

DISPUTE SETTLEMENT IN THE OMBUDSMAN AND THE COURT OF LAW REGARDING COMPENSATION IN PUBLIC SERVICE DISPUTE

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Abstract

Public Service is the embodiment of the main tasks of governance. In its implementation, sometimes losses experienced by members of civil society occur due to bad public service practice. Therefore Law No. 25 of 2009 regarding Public Service regulates dispute resolution in the implementation of public services. At least there are two types of ways to resolve compensation in public service disputes, namely the Non-Litigation settlement through the Ombudsman, and the Litigation settlement through the Court. However, in further studies, it was found that there was an overlap of authority between the Ombudsman and the Court in resolving public service disputes. This paper will try to discuss this topic in-depth in terms of the philosophy of the existence of the Ombudsman, and its implications for its Special Adjudication authority. Aside from that, this paper will also discuss the procedure of proceedings in the Administrative Court regarding public service disputes.

Keywords: Public Service, Compensation Dispute, Ombudsman, Administrative Court.

Abstrak

Pelayanan Publik merupakan pengejawantahan tugas utama sebuah pemerintahan Negara. Namun dalam pelaksanaannya terkadang pun menimbulkan kerugian yang dialami oleh masyarakat akibat buruknya pelayanan publik. Oleh karena

itu kemudian Undang-Undang No. 25 Tahun 2009 Tentang Pelayanan Publik mengatur mengenai penyelesaian sengketa akibat kerugian yang dialami oleh masyarakat dalam pelaksanaan pelayanan publik. Setidaknya terdapat dua jenis cara penyelesaian sengketa ganti kerugian dalam pelayanan publik yang menimbulkan kerugian di dalam Undang-Undang Pelayanan Publik yakni Jalur Non-Litigasi melalui Ombudsman, dan Jalur Litigasi melalui Pengadilan. Akan tetapi dalam penelaahan lebih lanjut ditemukan bahwa terdapat tumpang tindih kewenangan antara Ombudsman dan Pengadilan dalam menyelesaikan sengketa pelayanan publik. Tulisan ini akan mencoba membahas hal ini secara mendalam dari segi filosofi keberadaan Ombudsman, dan implikasinya dalam pemberian kewenangan adjudikasi kebusus oleh undang-undang. Selain itu pula akan dibahas mengenai prosedur beracara di peradilan tata usaha Negara mengenai sengketa pelayanan publik.

Kata Kunci: Pelayanan Publik, Sengketa Ganti Kerugian, Ombudsman, Peradilan Tata Usaha Negara.

Introduction

According to Koentjoro Poerbopranoto, Public Service is the core business of government's duty in State Administration¹. This core business is an embodiment of the "Theory of the Two Tasks / Dwipraja" of A. M. Donner that the function of state governance based on the perspective of Constitutional Law as *Taakstelling* or division of tasks and based on the perspective of State Administrative Law as *Taakvervulling* or the implementation of tasks²:

*Het vlak van de **doel**- of van de **taakstelling** enerzijds; het vlak van de **doelverwezenlijking** of **taakvervulling** anderzijds.³*

Translation:

¹ Koentjoro Poerbopranoto, *Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi*, Bandung: 1985, Penerbit Alumni, p. 36.

² See also: E. Utrecht, *Pengantar Hukum Tatausaha Negara Indonesia*, Jakarta: N.V. Penerbitan dan Balai Buku Indonesia, 1957, hlm. 9.

³A.M. Donner, *Nederlands Bestuursrecht: Algemeen Deel*, Wolters Kluwer Nederland B.V. 1953, p. 1.

(The first field being) the field that determines the **goals or tasks**. (The second field being) the field to **concretize the goals or tasks** that have been determined.

Provision of Public Services is an embodiment of the Public Interest (*Algemeen Belang*)⁴ as stated in the opening of the Constitution of 1945 of the Republic of Indonesia (UUD Negara Republik Indonesia, or hereinafter referred to as 'UUD 1945').⁵

Translation:

Then on that basis, to form an Indonesian Government that protects the entire Indonesian nation and all of Indonesia's blood and to promote public welfare, educate the people's lives, and participate in carrying out world order based on independence, lasting peace and social justice, then that Indonesian National Independence was compiled in an Indonesian Constitution, which was formed in the composition of the Republic of Indonesia which was based on the sovereignty of the people based on the Oneness of God, Just and civilized humanity, the Unity of Indonesian, and The democracy led by understanding wisdom among honorable Consultation / Representative, and by concretizing a Social Justice for all Indonesian people.

The implementation of government tasks in providing public services is also related to the rights of individual / group of individuals in the Rule of Law principle⁶. Therefore the public interest (*algemeen belang*) had become one of the limitations of individual rights. The balance between the provision of public interests and individual rights is one of the characteristics of the Rule of Law principle. According to P. Schnabel, as quoted by Philipus M. Hadjon, in the development of the concept of the Welfare State (*verzorgingsstaat / welvaarsstaat* or *sociale rechtsstaat*) the influence of the State manifests in three ways namely: first, direct influence as a result of recognition and protection of social rights, secondly the indirect influence as a result of the formation of

⁴M. Solly Lubis, *Hukum Tata Negara*, Bandung: 2008, CV Mandar Maju, p. 137.

⁵Indonesia, UUD NRI 1945, *Undang Undang Dasar Negara Republik Indonesia Tahun 1945*, Fourth Paragraph of the Preface.

