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Indexing

Abstracting

THE OMBUDSMAN RECONSTRUCTION OF THE REPUBLIC OF INDONESIA IN PROMOTING A RESPONSIVE LEGAL CULTURE

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Abstract: *The aim of this research is to show how the reconstruction of the existing Ombudsman of the Republic of Indonesia influences the promotion of a responsive legal culture in the bureaucracy system. The research methods are normative and empirical, along with the philosophical approach, statute approach, conceptual approach, and direct interview in the field. Concluding the reconstruction of the Ombudsman of the Republic Indonesia to be more ideal through the review of the Law Number 37 from 2008 regarding the Ombudsman of the Republic of Indonesia including the relation to its institutional authority, and the legal force of the Ombudsman's recommendations that should be final and binding, so the recommendations have an executorial power.*

Keywords: *reconstruction; ombudsman; legal culture; responsive bureaucracy*

INTRODUCTION

The Law reform in public services has been continually improved. It can be seen from the creation of the Law of the Republic of Indonesia Number 37 from 2008 regarding the Ombudsman of the Republic of Indonesia as well as the Law of the Republic of Indonesia Number 25 from 2009 regarding the Public Services (Yudianto 2015, 257). The application of public services today according to Agus Dwiyanto, besides its bureaucracy is too bureaucratic, and also has been infected by a chronic disease called "corruption" (Dwiyanto 2011, 63). Such disease appears because of the interaction between the structure of bureaucracy and some variables in wrong environment. Public services in real practice are also affected by legal culture (Mustafa 2016, 179). The Author calls it "legal culture of bureaucracy". This cannot be separated by contribution factors, such as values and local wisdom.

Amzulian Rifa'i says that in 2017 the number of complaints were 9.280 in total and consist of 4.358 (52.87%) direct complaints, 1.765 (21.46%) were conveyed by letters and 288 (3,49%) through e-mail. The above number, 3.427 complaints were about the local Government, 1.041 about the police Department, about the central government institutions were 795, and the last 17 complaints were for House of Representatives. From the above number of complaints, only 55 recommendations have been issued : 20 of them have been executed, while 15 others were partly executed and 20 others have not been yet excuted (the Ombudsman of the Republic of Indonesia 2018).

Philosophically, the essence of bureaucracy aims are to provide public services in professional, honest and fair manners. In theoretical perspective, supervision is part of law enforcement and sanction's excution. (Ridwan HR 2006, 311) There are two types of supervision: supervision by law and supervision based on its benefits. (Ibid) From a legal perspective, based on the Law Number 37 from Year 2008 on the Ombudsman, there are conflicts of norm between Articles to another, conflicts of norm with other regulations, inconsistency, obscurity of norm, and absence of norm. From a sociological perspective, the Ombudsman as a supervisory body has an important meaning in society, even tough its recommendation do not have executive capacity, which is even more complicated because there are some other institutions that have similar functions to the Ombudsmans. Conducting some review of the Law of the Republic of Indonesia Number 37 from Year 2008 might be important for the future reconstruction of the Ombudsman. It is important to create certainty of law, fairness and expediency as the Ombudsman is a supervisory institution and it has law enforcement function. This reseach is a normative and empiric reseach. It is supported by data that obtained from the Ombudsman of the Republic of Indonesia. Other than that, the analysis of this research is based on data obtained from the Ombudsman of the Republic of Indonesia, West Nusa Tenggara branch office. The issue is how to reconstruct the Ombudsman of the Republic of Indonesesia in promoting a responsive legal culture of bureaucracy.

ANALYSIS AND DISCUSSION

Reconstructing Regulations regarding the Ombudsman of the Republic of Indonesia

The existence of the Ombudsman of the Republic Indonesia that have supervisory function in the constitutional system, this can be seen in Article 1 of the Law of the Republic of Indonesia Number 37 from 2008, which says:

The Ombudsman of the Republic of Indonesia is a public institution that has the authority to supervise public services conducted by public institutions and the government including the Government-owned companies, local government-owned corporation, public institutions and private institutions or persons whose given duties are provide public services and whose whole or some of their budget resources are from the central budget or from a local government's budget.

