republic of Indonesia is tasked with:

- a. Receive reports on allegations of maladministration in the delivery of public services
- b. Conduct a substance check on the report.
- c. Follow up on reports that fall within the scope of the Ombudsman's authority.
- d. Conduct self-initiated investigations into allegations of maladministration in the delivery of public services.
- e. Coordinating and cooperating with state institutions or other government institutions as well as community institutions and individuals.
- f. Build a working network.
- g. Conduct efforts to prevent maladministration in the provision of public services.
- h. Perform other duties provided by law.

The results of the examination from the Ombudsman can be in the form of Reports rejected and Reports accepted and provide Recommendations. While the report received will be given a Recommendation. Recommendations are defined as suggestions, but sometimes they are interpreted as advice. In relation to the duties and authorities of the Ombudsman, the Ombudsman's recommendations are more than ordinary advice to Government Officials or State Administrators on what should be done to improve the services complained by the community, both case-by-case and systematic. So the Ombudsman's recommendation is not a *legally binding court decision*, it does not mean that it can be simply ignored, because there is another binding mechanism that protects the Ombudsman's recommendation, besides moral binding, namely political binding.³⁵ In many countries, in the event that the Ombudsman's recommendations are not met by the reporter, the Ombudsman may submit a special report to the House of Representatives (palemen). Parliament will respond earnestly. The relevant Parliamentary Commission – for example *the "Select Commettee"* in the Parliament of the United Kingdom - will discuss and debate the matter after hearing both sides, namely the Ombudsman and the "dissident" agency or official. In such hearings, by and large, the Ombudsman is the winning party. Inevitably, the losing party, namely the reported agency or official, must comply with the recommendations of the Ombudsman.³⁶

To enforce Law No. 37 of 2008, administrative and criminal sanctions are also regulated. Administrative sanctions are imposed on the reported person and the reported supervisor who do not implement the ombudsman's recommendations, while criminal sanctions are imposed on anyone who obstructs the ombudsman from conducting investigations. Thus, the legal force of the ombudsman's recommendation is further strengthened in order to realize justice for the people of Indonesia. In many countries, the ombudsman's recommendations are only *morally binding*, in Indonesia they are *legally binding*.³⁷ The Ombudsman, which is expected to be the pillar of maintaining the cleanliness of government administration institutions from the village level to the central government, is only limited to recommendations, not law enforcement sanctions, further Bagir Manan believes that law enforcement revitalization is needed to realize comprehensive, fundamental, effective, efficient, and productive law enforcement, as a path to quality, appropriate, and correct law enforcement.³⁸

The target of law enforcement by the Ombudsman according to Prajudi Atmosudirdjo is all levels of the state apparatus, government apparatus, or as a political institution (state), in carrying out its function as a state administrator (*bestuur*) or as a "function" or as an activity serving the government and society, namely as an "operational government" activity or in other words state administration as a technical process of implementing laws.³⁹

CONCLUSION

The results showed that;

- a. The position of the Ombudsman of the Republic of Indonesia in the constitutional system of the Republic of Indonesia is that the Ombudsman is one of the additional *state institutions or secondary or extra auxiliary* institutions, namely state institutions established outside the constitution in this case the 1945 Constitution. Thus, the Ombudsman answers the demands of the community for the creation of democratic principles in every administration of government through an accountable, independent, trustworthy and free from political interference.
- b. The non-regulation of the Ombudsman in the constitution in this case the Constitution creates a loophole for the position of the Ombudsman in the constitutional system of the Republic of Indonesia that there is no guarantee that the Ombudsman institution as a state institution is permanent and not easily dissolved, except by amending the State Constitution of 1945. In relation to the duties and authorities of the Ombudsman, the Ombudsman's recommendations are more than ordinary advice to Government Officials or State Administrators on what should be done to improve the services complained by the community, both case-by-case and systematic. So the Ombudsman's recommendation is not a *legally binding court decision*, it does not mean that it can be simply ignored, because there is another binding mechanism that protects the Ombudsman's recommendation, besides moral binding, namely political binding.

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