⁶ SF Marbun dan Moh. Mahfud MD, *Pokok-pokok Hukum Administrasi Negara*, Yogyakarta: Liberty, 1987, p. 45.

government apparatus that is equipped with the power of office and expertise, thirdly the hope that the problems of society can be solved through the intervention of the authorities⁷. Therefore, according to this concept of the balance between public interests and individual rights, the society (members of civil society) can sue Administrative Actions (*Bestuurshandelingen*) in court.

Definition of Public Service in Article 1 point number 1 of Law No. 25 of 2009 regarding Public Service (hereinafter referred to as 'The Public Service Act') is an activity or series of activities in the framework of meeting service needs in accordance with laws and regulations for every public and resident of goods, services, and / or administrative services provided by public service Providers. Based on the given definition it can be seen that there are two types of public services, viz:

- Public Services in the field of goods and/or services;
- Public Services in the field of administrative services.

In its implementation, the provision of public services can cause friction or conflict viz: 1.) between the legal obligations of public service Providers and public (and/or individual) rights, 2.) between two conflicting legal obligations, and 3.) between two conflicting public (and/or individual) rights. These three kinds of conflicts are included in the category of disputes according to legal terminology. In the legal context of public services it means bad public services that cause harm to the society (there are the public rights that are violated) in which the society has a right of compensation. In the context of public services means the dispute is limited in terms of disputes on public services provided by the public service Providers for goods / services, and administrative services.

The Public Service Act actually stipulates how to settle disputes over compensation regarding Public Service dispute, and which institution(s) has the authority to resolve the dispute. There are at least two types of ways of settling compensation in public servicedispute in the Public Service Act, namely the Non-Litigation resolution through the Ombudsman, and the Litigation resolution through the Court of Law. Regarding this, there are at least two problems arise:

⁷Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia: Sebuah Studi tentang Prinsip-Prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*, Surabaya: 1985, PT Bina Ilmu, p. 79.

1. How is the dispute settlement process in the Ombudsman and The Court of Law regarding public service dispute?
2. How can we separate the authority between the Ombudsman and in The Court of Law regarding public service dispute?

The method used in this paper is the library method, by finding relevant literature and legal sources. The literatures used in this paper are related to administrative law, public service, ombudsman, administrative court and law in general. While the laws and regulations used are general administrative law act (the Law No. 30 of 2014 regarding Government Administration), Public Service Act (the Law No. 25 of 2009 regarding Public Service), ombudsman act (the Law No. 37 of 2008 regarding Ombudsman of the Republic of Indonesia), and administrative court procedural law act (the Law No. 5 of 1986 regarding Administrative Court as amended by the Law No. 9 of 2004 and Law No. 51 of 2009).

Analysis and Results

Non-Litigation Dispute Settlement Regarding Compensation In Public Service By The Ombudsman

1. The Authority of the Ombudsman regarding Dispute Settlement in Public Service Dispute

Regarding the non-litigation dispute settlement through the Ombudsman of the Republic of Indonesia (hereinafter referred to as the Ombudsman), the Public Service Act regulates two types of settlement methods, namely: 1.) mediation and/or conciliation, and 2.) through adjudication. For mediation and/or conciliation, the Ombudsman organizes mediation and conciliation between public service Providers and the Reporting Party. Whereas in the adjudication process, the Ombudsman will decide and act like that of a judicial body, thus the Ombudsman act as a non-litigation adjudication institution. Article 25 paragraph (1) of the Ombudsman Regulation No. 31 of 2018 regarding Special Adjudication confirms that the Ombudsman's verdict is final and binding. This can also be seen by using the Systematic

Interpretation⁸ by referring to Article 10 of Law No. 37 of 2008 regarding Ombudsman of the Republic of Indonesia (Ombudsman Act) which says that the Ombudsman cannot be sued whenever it carries out its duties and authorities, thus the Ombudsman's verdict in this Special Adjudication is indeed final and binding because it cannot be sued to any judicial institution.

For the compensation dispute in the Ombudsman, based on Ombudsman Regulation No. 31 of 2018 regarding Special Adjudication, firstly the person file an Adjudication application process if the dispute cannot be settled through Mediation and Conciliation proceedings. The authority of the Ombudsman's adjudication is actually quite new in the Public Service Act, and was not regulated in Law No. 37 of 2008 regarding the Ombudsman of the Republic of Indonesia. Even the Ombudsman made the implementing regulations only in 2018 through RI Ombudsman Regulation No. 31 of 2018 regarding Special Adjudication.

2. Philosophical and Functional Shift of the Existence of the Ombudsman in Settling Disputes Regarding Public Service

The Ombudsman had not only experienced a real expansion of authority, but also in philosophical terms. Before the enactment of the Public Service Act, the authority of the Ombudsman in Law No. 37 of 2008 is limited to Report Handling in the form of Recommendations only, both through the Report Handling process and the Mediation and / or conciliation. However, with the enactment of the Public Service Act, the authority of the ombudsman is added to one namely the Special Adjudication authority as regulated in Article 50 paragraph (5) of the Public Service Act, so that disputes regarding requests for compensation are settled through Special Adjudication as provided for in Article 50 paragraph (5) The Public Service Act and Ombudsman Regulation No. 31 of 2018 regarding Special Adjudication.

From a philosophical point of view, the expansion of the authority of the Ombudsman had caused a shift in the philosophical foundation of the existence of the Ombudsman in Indonesia. In the

⁸ Sudikno Mertokusumo dan A. Pitlo, *Bab-Bab Tentang Penemuan Hukum*, Bandung: Citra Aditya Bakti, 1993, p. 59.