The Ombudsman of the Republic of Indonesia as public services supervisor is not only to perform their duties based on Law Number 37 from 2008 on the Ombudsman, but also to refer Law Number 25 from 2009 on Public Services. The Article 5 of the Law Number 25 from 2009 on Public Services stated that the services provided as public goods and public services including administrative services are regulated by Laws. The scope includes: education, jobs and trading, settlement, communication and information, environment, health, social insurance, energy, banking, transportation, natural resources, tourism, and other sectors.

Dwi Ari Santoso, a researcher at the Solidarity Society for Transparency (SOMASI) of West Nusa Tenggara, in order to response education problems in West Nusa Tenggara, stated that:

The Government has to be available in order to apply and fulfill constitution's mandate, where people have a right to have proper information, illegal transactions in the Government, illegal levies at school with the schools committee as a cover often becomes discussion of students' parents every time they enroll for in the best school. These kind of stories are uncovered by mass media, that is why regulations regarding transparency of public information is important to be applied as well as the important of parents' role that represent society engagement especially to make a complaint regarding the student's attitude as a part of the supervision process (Santoso 2018, 7).

As a legitimate supervision body, the Ombudsman is authorised as a supervising president in the process of running his/her administration. However, in Article 38 paragraph (4) regulate that "in case the reported and the superiors of the reported officials fdo not obey or only partly obey the recommendations with

unaccepted reasons by the Ombudsman, the Ombudsman has right to release it to the public and make a report to the House of Representative or to the President". In the execution of its recommendation, the Ombudsman of the Republic of Indonesia takes a persuasive approach which contributes to ineffective process of recommendations' executions by public officials.

Moreover, there is an absence of norm in the dispute resolution processes, which is the adjudication function; as stated in Article 1 number 11, Article 40 paragraph (1), Article 46 paragraph (4), Article 68 paragraph (2) Law Number 25 from 2009, the Ombudsman is given authority to use the adjudication process. From this matters, the author provides the following solutions :

- A clear limitation in relation to the regulation regarding the definition of legal subjects, state administration, state-owned companies including persons who are involved in the public services regarding their budget resources. For example, an Article which says "a public services officials is every legal subject that perform public services, including public goods, public services and public administration that are performed by public officials and private sectors according to the law". In regards to the number of public service types, the Ombudsman might better divided into some Ombudsman sub-groups based on their characteristics that they are supervising. For example, the Ombudsman that handles basic services (e.g. health and education), the Ombudsman that handles general public administration and Ombudsman that handles the higher education (universities). Another option is that the Ombudsman division could be harmonized with the Law Number 25 from 2009, where it could be divided into: Ombudsman that supervise public goods, public services and public administration.
- Re-map independent public institutions that have similar functions with the Ombudsman, which are supervisory institutions and settlement making institutions for people's complaints as a result of maladministration within the public services. Based on the re-map such institutions are integrated within the Ombudsman of the Republic of Indonesia including the Public Information Commission, the Public Services Commission. This way, the administration matters might be positively simplified because there is no need of coordination among the institutions, no conflicts of authority, budget minimisation, and no more confusion in the society about to which institution they should convey their complaints.
- Regulation regarding the execution of sanctions that a reported or a superior of the reported officials. Once a sanction is not obeyed, the Ombudsman is makes a report to the House of Representative and the President.

J.B.J.M Ten Berge stated that sanctions are the core of the administrative law enforcement. However, in principle, the sanction are implemented in administrative law without the judge's role, but in several terms there is an administrative sanction through judicial process (Phillipus M. Hadjon in Ridwan HR 2006, 311).

