

# A Comparison of Administrative Court and Ombudsman in Supervising Government Action in Indonesia

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# A Comparison of Administrative Court and Ombudsman in Supervising Government Action in Indonesia

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## Abstract

This study aims to compare two institutions that have the same role: to supervise government action in Indonesia. Using the comparative and statutory approach, I will describe characteristics of the Administrative Court and Ombudsman. Based on Act Number 5 of 1986 and its amendments on the Administrative Court, and Act Number 37 of 2008 on the Ombudsman, both the Administrative Court and Ombudsman oversee government action for its maladministration, and remind government officials of the rule of law and protect the rights of the citizens. The study found several differences between the two institutions. First, the authority of the Ombudsman in the settlement of maladministration is broader than that of the Administrative Court. Second, the Ombudsman is also more active in resolving complaints from the public and can conduct investigations actively and independently; whereas, the Administrative Court is held only when a plaintiff brings a lawsuit. Third, the settlement of maladministration by Ombudsman is done via a dispute resolution mechanism that is simple, fast, and free of charge. Fourth, the parties can choose from several options for resolution provided by the Ombudsman. Fifth, the Ombudsman can make recommendations regarding the settlement of maladministration, including the recommendation to pay compensation and/or rehabilitation for the injured party. Besides, for public interest, the Ombudsman can also announce the findings, conclusions, and recommendations. However, the Administrative Court can declare that a certain ruling by the administrative agency is void, with or without a claim for compensation and/or rehabilitation.

## Keyword

Administrative Court, Ombudsman, Government Action

## インドネシアにおける行政裁判所とオンブズマンによる 政府の行為の監督の比較

アグス トゥリオノ

## 要旨

本研究は、インドネシアにおける政府行為監督上、同じ役割を果たす2つの機関を比較することを目的とする。関連条文にも注目しながら、行政裁判所とオンブズマンの特徴を比較し、説明

する。行政裁判所は1986年法第5号及びその修正条項と、オンブズマンは法37号に基づいて、それぞれ悪質な行政行為を監督する役割を果たす。これは政府が公式の法規範の概念を守り、市民権を保護するためである。一方、これら2つの機関には、以下のような差異がある。すなわち、第一に、履行が完了した悪質な行政行為を是正するオンブズマンの権限は、行政裁判所のそれより広がっている。第二に、オンブズマンはまた行政裁判所に比較し、市民からの訴えを解決する活動を行っている。たとえば、行政裁判所が原告により持ち込まれた訴訟によってしか裁判を開くことができない一方で、オンブズマンは自身の権限に基づいて積極的に調査を行うことができる。第三に、オンブズマンによる悪質な行政行為の是正は、簡潔で、迅速で、かつ無料という紛争解決手続きに則ってなされている。第四に、紛争解決の際、オンブズマンは当事者によって選択可能な多くの手法を準備している。第五に、オンブズマンは、被害者への賠償及びリハビリテーションの費用を支払うという内容を含んだ、勧告書を作成することができる。それに加え、市民の利益のため、オンブズマンはまた事実認定、決定及び勧告を公表することが可能であり、同時に行政裁判所は、当事者が賠償及びリハビリテーションを要求したか否かに関わらず、当該行政行為を無効であると宣言することができる。

#### キーワード

行政裁判所, オンブズマン, 政府のアクション

### A. Introduction

The Indonesian constitution mandates the government to serve all citizens to get them their basic needs and to improve the welfare of society. To achieve this important goal, the government should play active roles in their socioeconomic life of the community through public service delivery. In order to maximize the quality of the public service, the government has an attributive and discretionary power in implementing their duties to solve various problems that they are facing now.

Discretion is the power or right to decide or choose what should be done in a particular situation. Atmosudirjo defined the discretion in his book as a freedom of government officials to do or not to do something according to their own decision.<sup>2</sup> Discretion means the government official has some options to choose in a situation. It is often the case that lawmakers intentionally

leave some vague words in their legislation and even grant some discretionary power to government officials when they enforce the legislation. In other words, discretionary power is come from the legislative body, and is developed and enforced by the executive body.

Granting the discretion to the government is not necessarily a bad idea. It is because a legislation never covers all the possibilities under the legislation. And the government activities are increasingly getting complex when they perform their tasks to provide public service with the community. In some situations, the discretionary power is useful for government officials to make minor adjustments without a new legislation. But in many situations, such discretionary power has resulted in a lot of abuse of authority or maladministration and even corruption. Maladministration is any behavior or act beyond the authority against the law. In maladministration, government

officials use their authority for any purpose other than the purpose articulated in the law. Maladministration also happens when operators of a government service improperly perform their duty by negligence.<sup>3</sup> In the Ombudsman Investigation Guide Book for Indonesia, maladministration is generally defined as a behavior which is not fair, including unduly delayed, impolite, careless, abusive of authority, unreasonable, unjust, oppressive, improper, and discriminative act.<sup>4</sup>

To deal with problems of maladministration, the government thought they needed to establish the Administrative Court to supervise the government action. It aimed to resolve maladministration or disputes between the people or civil legal entity and the agency or official of the state administration. The Administrative Court was initially established in 1986 by the special regulation of Act No. 5 of 1986 law for the Administrative Court, which has been amended several times including the latest amendment by Act No. 51 of 2009. However, efforts to reform the bureaucratic system through the establishment of the Administrative Court didn't work well. Several amendments to the rules of the Administrative Court in Indonesia didn't reduce the level of maladministration by government officials and didn't protect the rights of citizens effectively.