"Considering" section of Law No. 37 of 2008, the existence of an ombudsman is in the context of oversee/supervise the implementation of public services in order to concretize state apparatus and government officials that are effective and efficient, honest, clean, open and free from corruption, collusion and nepotism.⁹ Therefore, when given new authority to resolve disputes over public service losses through special adjudication, the ombudsman will also determine how much compensation will be given to the affected person(s), and it will become an adjudication institution with a verdict like that of the court. This is an effect of an extreme shift from the original philosophical foundation of the existence of the Ombudsman in Indonesia (which was a supervision institution of the behavior of public services agents) into a non-litigation adjudication institution.

As a comparison, in the Netherland's *Wet Nationale Ombudsman*, the task of the Ombudsman in the Netherlands is to examine whether a public service behavior is appropriate or not, and to make recommendations for the improvement of the reported public services agent(s). The Ombudsman is a person appointed by the Cabinet, on the advice of the Second Chamber of the Netherlands Parliament (*Tweede Kamer van Staten-Generaal*) and currently the Dutch Ombudsman is held by Reinier van Zutphen¹⁰. In the Netherlands there are also a *Kinderombudsmen* who handle complaints for public services regarding children and teenagers¹¹, and *Veteranombudsmen* for veterans' affairs¹². There are also *Locaal ombudsmen* or *ombudsmen* or *ombuds committee* at the provincial or municipal (*gementee*) level appointed in each region. The purpose of the existence of an Ombudsman in the *Wet Nationale Ombudsman* is to create a "Proper Conduct" (*Beoorlijkheid*) or Appropriate Behavior in Public Services, and not to impose sanctions or revoke / declare invalid a Government Decision / Action or decide the compensational amount. According to Langbroek and Rijpkema the authority of both the central and local / regional Ombudsmen is: "the

⁹ Setiajeng Kadarsih, "Tugas dan Wewenang Ombudsman Republik Indonesia dalam Pelayanan Publik Menurut UU No. 37 Tahun 2008.", *Jurnal Dinamika Hukum* Vol. 10 No. 2 Mei 2010, p. 179.

¹⁰<https://www.nationaleombudsman.nl/de-nationale-ombudsman/wie-is-de-nationale-ombudsman> accessed on 25 May 2019.

¹¹Koninkrijk der Nederlanden, *Wet Nationale Ombudsman*, Wet van 4 Februari 1981, Article 11a-11e.

¹²*Ibid*, Article 11f-11i.

*National Ombudsman and local Ombudsmen or Ombuds committees should judge the behaviour subject to a complaint as 'proper' or 'improper'.*¹³ Thus the Ombudsman only examines whether a behavior of Public Service agents is appropriate or not. This function is regulated in *Algemene wet Bestuursrecht / AwB* (Dutch General Administrative Law Act/GALA)¹⁴. If it is proven to be an “inappropriate/improper conduct”, then a recommendation will be issued.

The authority to adjudicate the legal products of Government Administration in the Netherlands prior to 1994 in the form of Government Decision (Individual Decree) was in the *Administratief Rechtspraak Overheidsbeschikkingen / AROB* based on *Wet AROB*. For the dispute of the Factual Actions of the Government in the form of *Onrechtmatige Overheidsdaad / OOD* (Administrative Tort) was the authority of Civil Judges in Public court. But since January 1st, 1994 *Wet AROB* was revoked. At the present moment, the authority to adjudicate a Government Decision becomes the authority of the Administrative Judges (*Bestuursrechtspraak - vide Article 1: 4 AwB*)¹⁵ whereas *OOD* remains the authority of the Civil Judges in the Public Court (civil matter) based on Article 6: 162 *Nieuw Burgerlijk Wetboek* (Nederland's Civil Code). Unlike in the Netherlands, in Indonesia before 2014 the authority to adjudicate Individual-Decree (Decision or *beschikking*) was in the Administrative Court and the authority to adjudicate the Factual action Dispute in the form of *OOD* was in the Public Court (civil matter). After the enactment of Law No. 30 of 2014 regarding Government Administration, both Government Decree¹⁶ and Factual

¹³Langbroek, Philip M. dan Peter Rijpkema, “*Demands of proper administrative conduct. A research project into the ombudsprudence of the Dutch National Ombudsman*”. *Utrecht Law Review* Volume 2, Issue 2 (December) 2006, p. 81.

¹⁴ Article 9: 18 *AwB*: *Een ieder heeft het recht de ombudsman schriftelijk te verzoeken een onderzoek in te stellen naar de wijze waarop een bestuursorgaan zich in een bepaalde aangelegenheid jegens hem of een ander heeft gedragen.* **Which translated:** Everyone has the right to request the Ombudsman in writing to investigate the way in which an administrative body has behaved towards him or another person in a particular matter.

¹⁵Muhammad Adiguna Bimasakti, *Hukum Acara dan Wacana Public Lawsuit Di Indonesia Pasca Undang-Undang Administrasi Pemerintahan: Sebuah Sumbangan Pemikiran*, Yogyakarta: Deepublish, 2019, p. 18.

¹⁶ not only Decisions in the form of *Beschikking* or Individual-Decrees but all forms of *Besluit* or government decrees whether for

Actions becomes the authority of the Administrative Court¹⁷. The authority to examine all Statutory Regulations other than Laws is the constitutional authority of the Supreme Court (*Vide* Article 24A of the UUD 1945), and the authority to examine Laws is the constitutional authority of the Constitutional Court (*Vide* Article 24C of UUD 1945). Thus the boundaries between the authority of the Ombudsman and the judiciary power should be clear. The overlap of the authority of the Court with the Ombudsman will be discussed in the next section.

