

Regional Ombudsman as a Public Service Oversight Agency in Indonesia (Analysis of Constitutional Court of the Republic of Indonesia Decision Number 62/Puu-Viii/2010)



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ABSTRACT: This study aims to identify and analyse the recognition of Regional Ombudsman institutions in Indonesia that existed before establishing the National Ombudsman of the Republic of Indonesia. This qualitative descriptive research uses a normative juridical approach, specifically focusing on the conceptual approach, legislation, and court decisions. The research findings reveal that the enactment of Law No. 37 of 2008 on the Ombudsman of the Republic of Indonesia has sparked protests from several pre-existing regional Ombudsman institutions. This is because the Ombudsman Law regulates a prohibition on the use of the name "Ombudsman" by public service oversight agencies at the regional level, resulting in petitions for judicial review to the Constitutional Court of the Republic of Indonesia. In its verdict, the Constitutional Court declared that the state cannot monopolise the name "Ombudsman" as a public service oversight agency. The prohibition on establishing public service oversight agencies with the name "Ombudsman" other than the Ombudsman of the Republic of Indonesia, as stipulated in the a quo law, is not in line with the constitutional spirit and protections guaranteed by the Constitution. This includes the right to recognition, assurance, protection, fair legal certainty, and equal treatment before the law within the government. This prohibition is also contrary to the constitutional guarantee of the right of every individual to advance themselves collectively in pursuing their rights for the betterment of society, nation, and the state.

KEYWORDS: Ombudsman; Public Service Oversight; Constitutional Court.

A. INTRODUCTION

The Ombudsman institution in Indonesia was established as one of the anti-corruption measures, following recommendations from the People's Consultative Assembly (MPR). This was done through Decree (MPR) No. VIII of 2001 on Recommendations for the Direction of State Policies that are Clean and Free from Corruption, Collusion and Nepotism (KKN), which was specifically authorised to oversee the administration of public services (*vide* Article 1 point 1 of Law No.37 of 2008 on the Ombudsman of the Republic of Indonesia).

In general, the Ombudsman is known as an independent institution that deals with public complaints related to errors in public administration, also known as maladministration. This includes investigating strange decisions or actions by public officials, arbitrary conduct, abuse of authority, deviations or violations of provisions, undue delays, and breaches of propriety principles.

It's important to note that the Ombudsman's primary function is not solely dedicated to resolving public complaints on a case-by-case basis. Instead, the main focus is taking the initiative to specialise in administrative or systemic. This is done in an effort to improve the quality of public services.

The national Ombudsman does not exclusively handle public maladministration matters. Ombudsman institutions are also established by specific sectors within the community that deal with more specialised areas of work. For example, in the United Kingdom and Australia, there are industry-specific Ombudsman offices in addition to the national Ombudsman, such as those for banking, telecommunications, housing, hospitals, etc. Sweden has a press ombudsman established by journalist associations and the press industry, which effectively resolves public complaints arising from mass media reporting. In Indonesia, certain media publishers like Kompas and Jawa Pos have their own Ombudsman offices. The Press Council also serves as a press ombudsman to some extent (Taufiqurokhman, 2015).

The Ombudsman is an independent body that receives and investigates complaints about poor public administrative services. It does not compete with the courts or act as an appeal body for those who have lost in court (Pope, 2003).

Regional Ombudsman as a Public Service Oversight Agency in Indonesia (Analysis of Constitutional Court of the Republic of Indonesia Decision Number 62/Puu-Viii/2010)

The Ombudsman of the Republic of Indonesia (ORI) is an independent state institution without affiliation with any state, regional, or other institutions and is free from external interference. The Ombudsman of the Republic of Indonesia (ORI) was established with the aim of promoting clean governance at both central and regional levels in accordance with principles of good governance based on democratic, transparent, and accountable principles of the rule of law. Its mission is to ensure that every citizen and resident has access to justice, security, and better welfare through the improvement of state services across all sectors. In addition, ORI also plays an essential role in creating and enhancing efforts to prevent and eradicate maladministration practices such as discrimination, collusion, corruption, and nepotism. It also contributes to improving national legal culture, public legal awareness, and the rule of law, which is based on truth and justice (Law No. 37 of 2008).

