THE RECOMMENDATION OR THE ADJUDICATION AUTHORITY OF THE OMBUDSMAN OF THE REPUBLIC OF INDONESIA

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ABSTRACT

This research investigates the Ombudsman recommendations as the improvement of the maladministration’s prevention and the efforts that against government agencies which do not implemented their duties. This juridical-normative research uses four kinds of approach like statute, historical, conceptual and comparative approach. The Ombudsman’s existence after 19 years establishment can be said hasn’t fully work as that institution expectation. The responsibility to accept all complaint about maladministration especially in public services just relied only by issues the recommendations about conclusions and suggestions. Ombudsman doesn’t has the authority to execute the result of their investigations, so that the rules of recommendation’s implementation are weak. The 2016-2020 period’s recommendation haven’t implemented optimal enough. Therefore, recommendations as the improvement of the maladministration’s prevention need to equalizing the perspective and detailed the implementation rules, so that a stronger legal protection about the position and also the function of its recommendations can be achieving prosperity.

Key Words: ombudsman recommendation; prevention of maladministration.

INTRODUCTION

In 1713 the Ombudsman was known in Sweden, and King Charles XII who was instituted the Hogste Ombudsman. Then Finlandia was introduced the Ombudsman in 1919 with almost same legal system as Sweden. Then in 1952 was Norway and also Denmark was established the Ombudsman in 1953. The Ombudsman grew rapidly from Scandinavia to several other countries such as Europe, Africa, America and Asia. Whereas in 1967 the Ombudsman of Great Britain had limited powers so that many people were dissatisfied with its administration. Therefore, the International Ombudsman Institute was formed (Firstia, 2020).
The Ombudsman of the Republic of Indonesia was present due to the lack of supervision in some supervisory forums for the governments. The establishment of supervisory forums such as the Inspectorate General and regional supervisory bodies aims to reduce deflections in the delivery of public services. However, this forum is only structurally positioned and not independent and does not include citizens, so the formation of an Ombudsman is very necessary to balance the legislative, executive, and judicial powers (Sujata, 2002).

The government's effort to realize a good governance system was formed by the National Ombudsman Commission during the reign of President Abudurrahman Wahid based on "Presidential Decree No. 44 of 2000". Then the regulation was strengthened by a "Law Number 37 of 2008" concerning the Ombudsman of the Republic of Indonesia (Solechan, 2018). According to Satjipto Rahardjo, explaining that the Ombudsman institution in Indonesia is very important and it can be used as public oversight of the government. If things happen that are not desirable, such as state administrators acting arbitrarily so that with the concept of a welfare state, this will provide a great opportunity for the government to realize the ideals of the community (Yusriwan, Taqwaddin & Efendi, 2018).

This institution has duty to complete the reports for maladministration in the implementation of public services, also compensation or rehabilitation to whistleblowers that have been harmed. The Ombudsman in implement it duties is prioritizes a persuasive approach if there are allegations of maladministration violations or abuse of power in public services, therefore this approach can increase the awareness of the agency to complete the maladministration report itself. However, all reports is completed by recommendations.

Since the Law Number 25 of 2009 about Public Services was presented, the character of the Ombudsman has changed. The law has gives it the special adjudication authority, so that public service providers have an independent third party in resolving violations of public and community services (Asyahtri, 2009). Special adjudication is a settlement of compensation. The provisions
intended in the settlement of compensation in the form of compensation if it cannot be resolved by means of mediation and conciliation. Article 50 Section (6) has explained "That the special Adjudication as referred to Section (5) is carried out no later than 5 (five) years since this law is promulgated”. But in fact the Ombudsman of the republic of Indonesia is can’t implement it because a presidential regulation has not been issued so that special adjudication cannot be implemented.

The basic theoretical as an analytical tool to answer the problem is: the Welfare State which means that the welfare of the community is the responsibility of the state. Welfare State has a meaning such as maintaining and participating in raising the economic and social welfare of its community (Alfitri, 2012). This theory explains that the government as the represents of the state to responsible the services for its community. Therefore, public service is one way to achieve prosperity by providing services according to procedures without arbitrarily.

According to the law, the Ombudsman only can provide the advice or suggestions as a recommendation to the reported party or the reported supervisor, it is to improve the performance of the state institutions. According to the Law, the Ombudsman recommendations must be implement by the reported party and the reported supervisor. Both who do not implement the Ombudsman recommendation will get the punishment. However, the Ombudsman as a supervisory institution in implementing recommendations cannot provide the absolute punishment, but only conveys to superiors or the president and the House of Representatives to follow up if state administrators do not implement the recommendations. So that the state institutions still consider the Ombudsman as an institution that does not have strong power to provide the absolute punishment. These are some of the weaknesses of the Ombudsman as an independent institution authorized to supervise and overcome maladministration in public services.