The problem regarding the Ombudsman's legal products in the form of Recommendations and Verdict that cannot be sued in the Court is not only based from Ombudsman Regulation No. 31 of 2018 regarding Special Adjudication. This problem began by the existence of Article 10 of the Ombudsman Act. As mentioned earlier, Article 10 of the Ombudsman Act states that the Ombudsman (institutionally) cannot be sued in the Court in carrying out its duties and functions. This implies that the product issued by the Ombudsman in the context of carrying out its duties and functions cannot be sued in court. Therefore even before the enactment of Ombudsman Regulation No. 31 of 2018, Article 10 of the Ombudsman Law had implied that ombudsman legal products are final and binding. This can also be seen in the word "mandatory" in Article 38 of the Ombudsman Law, that it is mandatory for the Reported Party (Public Service Provider) and the Reported Party's superiors to implement the Ombudsman Recommendation(s).

Authority to Adjudicate Public Service Disputes through Litigation and its Procedures

1. The Authority of the Court in Public Service Dispute

The Public Service Act regulates two types of authority for the dispute settlement over compensation in public services at the Courts, as in Article 51 and Article 52:

individual(s) or public as long as it is not in the form of laws and regulations.

¹⁷See Supreme Court Regulation No. 2 of 2019 Regarding Guidelines for Resolving Disputes on Government Actions and Authority to Judge Unlawful Acts by Government Agencies and / or Officers (*Onrechtmatige Overbeidsdaad*).

Which Translated:

Article 51

A person can sue the Provider or executor (of public service) through the administrative court, if the services provided cause losses in the field of administration.

Article 52

(1) *In the event that a Provider commits an act against the law (tort) in the administration of public services as regulated in this law, the members of civil society can file a lawsuit against the Provider **in court**.*

From the provisions of the two articles, the difference can be seen in terms of the type of dispute, namely the Administrative dispute and the Administrative Tort (*Onrechtmatige Overheidsdaad*/OOD). For the Administrative dispute it is clearly the authority of the Administrative Court in Article 51 of Law No. 25 of 2009. However, in Article 52 regarding OOD it only mentions "Court" without mentioning the type of the court. For OOD, the reference that can be used is Article 1365 of the Civil Code which becomes the domain of the authority of the Public Court in accordance with Article 50 and 51 of Law No. 2 of 1986 regarding Public Court, which the first level is the District Court. However, in this case, the subject is the members of civil society against the public service Provider (performing government functions), and the *objectum litis* is public services (the realm of authority in the field of public law), the question will arise whether it is classified as Administrative Tort as in public law case or as in civil law case?

This kind of dispute is Administrative Tort or OOD as in public law case because the *subjectum litis* is an official / government body, and the *objectum litis* is a factual action as in Article 87 of Law No. 30 of 2014 regarding Government Administration Act. Then is this OOD dispute still the authority of the Public Court to resolve? If referring to Article 1 number 8, Articles 75-78, Article 85 and Article 87 of Law No. 30 of 2014 regarding Government Administration, OOD is part of Administrative Court authority¹⁸. Based on the systematic division in Articles 51 and 52 of the Public Service Act along with the Government

¹⁸Muhammad Adiguna Bimasakti, *Perbuatan Melawan Hukum (PMH) Oleh Pemerintah / Onrechtmatige Overheidsdaad (OOD) Dari Sudut Pandang Undang-Undang Administrasi Pemerintahan*, Yogyakarta: Deepublish, 2018, p 23.

Administration Act, the types of disputes in public services are as follows:

- Administrative Disputes in the form of losses due to the issuance of Written Decisions/Decree of the Public Service Provider in terms of Administrative Services and Goods / Services (*vide* Article 51 of the Public Service Act; Article 1 number 9, Article 2, Article 49 of Administrative Court Act; and Article 87 of Government Administration Act); and
- Dispute regarding Administrative Tort (*Onrechtmatig Overheidsdaad/OOD*) in the form of losses due to the factual actions of the Public Service Provider in terms of Public Services in the form of Goods / Services (*vide* Article 52 of the Public Service Act; Article 1 number 8, Article 75-78, Article 85 and Article 87 of Government Administration act).

Both of them are currently the authority of the Administrative Court. Thus all of the compensation in Public Service dispute have become the authority of the Administrative Court.

2. Procedure for Dispute Settlement in Public Services at Administrative Court

The Public Service Act does not regulate the procedure for settling disputes in public services. This means that the condition "*silencio op de wet*" or "silence of the law" occurs. Thus legal experts must seek for other references that are relevant to this matter. Based on the elaboration in the previous section that the authority over disputes in public services rests within the Administrative Court, then it means that the procedural law applies in this matter is the procedural law of the Administrative Court which regulated in Law No. 5 of 1986 regarding Administrative Court along with its amendments: Law No. 9 of 2004 and Law No. 51 of 2009, and Law No. 30 of 2014 regarding Government Administration.