Regarding Ombudsman services, the National Ombudsman may establish its representative offices in Provinces, Regencies, or Municipalities if deemed necessary or as required by law. These offices are an integral part of the National Ombudsman's office and are led by one of the Ombudsmen, assisted by several Assistant Ombudsmen and supported by Secretariat staff. The National Ombudsman Representatives in the region are bound by the same provisions regarding functions, duties, and authorities as the National Ombudsman.

The practice that occurred in Indonesia before the establishment of the National Ombudsman of the Republic of Indonesia (ORI) institution, with Law No. 37 of 2008 and the Ombudsman Representatives in provinces, regencies, or municipalities with Government Regulation (PP) No. 21 of 2011 concerning the Establishment, Structure and Work Procedures of the Ombudsman Government Regulation (PP) Representatives of the Republic of Indonesia in the Regions, together with No. 48 of 2017 concerning Amendments to Government Regulation (PP) No. 21 of 2011, in fact, several regions already had their own regional Ombudsman institutions. The regulation that prohibits the use of the name "Ombudsman" as a public service oversight institution that already exists in the regions (Article 46, paragraphs 1 and 2) has caused or at least potentially caused harm to the regional Ombudsman institutions. Consequently, this situation has prompted the existing regional Ombudsman institutions to file judicial review petitions to the Constitutional Court of the Republic of Indonesia.

B. RESEARCH METHOD

This type of research is doctrinal, meaning it provides a systematic explanation of rules that govern a specific legal category, analyses the relationship between rules, explains areas of difficulty, and may predict future developments (Hutchinson, T.C., 2008). Research data is obtained through a library study (secondary legal materials) consisting of laws and regulations, court decisions, and literature. The two approaches used in doctrinal research are a philosophical approach, which involves examining all laws and regulations related to the legal issues at hand (Marzuki, 2014) and a conceptual approach that stems from views and doctrines within the field of law (Marzuki, 2014).

C. RESULTS AND DISCUSSION

1. Concept of Ombudsman

The International Bar Association Resolution defines the Ombudsman as an office established by the constitution or laws, which is led by an independent, high-ranking public official accountable to the Legislature or Parliament. Its main role is to receive complaints from individuals who have been harmed by government bodies, officials, or employers or acting on their own initiative. The Ombudsman has the authority to investigate, recommend corrective actions, and publish reports based on their findings. From a judicial perspective, the Ombudsman is seen as a "watchdog designed to investigate the entire operation of administrative law" (Ferris, C., Brian Goodman and Gordon Mayer, 1980).

The Ombudsman is an independent body that operates outside the judiciary. Its main responsibility is handling complaints about corruption in the public service, mismanagement, maladministration, and abuse of power (Gregory & Giddings, 2002). The existence of the Ombudsman is intriguing both institutionally and functionally, as it contributes to limiting government authority and oversight. The techniques to restrict government power that develops through the Ombudsman are different from conventional methods, such as parliamentary or court-based government oversight (Kurnia, 2004).

Kucsko-Stadlmayer (2008) describes the uniqueness of the Ombudsman as an institution that aims to limit government power and oversight within the framework of the principles of the rule of law and democracy with the following brief statement: "*independent, easily accessible and 'soft' control of public administration through highly reputable persons ... essential contribution to the efficiency of those principles (i.e., democracy and the rule of law).*" Therefore, it can be understood that the Ombudsman is an extension of the means of legal protection for citizens against their government, even though it only exercises soft control (As'adi, 2016)

Regional Ombudsman as a Public Service Oversight Agency in Indonesia (Analysis of Constitutional Court of the Republic of Indonesia Decision Number 62/Puu-Viii/2010)

The existence of the Ombudsman, in the final analysis, is to ensure that the rule of law is upheld in the administration of government in general and in the administration of public services in particular, where the Ombudsman is positioned as a means of legal protection for citizens in the context of public services by the government or public service providers (McMillan, 2004).