The Ombudsman as a public institution that has supervisory functions, the scope is public law (state administration law). According to Ten Berge, the enforcement not only limited to administrative sanctions, but also to sanction that result from judicial processes, and not only accepting complaints and giving recommendations as mentioned in Article 35 letter (b) Law Number 37 from Year 2008 on the Ombudsman.

Besides the inconsistency and obscurity of norms, the final outcomes of a maladministration feedback are recommendations, that are then are conveyed to the reported or the superior of the reported officials. The word "obligation" in Article 38 paragraph (1) Law Number 37 from 2008 means that the reported or th superior of the officials are obliged to carry out the recommendations.

If the obligated subjects are not doing so, the Article 39 says: "the reported and the superior of the reported officials who do not perform the recommendations as mentioned in Article 38 paragraph (1), paragraph (2), or paragraph (4) are given an administrative punishment according to the regulations". Administrative punishment is mentioned in Article 54 to Article 58 of The Law of the Republic of Indonesia Number 25 from 2009. The same intention also acommodated i.e in the Article 351 paragraph (4), and paragraph (5) Law Number 23 from 2014 on the Local Government. The core of the Article is that the head of local government is obligated to perform the Ombudsman's recommendations; if the reported officials do not implement it, they will be given a coaching regarding governance.

Therefore, "obligation" in this matter means order to do something. On the one hand, a recommendation is a law order which has executorial power. However, some argue that it could be interpeted as an obligation of political and moral dimensions, in other words, recommendations are interpreted as a suggestion or advice, where there are no legal consequences if we do not obey them. The following table shows how the Ombudsman takes a persuassive approach to force its recommendations.

Table 1: Legal System (Structure, Substance and Legal Culture)

Substance	Structure	Legal Culture
Article 38 paragraph (3) Law Number 37 Year 2008 which stated that : “The superior of the reported officials is obligated to make a report to the Ombudsman in regards to the recommendation’s execution along with examination’s result within 60 days from the day when the recommendations were accepted.	Article 2 The Law Number 37 Year 2008 which stated that : the Ombudsman is an independent public institution and it has no structural connections to other public institutions, and there is no intervention of other power in doing its duties.	Article 44 paragraph (3) Ombudsman Regulation of Regulation Number 002 Year 2009 regarding the Procedure of Examination and Settelement of Complaints which stated that : the Ombudsman takes a persuasive approach enforcing the recommendations

Based on the above table, this is why the reconstruction of the sanction enforcement is important. The expected reconstruction of the Ombudsman Law, the author suggested:

- First, to add the Ombudsman’s task in the Article 7 Law Number 37 from 2008 which primarily consist of letter (a) to (g). Letter (i) states: “perform special adjudication to processed public services among parties, decided by the Ombudsman”. The formulation of letter (j): “in terms of special adjudication performance, the Ombudsman can be aided by third parties, in the elements of the local institutions based on the local knowledge in each region”.
- Second, adding 1 paragraph in the Article 37 which primarily consist of 3 paragraphs. The formulation of the paragraph (4): “within 90 days, if the superior of the reported officials is not implemeting the recommendations, the Ombudsman can convey the recommendation to the district court to get a final and binding court decision”.
- Third, to add two paragraphs in the Article 38 Law Number 37 from 2008 i.e are paragraph (5) and paragraph (6). The formulation of paragraph (5) is: “if the superior of the reported officials does not perform or just partly performs the recommendations, he/she will be punish by a higher supperior where the highest superior is Minister of Public Servant Empowerment, except public servants of a local government”. And the formulation of paragraph (6) is: “the superior of the reported officilas from a corporation, private sectors or individuals who are do

not perform or partly perform the Ombudsman's recommendation will be sanctioned by public officials who is authorised to issue their operational permits".