The following is a brief description of the procedure for settling disputes in public services based on Administrative Court Act and Government Administration Act as well as other regulations such as Supreme Court Regulations on Administrative Proceedings:

- The litigation subject (*subjectum litis*) is the members of civil society (Public) as the Plaintiff against the Public Service Provider as the Defendant (Government Body / Official) (*vide* Articles 51 and 52 of the Public Service Act; also see Article 1 number 12 and Article 53 of the Administrative Court Act);
- The litigation object (*Objectum litis*) is Decision(s) and/or Factual Action(s) in regards of Public Services that cause harm to the plaintiff;
- Before filing a lawsuit in the Administrative Court, the plaintiff must take administrative proceedings in the form of 'administrative objections' and 'administrative appeals' in accordance with Articles 75-78 of Government Administration Act and Article 2 of Supreme Court Regulation No. 6 of 2018;
- The time limit for the Plaintiff to file a lawsuit (*Bezwaar Termijn*) is 90 working days from the receipt of the results of the latest administrative proceeding (*vide* Article 55 of Administrative Court Act and Article 76 paragraph (3) of Government Administration Act; See also Article 5 Supreme Court Regulation No. 6 of 2018);
- Before being examined by the judge(s), the dismissal process is carried out by the Chairperson of the Administrative Court (*vide* Article 62 of Administrative Court Act);
- The trial will be conducted with regular procedure or quick procedure;
- The time limit for the judges to dismiss the case at the First Level Trial for regular procedure is 5 months, and the Appellate Trial takes 3 months (*vide* Supreme Court Circular No. 2 of 2014);
- The main request for the verdict (*petitum*) is that the judge declared null or invalid the Decision / Action regarding public service that being sued, with or without a request to issue a new Decision / Action and / or compensation (*Vide* Article 97 paragraph (9) and paragraph (10) of Administrative Court Act).

Problems of The Ombudsman's Authority to Settle The Dispute Over Compensation in Public Service Dispute: Its Overlap With The Administrative Court Authority and The Difference between The Two.

Based on the description above, it is known that there are two ways of disputes settlement regarding Public Service Dispute, namely the non-litigation resolution through the Ombudsman and the litigation resolution through the Administrative Court. The Ombudsman is authorized to settle disputes through mediation or conciliation, and special adjudication, while the Administrative Court resolves through the adjudication process. As mentioned earlier in the section that the special adjudication authority possessed by the Ombudsman under the Public Service Act emmerge an overlap of authority with the Administrative Court in settling public service disputes primarily regarding compensation disputes.

1. Problems of the Ombudsman's Authority

Problems arise when discussing the definition of maladministration in the Ombudsman Act. Article 1 number 3 of the Ombudsman Act explains the definition of maladministration as behavior or actions against the law (Tort), exceeding the authority, using the authority for other purposes than those intended for the authority (arbitrary), including negligence or neglecting obligations in the administration of public services carried out by the State Organs and government which gives rise to material and / or immaterial losses for the members of civil society or individuals. Conceptually, since the beginning of the formation of the Ombudsman, its authority is indeed in line with the judiciary because the ombudsman also has the authority to judge whether an administrative actions are against the law (tort) or beyond its authority, or arbitrary (as a maladministrative action).

The definition of maladministration in Article 1 number 3 of the Ombudsman Act is rather excessive, because the definition of maladministration should not refer to the validity of government administrative legal actions, but rather but only to examine whether the administration is inefficient or dishonest / corrupt, or mismanaged. The equivalent of the word maladministration (Latin: *mala* means to fail) in Dutch is *Wanbebeer* or *Wanbestuur* a.k.a. Bad Government as opposed to *Behoorlijk Bestuur* or Good Government. Philosophically, the existence of an ombudsman adopted from the concept of an ombudsman in Scandinavian countries, which is an oversight body, so that its scope is a complaint about behavior, not about acts in the sense of legal products of administrative actions (*bestuurshandelingen*). Furthermore the root of

ombudsman existence can be traced in the time of caliphate Umar Ibn Khattab¹⁹, until he appointed *Qadhi* (Justice) of the state²⁰. It is the authority of the court to judge it, not the ombudsman. Thus it can be concluded that what is actually examined by the Ombudsman is not the legality of legal products but the Personal Behavior of the Public Service Provider, because maladministration has implications for personal error (*faute personnelle*) rather than office error (*faute de service*)²¹. Personal error implies to personal responsibility and office error implies to office responsibility. It is rather strange when the definition of maladministration in the Ombudsman Act is associated with the legality of the validity of actions in the form of acts against the law (tort), exceeding the authority, using the authority for other purposes than those intended for the authority (arbitrary), as if maladministration also has implication for office responsibility (*faute de service*). Whereas both (personal and office responsibility) are two different things, even though they can be related.

Article 50 paragraph (5) of the Public Service Act mandates that the Ombudsman is authorized to settle disputes over compensation through special adjudication. This means that the Ombudsman will examine the amount of damage suffered by the reporting party and examine how much compensation should be given by government officials who are public service Providers (the reported party). Then the question arises related to the allusion to the authority of the administrative court in determining compensation for state administration as regulated in Articles 51 and 52 of Public Service Act and Article 97 of Administrative Court Act. This also related to the final and binding nature of the Ombudsman's decisions (will be discussed later).

2. Differences between the Maladministration Examination in the Ombudsman and in the Administrative Court

¹⁹ Dean M. Gotteher, *International Update, The Second Ombudsman Leadership*, San Fransisco: Forum Conference, 2000, p. 14.

²⁰ Bryan Gilling, *The Ombudsman in New Zealand*, Wellington: Dunmore Press, 1998, p. 67.

²¹ Philipus M. Hadjon, et.al. *Hukum Administrasi dan Good Governance*, Jakarta: 2012, Penerbit Universitas Trisakti, p. 32.

The definition of maladministration governed by the Ombudsman Act is very broad so that it is grazed the existence of tort element (*onrechtmatige* - vide Article 1365 of Civil Code and Article 53 paragraph (2) letter a of Administrative Court Act), including exceeding of authority, using authority for other purposes than those intended by the law (those two are included in the General Principles of Good Governance / *Algemene Beginselen van Beoorlijk Bestuur* - ABBB- see Article 53 paragraph (2) letter b of the Administrative Court Act). Article 1 number 3 of the Ombudsman Act explains the definition of maladministration as behavior or acts against the law (tort), exceeding the authority, using the authority for other purposes than those intended for the authority, including negligence of legal obligations in the administration of public services carried out by the State Organs and government which gives rise to material and / or immaterial losses for the members of civil society or individuals. But surely the difference between the two can be explained by the responsibility-concept approach as follows.