The functions of the Ombudsman in Indonesia are not significantly different from Ombudsman institutions in many countries. These functions include (1) Accommodating public participation in efforts to obtain quality and efficient public services and ensuring fair, impartial, and honest administration of justice; (2) Enhancing individual protection in accessing public services, justice, welfare, and defending their rights against abuse of power, undue delays, and improper discretion.

The Ombudsman in Indonesia has two functions. Firstly, it serves as an influencing institution in public services, known as the Magistrature of Influence. Secondly, it acts as a sanctioning body known as the Magistrature of Sanction. This is regulated in Article 38 paragraph (1) of Law No. 37 of 2008, which states: The Party Complained and the superior of the Party Complained shall comply to perform the Recommendation of the Ombudsman. The word “shall” in this provision indicates that the Ombudsman’s recommendation is equivalent to a court ruling.

This is further emphasised in Article 50, paragraph (5) of Law No. 25 of 2009 on Public Services, which regulates that “In the case of compensation settlements, the Ombudsman has the authority to conduct mediation, conciliation, and special adjudication.” The implementation of special adjudication, as mentioned in paragraph (5), its mechanisms, and procedures are further regulated by Ombudsman Regulation (paragraph 7). The Ombudsman Regulation in question is Ombudsman of the Republic of Indonesia Regulation No. 31 of 2018 concerning the Mechanism and Procedures for Special Adjudication.

In practice, the Ombudsman has never settled compensation claims for harm caused by public services through special adjudication. This is because the mechanism and provisions for compensation payments need to be further regulated by presidential regulation as stated in Article 50, paragraph 8 of the Public Service Law. As of now, the presidential regulation has not been issued. In fact, according to the Public Service Law’s Article 60 paragraph (7) provision, a presidential regulation regarding the mechanism and provisions for compensation, as mentioned in Article 50 paragraph (8), must be stipulated no later than six months from the enactment of this law (note: the Public Service Law was enacted on 18 July 2009).

2. REGIONAL OMBUDSMAN

Ombudsman institutions are usually established at the national level, but nowadays, they are also established at the provincial or regency/municipal level. These Ombudsman institutions generally have the authority to investigate public complaints related to the quality of public services. If the complaints are found to be valid, the Ombudsman provides recommendations for improvement.

Democratic countries are paying attention to the fact that local governments are becoming more important as the scope of public services they provide expands. In line with this progress, they use more public resources. This reality requires the implementation of a control system while ensuring that it does not undermine the autonomous structure of regional government (Sander,2013)

Regional Ombudsman institutions have similar functions, but they perform their duties within specific cities or regions. They advocate for civil rights and seek solutions to issues within local government. Additionally, they suggest improvements to local governance. In the short term, regional ombudsman institutions have a limited scope of responsibilities and authority because they operate within specific regions.

When Law No. 37 of 2008 on the Ombudsman of the Republic of Indonesia (ORI) was enacted, there were already eight regional Ombudsman institutions in Indonesia. These were the Ombudsman for Asahan Regency, the Regional Ombudsman Commission of Bangka, the Ombudsman for Central Kalimantan Province, the Ombudsman for the Special Region of Yogyakarta (DIY), the Private Ombudsman for DIY Province, the Ombudsman for Makassar City, the Public Service Commission of East Java Province, and the Ombudsman for Pangkal Pinang City. These eight Regional Ombudsmen were established through the Partnership for Good Governance (Partnership). [Taufiqurokman, 2015).

The primary role of establishing Ombudsman offices in the regions is to act as a public advocate against maladministration. Over time, their role can expand to cover more critical areas related to poor public service. The scope of the Ombudsman’s work can extend to addressing issues such as combating corruption, human rights violations, and transparency in government administration.