- The reason behind 90 days is in line with the expiration date of an "administrative decision" after which a lawsuit can be filed in an administrative court
- It is important to regulate the adjudication process of the Ombudsman of the Republic of Indonesia

Legal Culture based on "Pancasila" towards the restoration of the National Legal System

The society has a vital role in the legal system. An individual takes a role as determined by law. In reality it is not only determined by the legal system, but also by presumption and common sense. As a result, it is philosophically expected that recommendations of the Ombudsman of the Republic of Indonesia are legally binding because of the values within. Such values are obtained from the living culture amid the society.

To improve the legal awareness in the society, it could be extracted from the cultural values that are still embedded amid Indonesian people, which worked positively as a spirit of development, including the development in the public services. For example, the values of the Sasak Tribe in Lombok, West Nusa Tenggara Province are known as "Patut, Patuh, Pacu", which means "proper, obedient, and disciplined" (Arzaki 2001, 9).

Legal Enforcement and Strengthening of the Society's Legal Culture in the Promotion of Bureaucratic Legal Culture

The public services conducted by bureaucracy have to be based on law. Ludwig Von Bertalanffy says: "Systems are complexes of elements in mutual interaction, to which certain law can be applied" (Rasjidi and Putra 2003, 82). It is hard to deny the belief that persuasive attitude of the Ombudsman has affected the ignorance from the government officials to admit and execute the Ombudsman's recommendations.

To see the awareness about the legal culture of government officials that may receive a complaint, we can have a look at see it from Chambliss and Robert Seidman's theory; there are three guides i.e. the *rule making institutions*, the *rule sanction institutions*, and the *role occupant*. Bureacracy as a public servant would work to give public services responsively and can be hindered from corruption, collusion and nepotism (Rahardjo 2009, 28).