Maladministration has implications for personal error (*faute personnelle*) rather than office error (*faute de service*)²². Therefore, disputes regarding maladministration related to personal responsibility alone are the authority of the Ombudsman, while maladministration that caused legal defect on legal products of public service provider becomes the authority of the Administrative Court based on the concept of office responsibility. Therefore the Ombudsman is not authorized to declare null / invalid legal products of public service Providers.

3. Responsibility for Compensation and Execution of the Ombudsman's Verdict

As explained above, the implication of maladministration is the emergence of personal responsibility of the public service Provider because of personal error (*faute personnelle*) and not office error (*faute de service*)²³. As explained above, the implication of maladministration is the emergence of the personal responsibility of public service Providers due to personal error (*faute personnelle*) and not office error (*faute de service*).

²²Philipus M. Hadjon, et.al. *Hukum Administrasi dan Good Governance*, Jakarta: 2012, Penerbit Universitas Trisakti, p. 32.

²³Hadjon, et.al. *Op.Cit.*

Therefore in theory the responsibility for compensation should be that the official public service Provider and the State or its institution cannot be held accountable. So what instruments can be used to execute the Ombudsman's decision to the Reported Party or the Reported Party's supervisor in order to pay the compensation obliged by the Ombudsman verdict? Is the Ombudsman authorized to carry out real executions (*executie riil*) like the civil court does? The answer is certainly no. The instruments that can be used are only instruments of supervision of executions by the superiors (hierarchical executions) as it is in the Administrative Court. The problem is whether for the compensation obliged by the Ombudsman verdict and still deemed insufficient by the Reporting Party, is a lawsuit can still be filed to the Administrative Court on the grounds of a lawsuit in the form of a *faute de service*? Conceptually this might be done because of differences in the concept of responsibility in the Ombudsman (*faute personnelle*) and in the Administrative Court (*faute de service*), but for the sake of legal certainty, of course, it must be confirmed whether the mistake was made due to an office error or personal error so that the State will not bear losses due to the personal error of its apparatus.

4. The “Final and Binding” Nature of the Ombudsman's Recommendation and Verdict

As previously explained that the Ombudsman Regulation No. 31 of 2018 and Article 10 of the Ombudsman Act implies that Ombudsman legal products (recommendation or verdict) are final and binding. This can also be seen from the word "mandatory" in Article 38 of the Ombudsman Law, that it is mandatory for the Reported Party (Public Service Provider) and the Reported Party's superiors to implement the Ombudsman Recommendation(s).

A further problem is the final and binding nature of the Ombudsman's special adjudication verdict. If the Ombudsman decided to give compensation of Rp. 1,000,000,000 (one billion rupiah) for example, the Reported Party is obliged to pay it and he cannot submit any legal remedies including through a lawsuit in the Administrative Court. But if it turns out that the Ombudsman is refusing an application/report from the Reporting Party, can (s)he file a lawsuit, while the Ombudsman's recommendation and verdict have final and binding nature? According to the nature of the ombudsman's legal

product and the concepts of responsibility as explained above, the Reporting Party whose report had been rejected by the Ombudsman can still file a lawsuit in the Administrative Court on the grounds of office responsibility concept and ask for compensation if there is evidence of misconduct. A report in the Ombudsman does not prevent a person from filing a lawsuit in the Administrative Court because the Ombudsman is not classified as an administrative proceedings agency or a litigation / judicial institution.

5. Execution of the Ombudsman's and Administrative Court's Verdict

As mentioned above, the Ombudsman does not have a real execution instrument (*executie riil*) like a civil justice. The execution power possessed by the Ombudsman according to Nuryanto A. Daim is an Execution model as in the Administrative Court with "Political Binding Power" and "Moral Binding Power". The Political power means that if the administrative agent or body unwilling to fulfill the verdict or the recommendation of the ombudsman, and then the ombudsman can make a report to the people's representative institution so that the people's representative institution can use its political power to supervise the agent or body (see Article 42 of Ombudsman Act)²⁴. The moral binding power instrument is by announcing the fault of the agent or body in the Mass Media based on Article 38 paragraph (4) of the Ombudsman Act.

The model of execution in the Administrative Court is broader because it is related to the office responsibility in accordance with Article 116 of Law No. 51 of 2009 (Second Amendment to Law No. 5 of 1986 or Administrative Court Act)²⁵:

- **Automatic Execution** is if the request / *petitum* is granted to declare null or invalid a Decision / Action. If within 60 working days after the verdict has entered permanent legal force, the Government Officer / Body does not revoke the Decision / Action object of the dispute voluntarily (with a revocation letter) then the

²⁴ Solechan, "Memahami Peran Ombudsman Sebagai Badan Pengawas Penyelenggaraan Pelayanan Publik di Indonesia.", *Administrative Law & Governance Journal* Vol. 1 Edisi 2 Mei 2018 ISSN 2621 – 2781, p. 83.

²⁵Bimasakti, *Loc. Cit.*,p. 77.