Since 2019, based on data from the reported institutions of the Ombudsman revealed cases of maladministration that are often complained by the public about public services is the local
governments, government agencies/ministries and the police (Ombudsman RI, 2020). The Ombudsman of the Republic of Indonesia from 2014 to 2018 has issued 34 recommendations to some institutions/ministries and regional heads, but of these, not all of the recommendations by the ministry or agency have been implemented. It is only 12 have been partially implemented and 10 which haven’t yet (Farisa, 2020). As for the reports received by the Ombudsman, only a few were completed with recommendations.

This independent institution has other weaknesses such as not really being a supervisor to reduce the maladministration. The Ombudsman does not have the authority to demand or impose sanctions directly on the reported institution, but the it recommendations only self-correction. So that the Ombudsman recommendation is non-binding and cannot be forced to be executed (Asmara, 2016). As a result, the Ombudsman recommendations are often ignored by state institution. This incident confirms that the implementation of administrative sanctions also does not have strong executorial powers. Thus, the recommendation of the Ombudsman of the Republic of Indonesia as stated above, it is clear that there is a legal imbalance, and also a clash between das sein and das sollen when it is associated with positive law.

On other hand, the existence of the Folketinggets Ombudsman Denmark so far, its existence is highly recognized. Because the results of the investigation issued in Denmark in following up on complaints from the public are not only moral binding but also legal binding. the Folketinggets Ombudsman Denmark can sue if the advice or advice given to the relevant agencies is not carried out properly. So the recommendations that have been issued must be responded to in accordance with what was requested. Meanwhile, the recommendations issued by the Ombudsman of the Republic of Indonesia are only interpreted as suggestions or can also be interpreted as advice that given to state administrators which should be improved in public services that are often complained by the public (Fikri & Hadi, 2020). Indonesia has the biggest challenge that must be faced at this time is how to build the integrity so that the majority of the people want to cooperate with the
government to comply with the rules and be developed through programs that provide welfare to many people, or by providing the best service to the community. Based on the description, it is known that the settlement with the Ombudsman recommendation is not really legally binding because there are still state officials who do not implement the Ombudsman recommendation. So it is interesting for researcher to examine in more detail about “the Ombudsman recommendations as the improvement of the prevention of maladministration also the efforts that it can take against the government which do not implement it.”

According to the literature review there are several previous studies that examine about the Ombudsman recommendations. First "Principle of Legal Politics of Non-Legally Binding Recommendations of the Ombudsman of the Republic of Indonesia as an Instrument for Prevention and Handling of Maladministration Reports" (Arianto, 2019) This study discusses the recommendations of the Ombudsman of the Republic of Indonesia which are not legally binding, the results of this study state that solving public service problems through adjudication the Ombudsman issued is only a recommendation, because the Ombudsman is not a court institution or forum such as arbitration. The resolution of the Ombudsman of the Republic of Indonesia against maladministration actions through recommendations based on non-legally binding requires evaluation, because it is considered less effective in resolving problems and legal remedies such as imposing administrative sanctions are in fact not final and binding.

Second, "The Implementation of the Function of the Ombudsman of the Republic of Indonesia for Regional Heads in Organizing of Public Services" (Setiawan, 2019) This study discusses that based on the annual report of the Ombudsman of the Republic of Indonesia, the implementation of the Ombudsman recommendations to regional heads is considered to be still less than optimal, in the context of the legal rules that apply. Regulating the Ombudsman recommendation has binding legal force, because it is influenced by the low legal awareness of regional heads and the implementation of sanctions against regional heads who do not implement the Ombudsman
recommendations have been clearly regulated in the Regional Government Law, however it is still difficult to find the implementation of these sanctions.

Third, "The Ombudsman Recomendation by the State Administrators as a Form of Implementation of Good Governance Principles (Studies at the Ombudsman Representative Office of Central Java and the Ombudsman Representative Office of the Special Region of Yogyakarta)" (Devi, Adiyanta, & Sa’adah, 2019). related to this study discusses that the implementation of the recommendations The Ombudsman has not been fully implemented to its full potential because the time required to carry out the Ombudsman's recommendations is very long and the juridical consequences for public service providers who do not carry out their obligations can be given administrative sanctions and criminal sanctions according to the rules contained in the Act (Soekanto & Mamudji, 2008). While this research is different from the three researches above, this study analyzes the recommendations of the Ombudsman of the Republic of Indonesia to improve the prevention of maladministration actions because the Ombudsman has been considered an independent institution and wants to examine the efforts that can be given directly by the Ombudsman institution to government agencies that do not implement the Ombudsman recommendations.