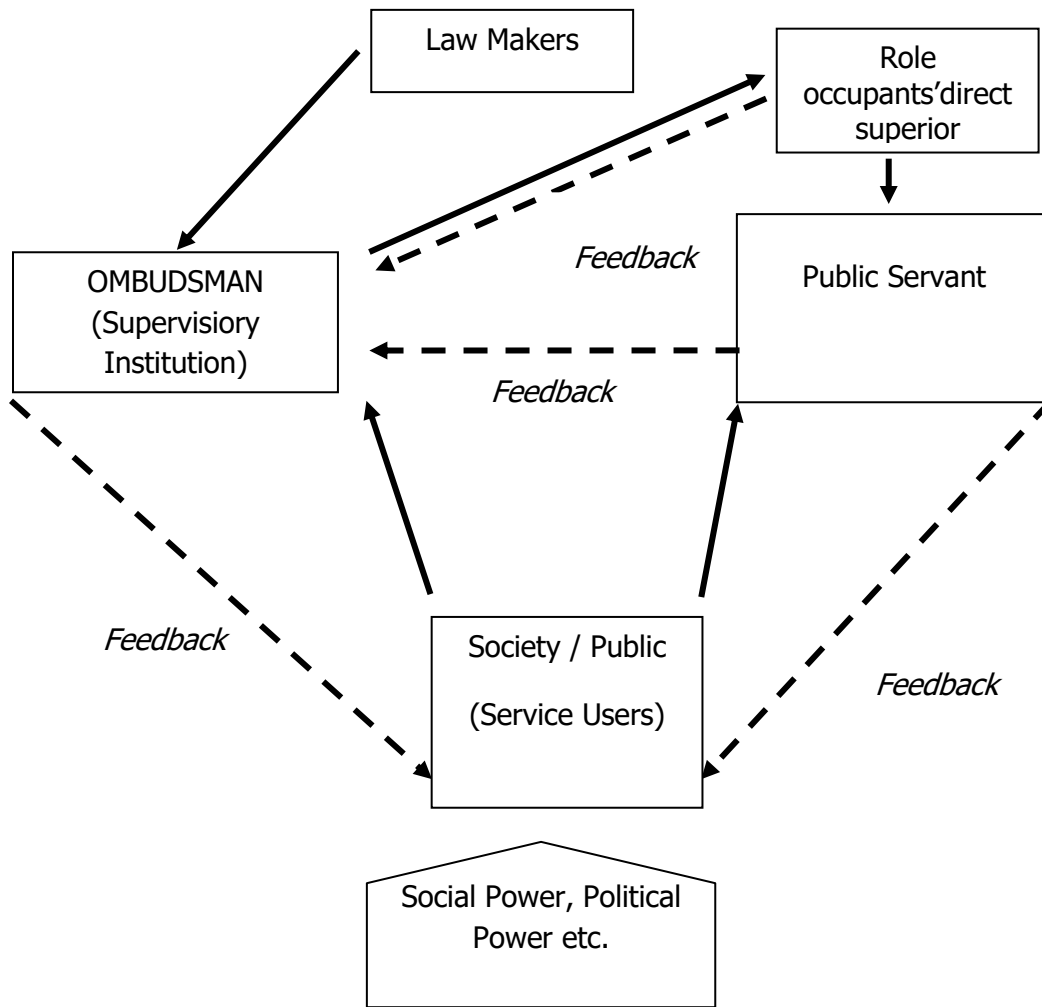


Figure 1: Collective Bureaucracy's Legal Culture to achieve responsive and free from corruption, collusion and nepotism of public services (Collected by primary legal sources while conducting this research).

Above describes the feedback or the results from the combinations of legal positions, duties, functions and the authority of the Ombudsman of the Republic of Indonesia. Such result would be considered a success if the Ombudsman consistently becomes a supervisory institutions within the public services.

The existence of togetherness of active stakeholders and the response on the importance of good public services could be achieved if all of the stakeholders actively play their role based on law and regulations. Adhar Hakim argues are some efforts to promote the legal culture of bureaucracy such as socialization of regulations, therefore encouraging social engagement as a prevention act from maladministration behaviour (Hakim 2018).

Others efforts are: accepting peoples complaints and going to the field, especially to the areas that have high potential maladministration to be happening, and examining the obedience of the officials based on The Law of the Republic of Indonesia Number 25 2009 regarding Public Services.

Social Engagement and Strenghtening the Legal Culture of the Society In the Field of Public Services


Public services will be successfully performed if social engagement is in place. That also includes every stakeholder such as the civil servants, the society, professional groups and others. They all have a role when it comes to public services. Alvien Lie, Commisioner of the Ombudsman of the Republic of Indonesia, says:

The low level of knowledge (about the Ombudsman) is an obstacle for the Ombudsman in the settlement process of any case, because society's engagement is essential. Our obstacle is that the people's knowledge about the Ombudsman is low. If the existance of the Ombudsman is unknown by the society, the society will not be able to enjoy the existence of the Ombudsman. The existence of the Ombudsman is questionable if people do not take its benefits (Lie 2018) .

The participation mentioned is from planning to the evaluation. It is divided into four steps: 1) decision, 2) implementation, 3) advantages, and 4) evaluation.

CONCLUSION

The reconstruction of the Ombudsman of the Republic of Indonesia can be seen from four aspects: (1) the substance of the regulations' review as part of the Law of the Republic of Indonesia Number 37 from 2008 reconstruction process, which includes: it is important to make a clear limitation of the Ombudsman's authority as well as the important of dividing the Ombudsman, a clear regulation regarding the adjudication process, the engagement of local / local society's institutions in mediation, consiliation and adjudication processes. Another important aspect is that the Ombudsman's recommendations should be final and binding, so that the Ombudsman's recommendation has an executorial power. It is also important to intergrate other supervisory institutions; (2) Law enforcement and strengthening legal culture within society in order to promote the legal culture of bureaucracy in the context of public services; (3) Law enforcement and strengthening the legal culture within society by encouraging every role occupant to engage based on their roles in order to promote a responsive legal culture of bureaucracy, which is bounded with every component (collectivity of law).

This research recommends reconstructing the Law of the Republic of Indonesia Number 37 from 2008 by submitting the legal draft to the House of Representative, as well as the important of human resources and the adequate budget. 

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