- Decision / Action AUTOMATICALLY has no legal force anymore.;
- **Execution with Penalty Money and / or Administrative Sanctions**, *i.e.* if related to the *petitum* being granted, the Defendant is obliged to issue a new Decision / Action. If within 90 working days after the verdict entered permanent legal force the Officer / body does not issue or make the Decision / Action requested voluntarily, then the Plaintiff asks the Chairperson of the Administrative Court so that the Officer / Body to be subjected to Coercive Efforts in the form of *Dwangsom* (Penalty money) and / or Administrative sanctions from the supervisor of the relevant Officer / body;
 - **Notification to the mass media** can be done together with *dwangsom* (Penalty money) and / or administrative sanctions; and
 - **Report to the President** to order the Officer / Body to implement the contents of the court's verdict, and to the people's representative institution to carry out its supervisory function.

Solutions

1. A Strict Separation Between the Authority of the Ombudsman and the Judiciary/Court of Law

As explained in this paper, both in terms of its philosophical and theoretical basis for maladministration, the Ombudsman legal competence should only be limited to examine public complaints about public services regarding the behavior of public service Providers (agents or bodies) related to the personal responsibility of the Providers, not the office responsibility. This can only be done by revising Law No. 37 of 2008 regarding The Ombudsman of the Republic of Indonesia. The thing examined by the Ombudsman is how the behavior of public service Providers in serving the society in terms of effectiveness and efficiency. Effectiveness in terms of carrying out its duties is met according to existing standards, efficient in terms of procedures and a reasonable period of time. The Ombudsman cannot examine whether a product *i.e.* Decision or Factual Action from the Public Service Provider is legal or illegal. Thus the recommendations issued may not be a recommendation to revoke or declare null / invalid any Decisions

or Actions, because it is the authority of the Judiciary through the litigation process in accordance with applicable laws and regulations. If it is not so, in the future the Ombudsman will become an *Ultra Vires* (beyond the authority) Institution and will always be in contact with the authority of the Administrative Court.

Regarding compensation for maladministration in public services, as long as the loss arises due to the personal error of the Provider, for example, due to the time being too long (inefficient), it can be reported to the Ombudsman so that the Officer is personally condemned. However, if the loss arises as a result of the issuance of or the Decision or Factual Actions of the Public Service Provider, then this matter has entered the sphere of Office Responsibility and is the authority of the State Administrative Court to adjudicate, so that the State is responsible for this kind of fault/error.

2. Efficiency of Procedural Law in Administrative Court

Two of the principles in the process of providing public services is effective and efficient. In this case the author's emphasis is on efficient handling of cases in the courts which have been known to be complicated and lengthy due to the procedural law governing thus. The lengthy and time-consuming legal process that is not insignificant and the formality that sometimes burdens justice seeker is one of the starting factors of overlapping between the authority of the Ombudsman and the Administrative Court because the society considers that practically and pragmatically complaining in the Ombudsman is felt to be more efficient because Officials / Bodies are obliged to carry out Recommendations or Decisions of the Ombudsman, even though in fact it is an *Ultra Vires* action (beyond its own original authorities). Thus the Administrative Court Procedural Law needs to be simplified.

Conclusion

The Public Service Act regulates how to settle disputes over compensation in public services and which body / official has the authority to resolve the dispute. There are at least two types of ways of settling compensation disputes in public services that cause losses in Public Service Act, namely the Non-Litigation resolution through the Ombudsman, and the Litigation resolution through the Court of Law.

Giving authority to settle disputes in the field of public services to the Ombudsman is a philosophical shift of the existence of the Ombudsman from its original philosophy. The original concept of the Ombudsman is to handle complaints about the maladministration (bad / failed government) as manifestation of bad or improper behavior from public service Providers. The Ombudsman should not have the authority to annul / declare invalid a product of public service Providers because it is the duty of the court of law as a litigation institution. The Ombudsman's recommendation should only be limited to how the Public Service Provider is responsible for his personal error (*faute personnelle*) rather than the office error (*faute de service*). However, the Public Service Act gives the Ombudsman special authority to determine the amount of compensation due to maladministration in Article 50 paragraph (5) of the Public Service Act. The procedure is regulated in Ombudsman Regulation No. 31 of 2018 regarding Special Adjudication.

On the other hand, the Court of Law also has the same authority to adjudicate public service disputes due to losses, which are regulated in Articles 51 and 52 of the Public Service Law, namely:

- Administrative Disputes in the form of losses due to the issuance of Written Decisions/Decree of the Public Service Provider in terms of Administrative Services and Goods / Services (*vide* Article 51 of the Public Service Act; and Article 1 number 9, Article 2, and Article 49 of Law No. 5 of 1986 Regarding Administrative Court; Article 87 of Government Administration Act); and
- Dispute regarding Administrative Tort (*Onrechtmatige Overheidsdaad/OOD*) in the form of losses due to the factual actions of the Public Service Provider in terms of Public Services in the form of Goods / Services (*vide* Article 52 of the Public Service Act; Article 1 number 8, Article 75-78, Article 85 and Article 87 of Law No. 30 of 2014 regarding Government Administration).

Both are the authority of the Administrative Court with the procedures as stipulated in the Administrative Court Procedure Law.

The solution offered in this paper in terms of the overlapping authority of the Administrative Court with the Ombudsman is to strictly separate the authority of each institution. The Ombudsman has the authority to follow up on reports / complaints from the members of

civil society and issue recommendations / decisions related to Public Service Provider Behavior related to the effectiveness and efficiency of public service and have implications for the personal responsibility of the Public Service Provider including compensation issues so that the Officer is personally responsible. Whereas the Administrative Court has the authority to adjudicate the legal products of the Public Service Provider in the form of Decisions or Actions, which has implications for the Office responsibilities of the Public Service Provider including compensation issues so that the State is responsible for such fault/error.