According to Article 43 paragraph (1) of Law No. 37 of 2008 on the Ombudsman of the Republic of Indonesia (ORI), the Ombudsman may establish representative offices in provinces or regencies/municipalities if deemed necessary. The Ombudsman representative office, as specified under paragraph (1), shall have a hierarchical relationship with the Ombudsman, and it will have a chief of the representative office (paragraph 2). The establishment of Ombudsman Representatives in provincial, regency, or

Regional Ombudsman as a Public Service Oversight Agency in Indonesia (Analysis of Constitutional Court of the Republic of Indonesia Decision Number 62/Puu-Viii/2010)

municipality areas is regulated by Government Regulation No. 21 of 2011 concerning the Establishment, Structure and Work Procedures of the Ombudsman Representatives of the Republic of Indonesia in the Regions, together with Government Regulation (PP) No. 48 of 2017 concerning Amendments to Government Regulation No. 21 of 2011. The establishment of the a quo Ombudsman Representatives is in line with Article 5 paragraph (2) of Law No. 37 of 2008 on the Ombudsman of the Republic of Indonesia, which allows the Ombudsman to establish representative offices in provinces and/or regencies/municipalities.

Institutionally, the Ombudsman representatives in the regions have a hierarchical relationship with the Ombudsman domiciled in the capital city of the Republic of Indonesia. Likewise, in carrying out its functions, duties and authorities, mutatis mutandis has the same function as the Ombudsman of the Republic of Indonesia. Currently, there are 34 Provincial Ombudsman Representatives in Indonesia. Therefore, the Ombudsman in the region consists of 34 (thirty-four) Provincial Ombudsman Representatives and 8 (eight) Ombudsman institutions established by the respective regions. The differences between Provincial Ombudsman and Regional Ombudsman Representatives can be summarised in the following table:

Table 1. The Differences between Provincial Ombudsman and Regional Ombudsman Representatives

No	Distinguishing Factors	Provincial Ombudsman Representative	Regional Ombudsman
1	Basis of Establishment	Laws and Government Regulations.	Regulations issued by the Governor, Regent, or Mayor
2	Founding Principle	Deconcentration.	Decentralisation
3	Funding Source	State Budget (APBN)	Regional Budget (APBD)
4	Relationship with the Ombudsman of the Republic of Indonesia (ORI)	Hierarchical relationship with the Ombudsman of the Republic of Indonesia (ORI)	Operate independently and have a separate and coordinative relationship with the Ombudsman of the Republic of Indonesia (ORI)

Source: Processed from the analysis result of laws and regulations.

Furthermore, when viewed in terms of Ombudsman governance in Indonesia, it can be modelled as follows:

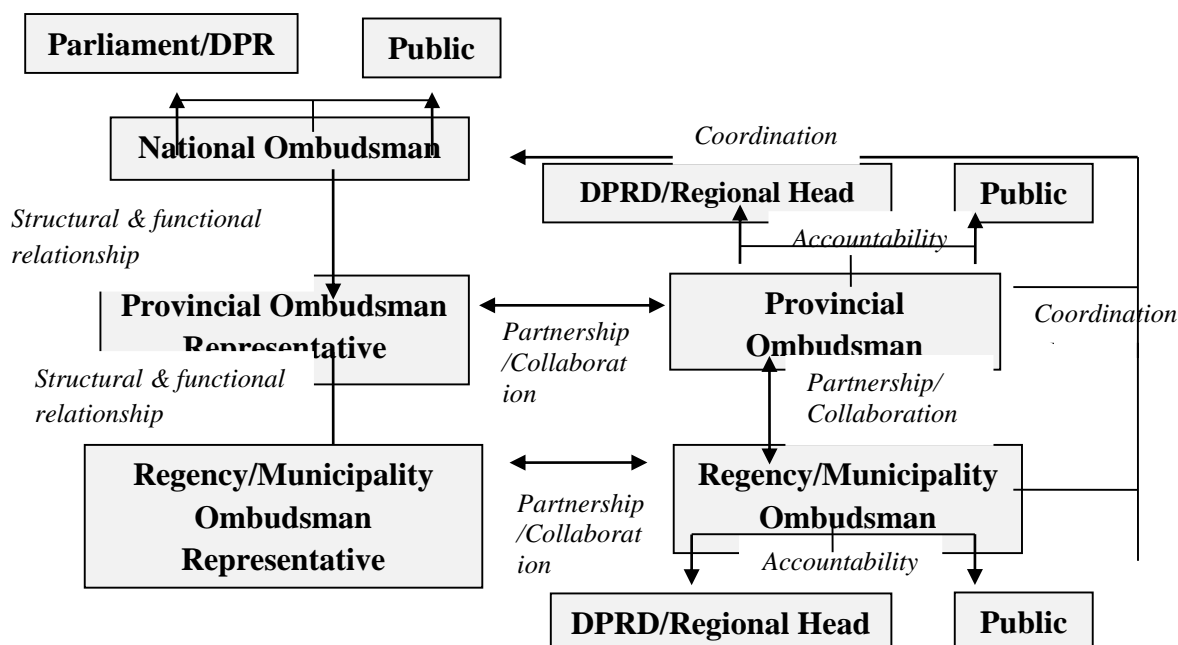


Figure 1. Position of Indonesia Ombudsman

Source: Nugroho, Riant and Patarai, M. Idris, 2008.

Public participation in overseeing the government's administration is essentially not under the authority or jurisdiction of the central government because this is the implementation of the principle of decentralisation. Furthermore, it is important to encourage and support initiatives from regional areas, particularly in establishing Ombudsman institutions, rather than ignoring or disregarding them.

Regional Ombudsman as a Public Service Oversight Agency in Indonesia (Analysis of Constitutional Court of the Republic of Indonesia Decision Number 62/Puu-Viii/2010)

Efforts to eliminate public service oversight agencies in the regions that use the name Ombudsman can be seen as obstructing public participation in governance. Therefore, the prohibition, as stipulated in Article 46 of Law No. 37 of 2008 concerning the Ombudsman of the Republic of Indonesia (ORI), may be considered excessive. Article 46 of the a quo Law regulates as follows:

Paragraph (1): When this Law takes effect, the word “Ombudsman,” which has been used as the name of institutions, agencies, legal entities, publications or others which do not constitute an Ombudsman institution performing the function and duties according to this Law shall be replaced by other names within no later than 2 (two) after the date of this Law takes effect.

Paragraph (2): Institutions, agencies, legal entities, or publications that do not comply with paragraph (1) will be considered illegally using the “Ombudsman” name.

The provision in Article 46 of the ORI Law not only impacts the necessity of changing the name of all Ombudsman institutions in the regions but also requires the removal of the word “Ombudsman” used by other institutions. This includes various print or electronic media outlets that have Ombudsman institutions for complaint mechanisms against the substance of the news.

Based on the regulation in Article 46 of the ORI Law mentioned above, several regional Ombudsman institutions that had existed before the law was established filed a judicial review petition to the Constitutional Court of the Republic of Indonesia because they were considered unconstitutional or contrary to the 1945 Constitution (the Constitution of Indonesia).

When examining and adjudicating the material judicial review of the Ombudsman Law, which was considered contrary to the 1945 Constitution, the Constitutional Court provided the following considerations:

- a. Several regional governments established Ombudsman institutions before the enactment of the a quo law, which was a positive step taken by regional governments to ensure transparent and accountable governance. This allowed room for the public to report any complaints regarding public services to the Ombudsman institutions. The establishment of such institutions is common as in universal practice in various countries, including both central and regional governments, as well as private institutions that can establish ombudsman institutions as independent institutions that act as intermediaries between providers and recipients of public services, such as the government, and the public. These institutions receive reports and complaints, seek alternative solutions, and provide recommendations for resolution to the authorised officials;
- b. According to the Constitutional Court, to uphold the constitutional principles of fair legal certainty, both for the public and regional governments that have established Ombudsman institutions, the existence of these institutions must be protected by law. The enactment of Article 46, paragraphs (1) and (2) of the a quo Law could endanger the existence and sustainability of Ombudsman institutions and violate the principles of ensuring fair legal certainty, which should be provided to legally established Ombudsman institutions according to the law;
- c. Considering that the word “ombudsman” has a common meaning and is widely accepted internationally as an independent function to receive reports and complaints, investigate, provide alternative solutions, and offer policy recommendations or solutions for such complaints to specific parties. Given the broad recognition of the term “ombudsman,” people are more likely to understand it compared to other words in the Indonesian language, such as “*Lembaga Pengaduan Masyarakat*” (public complaint service), which may require further explanation. The term “ombudsman” is as well-known as the term “*Lembaga Bantuan Hukum*” (legal aid institution), which is easily understood. The ombudsman’s function is needed for various purposes and by many parties. Therefore, if there is a monopoly on the use of the term “ombudsman,” it can significantly disrupt the public communication process in conveying ideas or opinions. This would hinder the right to communicate and the freedom of expression, both of which are guaranteed by the Constitution [see Article 28E, paragraph (3), and Article 28F of the 1945 Constitution];
- d. Considering that, according to the Constitutional Court, the state cannot monopolise the ombudsman institution, as in the case of the a quo law. Therefore, the prohibition on the establishment of an institution using the name “ombudsman” by an entity or organ other than the Ombudsman of the Republic of Indonesia is not in line with the spirit and constitutional protection guaranteed by the Constitution, which includes the right to recognition, guarantees, protection, and fair legal certainty, as well as an equal treatment before the law within the government [see Article 28D, paragraphs (1) and (3) of the 1945 Constitution]. This prohibition also contradicts the constitutional guarantee of the right of every individual to advance collectively and individually in pursuing their rights and contributing to the development of their community, nation, and state [see Article 28C, paragraph (2) of the 1945 Constitution]. Therefore, every institution or body wishing to establish an ombudsman institution to perform independent functions such as receiving reports and complaints, investigating, offering alternative solutions, and providing policy recommendations or solutions for such complaints to certain parties should be provided with the same guarantees and protections.

Based on the key considerations of the Constitutional Court (MK) above, in its ruling, the Constitutional Court decided:

Regional Ombudsman as a Public Service Oversight Agency in Indonesia (Analysis of Constitutional Court of the Republic of Indonesia Decision Number 62/Puu-Viii/2010)

- a. Article 46, paragraphs (1) and (2) of Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2008 Number 139, Supplement to the State Gazette of the Republic of Indonesia Number 4899) **are contrary to the 1945 Constitution of the Republic of Indonesia;**
- b. Article 46, paragraphs (1) and (2) of Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia (State Gazette of the Republic of Indonesia of 2008 Number 139, Supplement to the State Gazette of the Republic of Indonesia Number 4899) **are not legally binding.**

D. CONCLUSION

- a. The establishment of a regional Ombudsman aims to find a symmetrical relationship between the motivation to improve the quality of public services to the community and the implications for government public accountability. The objective aspect of the principle of government decentralisation itself is essentially to encourage regional creation or initiation without going overboard because the creation and initiation of regional government have stimulated the actual implementation of regional government. This is realised in the concept of improving the quality of services and public accountability.
- b. The study of the regional ombudsman as a public service oversight agency established by the regional government aims to discover the relationship between public satisfaction with public services and the level of community support and participation through the use of public service oversight agencies. Furthermore, it is also to find a repositioning that public support for regional governments will increase when the community has a shared perception, namely, "the government can be trusted to hold the people's mandate" through satisfactory service. Likewise, the intensity of government attention to the people's basic rights will have a balanced effect on the level of accountability, where the quality of public services determines public accountability.

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