RESEARCH METHODS

This paper is juridical-normative research by using statute approach, historical approach, conceptual approach, and comparative approach. The comparative approach in this research is used to prove the differences between the Ombudsman of the Republic of Indonesia and another country which has known the Ombudsman before than Indonesia. Such as Sweden, and a like. The authors obtained data various sources as follows: online interview with an expert on Indonesian Constitutional Law, and a like. Also online interview with several legal experts from related institution, such as head of prevention department at the Ombudsman of the Republic of Indonesia
Aceh Representative Office. The results of this interview have been sufficient both fact and theory in the process of writing this research. While this research is different from the three researches above, this study analysis the recommendations of the Ombudsman of the Republic of Indonesia as the improvement of the prevention of maladministration because the Ombudsman as an independent institution and to examine the efforts that can be given to government institution that do not implement it (Sugiyono, 2016).

**DISCUSSIONS AND ANALYSIS OF RESULTS**

Indonesia with all its government administration systems cannot be denied that maladministration in public services that leads to cases such as corruption can never be avoided. Because there is a high possibility of fraud such as corruption in the government bureaucracy, because there are still many things that are not known by the public. Even though in fact the form of abuse that is carried out seems to be part of an already regulated system. Such conditions lead to poor public services to the community. The Ombudsman recommendation does not have an executive value such as a legal decision, the existence of an Ombudsman recommendation has become an instrument at least to reduce arbitrary measures by government agencies that can lead to maladministration. With the Ombudsman recommendation, every decision or action of a government agency will certainly see the recommendation. Thus it can be argued that the Ombudsman's recommendation can be an instrument for preventing maladministration of government agencies (Abidin, 2021).

The welfare as understood based on the theory of the welfare state is not only achieved through economic development and social security that is based on the economy, but the welfare in question must also include public services that are easy, fast, and guaranteed transparency. Thus, the relevant principles of good governance contained in various laws and regulations can be achieved and are no longer aspired to. This is in line with the purpose of the Ombudsman in
Indonesia, whose existence is as a means of preventing maladministration in the Indonesian bureaucratic system, but the purpose and function can be said to have not been implemented properly.

Based on the provisions of the Ombudsman Regulation of the Republic of Indonesia, the efforts that can be made to agencies or public service providers who commit maladministration and have issued the recommendation, but do not implement them, are resolved by:

a. The Ombudsman approaches to the Parties

If the recommendation is not implemented by the reported party, then the Ombudsman will be delegated to the monitoring team first. So the task of this team is to make efforts such as inviting the parties who have been given the Final Examination Result Report (LAHP) to sit back or be found to discuss where the obstacles are, so that they do not carry out the recommendations. Therefore, the efforts made both at the representative office and at the center will be asked again to what extent and what has been implemented and where are the obstacles to the recommendation so that the reported party does not implement the recommendation (Muammar, 2021).

b. The Ombudsman Submits the reports to the House of Representatives and the President

The Ombudsman recommendations that have been issued, but it haven’t implemented yet for 60 days, the Ombudsman will disclose the recommendations to the reported superior about the behavior of the reported party who has ignored them. then after 90 days the reported superior still does not follow up, it will be report to the President of the Republic of Indonesia and the House of Representatives of the Republic of Indonesia.

c. Publication

Realizing the effective implementation of recommendations, it is very necessary to have a publication instrument. According to Niemeijer and Timmer, publicity is very important because it can be used as the formation of public opinion. Then Ten Berge saw that publication as a way for openness. The publicity discussed here acts as, first: as an intermediary tool and second: to be
known by the public and has the effect of being ashamed of having made a mistake (Spelt & Berge, 1991). Furthermore, publication can be carried out based on the rules for completing reports. Where the Ombudsman will publish the reported party that does not implement the recommendations with unacceptable information after given it some period of time. However, in fact this does not apply to the Ombudsman of the Republic of Indonesia, but applies to other countries. Tazmania is a country that shows that the instrument of publication through the mass media has a good impact on the executive Ombudsman in the country. Meanwhile, Indonesia is very sad that its state administrators still lack legal compliance and awareness (Harijanti, 2002).

d. The Administrative Sanction

Based on the Ombudsman Regulation of the Republic of Indonesia No. 26 of 2017 about Procedures for Receiving, Examination and Completion of Reports. Whereas the Reported Party do not implement the recommendations or implement some of the recommendations without proper reasons, so that the sanction is given to the reported party who does not implement the recommendations. Ninik Rahayu stated that a member of the Ombudsman of the Republic of Indonesia: "If based on the results of monitoring the Ombudsman get the reported party or the reported superior does not implement the recommendation, it will be published and reported to the DPR and the President."