Bibliography

Books

- Bimasakti, Muhammad Adiguna. *Perbuatan Melawan Hukum (PMH) Oleh Pemerintah / Onrechtmatige Overheidsdaad (OOD) Dari Sudut Pandang Undang-Undang Administrasi Pemerintahan*. Yogyakarta: Deepublish, 2018.
- _____. *Hukum Acara dan Wacana Public Lawsuit Di Indonesia Pasca Undang-Undang Administrasi Pemerintahan: Sebuah Sumbangan Pemikiran*. Yogyakarta: Deepublish, 2019.
- Daim, Nuryanto A. *Hukum Administrasi: Perbandingan Penyelesaian Maladministrasi oleh Ombudsman dan Pengadilan Tata Usaha Negara*. Surabaya: Laksbang Justitia, 2014.
- Donner, A.M. *Nederlands Bestuursrecht: Algemeen Deel*. Wolters Kluwer Nederland B.V. 1953.
- Gilling, Bryan. *The Ombudsman in New Zealand*. Wellington: Dunmore Press, 1998.
- Hadjon, Philipus M. *Perlindungan Hukum Bagi Rakyat Indonesia: Sebuah Studi tentang Prinsip-Prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*. Surabaya: PT Bina Ilmu, 1985.
- _____. et.al. *Hukum Administrasi dan Good Governance*. Jakarta: Penerbit Universitas Trisakti, 2012.
- Lubis, M. Solly. *Hukum Tata Negara*. Bandung: CV Mandar Maju, 2008.
- Marbun, S.F. and Moh. Mahfud MD. *Pokok-pokok Hukum Administrasi Negara*. Yogyakarta: Liberty, 1987.
- Mertokusumo, Sudikno, dan A. Pitlo. *Bab-Bab Tentang Penemuan Hukum*. Bandung: Citra Aditya Bakti, 1993.

- Poerbopranoto, Koentjoro. *Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi*. Bandung: Penerbit Alumni, 1985.
- Utrecht, E. *Pengantar Hukum Tatausaha Negara Indonesia*. Jakarta: N.V. Penerbitan dan Balai Buku Indonesia, 1957.

Articles From Journal and Others

- Gotteher, Dean M. *International Update, The Second Ombudsman Leadership*, San Fransisco: Forum Conference, 2000.
- Kadarsih, Setiajeng. "Tugas dan Wewenang Ombudsman Republik Indonesia dalam Pelayanan Publik Menurut UU No. 37 Tahun 2008.", *Jurnal Dinamika Hukum* Vol. 10 No. 2 Mei 2010, pp. 175-182.
- Langbroek, Philip M. dan Peter Rijpkema. "Demands of proper administrative conduct. A research project into the ombudsprudence of the Dutch National Ombudsman". *Utrecht Law Review* Volume 2, Issue 2 (December) 2006, pp. 81-98.
- Solechan. "Memahami Peran Ombudsman Sebagai Badan Pengawas Penyelenggaraan Pelayanan Publik di Indonesia." *Administrative Law & Governance Journal* Vol. 1 Edisi 2 Mei 2018 ISSN 2621 – 2781, pp. 67-89.

Laws and Regulations

- Indonesia. UUD NRI 1945. *Undang Undang Dasar Negara Republik Indonesia Tahun 1945*.
- _____. *Undang-Undang Tentang Peradilan Tata Usaha Negara*. UU No. 5 Tahun 1986. LN No. 77 Tahun 1986. TLN No. 3344.
- _____. *Undang-Undang Tentang Perubahan atas Undang-Undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara*. UU No. 9 Tahun 2004. LN No. 35 Tahun 2004. TLN No. 4380.
- _____. *Undang-Undang Tentang Perubahan Kedua atas Undang-Undang No. 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara*. UU No. 51 Tahun 2009. LN No. 160 Tahun 2009. TLN No. 5079.
- _____. *Undang-Undang Tentang Ombudsman Republik Indonesia*. UU No. 37 Tahun 2008. LN No. 139 Tahun 2008. TLN No. 4899.
- _____. *Undang-Undang Tentang Pelayanan Publik*. UU No. 25 Tahun 2009. LN No. 112 Tahun 2009. TLN No. 5038.
- _____. *Undang-Undang Administrasi Pemerintahan*. UU No. 30 Tahun 2014. LN No. 292 Tahun 2014. TLN No. 5601.

Supreme Court Regulations No. 6 of 2018 Regarding Guidelines for Resolving Government Administrative Disputes After Taking Administrative Proceedings.

Supreme Court Regulation No. 2 of 2019 Regarding Guidelines for Resolving Disputes on Government Actions and Authority to Judge Unlawful Acts by Government Agencies and / or Officers (*Onrechtmatige Overheidsdaad*).

Ombudsman RI. *Peraturan Ombudsman Tentang Ajudikasi Khusus*. Peraturan Ombudsman RI No. 31 Tahun 2018.

Koninkrijk der Nederlanden. Wet Nationale Ombudsman. Wet van 4 Februari 1981, and its amendments.

Koninkrijk der Nederlanden. Algemene Wet Bestuursrecht (Awb). Wet van 4 Juni 1992, and its amendments.

Others

<https://www.hukumonline.com/berita/baca/1t5b83a09e9f6e0/potensi-persinggungan-kewenangan-ombudsman-dengan-badan-peradilan-oleh-enrico-simanjuntak> accessed 25 May 2019.

<https://www.nationaleombudsman.nl/de-nationale-ombudsman/wie-is-de-nationale-ombudsman> accessed 25 May 2019.