Administrative sanctions can be given by the reported superior. The Ombudsman cannot execute but only monitoring, in this monitoring has the opportunity to encourage that the recommendation will be implemented, but if do not, then the central monitoring team will take care of it. If administrative sanctions can be given by the Ombudsman, it can facilitate to supervise the public services (Muammar, 2021).

The implementation of the Ombudsman recommendations will be effective if the reported that has morals such as stated in the General Principles of Good Governance. Even though it will eventually be released to the media, in the end the influence will return to the morals of each
official. So far, the Ombudsman has tried to make this settlement more into moral binding than legal binding, but what is meant by legal is the existence of a Final Examination Report, so that’s the legal form now (Muammar, 2021).

Another problem is the strength of the recommendations is widely doubted by various parties. So this cannot be measured as in a legal process or a court that can directly give a verdict of sanctions and execution of one of the parties found guilty. Therefore there is a difference between an Ombudsman and a legal process in court. Therefore, the Ombudsman is often referred to as the magistrate of influence, only using an influence approach.

So far, people only understand that the Ombudsman is an institution that can only provide advice or recommendations. Because it does not have coercive power, even though the rules for administrative sanctions have been regulated in law, but administrative sanctions here are clearly different from the practice in other countries such as Sweden, Ethiopia and New Zealand. Recommendations to that country are only morally binding. Because the state administrators have high public legal awareness. While in Indonesia the recommendations of the Ombudsman are morally and legally binding, but the public administrators lack legal awareness.

In practice in Indonesia, the Ombudsman recommendations are expected to resolve complaints reported by the public in order to improve the quality of public services and be followed by administrative sanctions that are proven to have deviated. The Ombudsman's recommendation is the final product. The formation of institutions that can assist the government is urgently needed to carry out supervision for itself and oversee public service providers. So that the implementation is based on democracy in order to realize prosperity, justice and legal certainty in accordance with what is meant by the 1945 Constitution of the Republic of Indonesia.

This problem has become a public concern where the Ombudsman of the republic of Indonesia has carried out according to its main duties and functions written in the law. However, the efforts made by the Ombudsman will be countered by the reported party/the reported superior and
will be in vain due to very minimal legal awareness. Then the absence of coercive power of the Ombudsman of the Republic of Indonesia should have implications when implementing these recommendations.

It is necessary to add several things so that the authority of the Ombudsman becomes stronger, namely: First, it has the authority to execute. Second, it has the authority to directly impose sanctions on agencies that commit maladministration, because so far it can only provide social sanctions. Third, special adjudication authority is needed which must be immediately regulated in the Ombudsman law. Where special adjudication is one of the efforts to resolve disputes between parties decided by the Ombudsman.

Therefore, if given additional authority (bevoegdheid) to the Ombudsman of the Republic of Indonesia, it will make progress when maladministration frequently occur so that it becomes a frightening specter for people who want prosperity. When you include the phrase “the Ombudsman can sanction the reported party or impose a large fine, so that it has very large authority”. So that the suggestions can make the reported party more carefully, and the Ombudsman efforts to reduce unwanted actions were achieved.

In essence, the Ombudsman recommendations didn’t able to solve the problems that occur in government agencies, especially in public services. The Ombudsman does not need to establish another institution to oversee the Ombudsman, because automatically the work of the Ombudsman is bound by law. However, social oversight and mechanisms need to be opened so that the public can monitor the performance of the Ombudsman.

CONCLUSIONS

The Ombudsman as a public service supervisory agency issues an instrument, namely recommendation. The decision issued is not the same as the court decision. The implementation of the recommendations in the last 5 years is still not optimal because there are still public service
providers who do not implement the Ombudsman recommendations because several obstacles such as the lack of awareness of the state administrators in adhering to the recommendations, due to lack of clarity about the sanctions, then the Ombudsman also does not have the authority to execute, the meaning that it is only able to provide the recommendations such as conclusions, opinions and suggestions. So that the weak rules governing the implementation of the Ombudsman recommendations is not obeyed and the poor of public services so far.

The settlement that is currently being made by the Ombudsman for the final product issued such as a recommendation and must be implemented, if it do not then the effort can be subject to administrative sanctions and criminal sanctions for those who hinder the investigation process by the Ombudsman. Then, the implementation of administrative sanctions by state institutions for will be effective when reported has morals as mentioned in the General Principles of Good Governance. Even though it will eventually be released to the media, in the end the influence will return to the morals of their respective officials. The Ombudsman does not have the authority to impose such administrative sanctions, which are entitled to give such sanctions to the superiors of the reported party.

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