After the reform in 1998, the Indonesian government attempted to undertake major reforms of bureaucratic system. And the government established a National Ombudsman Commission in 2000 by the Presidential Decree Number 44 of 2000 on the National Ombudsman Commission. The Commission strengthened legal basis for the Ombudsman system with

Act No. 37 of 2008 on the Ombudsman of the Republic of Indonesia. Like the Administrative Court, Ombudsman was established to oversee the government action. Now there are two institutions to deal with the problems of maladministration in Indonesia. They have the same purpose, but they are different in some ways. In this article, I will discuss how these two institutions work.

## **B. Discussion**

### **1. The Authority of the Administrative Court and the Ombudsman in Overseeing Government Action**

The Administrative Court and the Ombudsman have similar but different functions in terms of oversight of government action. Similarities between the Administrative Court and the Ombudsman is that both institutions aim to resolve maladministration caused by government officials.

The Administrative Court is one of four judicial powers under the control of the Supreme Court in Indonesia. The other three are general courts, religious courts, and military courts. The power of the judicial body to prosecute a case can be distinguished in two; the relative competence and the absolute competence. The relative competence of the prosecution power is afforded to a tribunal, and it is provided in accordance with the law. The absolute competence is the court's discretion to prosecute a case, according to the subject matter of the dispute. The relative competence is provided in art. 6 of Act No. 5 of 1986 on the Administrative Court as amended by Act No. 9 of 2004, which states that:

(1) The Administrative Courts reside in the

capital of a regency/city, and their legal vicinities include the area of that province.

- (2) The Administrative High Courts reside in the capital of the provinces and their legal vicinities include that regency/city.

Presently, the number of the Administrative Court in Indonesia is still limited. There are as many as 26 administrative courts and only 4 of the Administrative High Court. The Administrative High Courts are located in Medan, Jakarta, Surabaya and Makassar. So each of the Administrative Court covers several territorial jurisdictions. For example, Medan Administrative Court jurisdiction covers the provinces of North Sumatera and the Administrative High Court jurisdiction covers the provinces in Sumatera Island.

The Administrative Court has absolute power to prosecute a case when the case falls within the subject matter of the court. The subject matter of the court is an administrative decision. Based on art. 1 (3) of Act No. 5 of 1986, the administrative decision is a written decision issued by agencies or officials of state administration. The administrative decision contains a legal action of the state administration that is based on certain articles of specific legislation. And the decision should be concrete, individualized, and final, and it adversely affecting to a private citizen, or private organizations.

Article 47 regulates the competence of the Administrative Court in the judicial system in Indonesia, namely the duty and authority to examine, decide and resolve disputes in state administration. The state administration dispute is a dispute arising in the field between the state administration and community or

civil legal entity, both at central and regional levels. It happens because of administrative decisions issued by the government officials based on legislation, including disputes between governmental officials.

The power of Administrative Court is limited. The Administrative Court has limited power to examine the validity of official acts of state administration. The object of the review by the Administrative Court should be a written decision issued by a state administrative agency. The written decision contains legal actions of state administration based on the legislation in force.<sup>5</sup>

Meanwhile, Ombudsman is a state institution which has the authority to supervise public service. Ombudsman is also entitled to supervise the government State-Owned Enterprises, Local-Owned Enterprises and State-Owned Legal Entity. In addition to them, private entities or individuals who are given the task to perform certain public service are subject to the supervision by the Ombudsman. Therefore, it is arguable that Ombudsman also supervises the business of the Administrative Court. But the Administrative Court has no authority to resolve disputes when the Ombudsman is defendant. By the art. 10 of Act No. 37 of 2008, Ombudsman has the right to not be arrested, detained, and sued by others in order to perform its duties.

## 2. The Procedure in Handling the Cases

Similarities between the Administrative Court and Ombudsman in supervising government action is to provide an access to justice for an adversely affected party. But in terms of its process, the Administrative Court and Ombudsman are different in many ways.

**a. The Procedure in the Administrative Court System**

**1) Filing a lawsuit**

The process of examination by the Administrative Court starts when the lawsuit is filed by a victim of maladministration. But a plaintiff should be careful to the timing of filing a lawsuit. Act No. 5 of 1986 on the Administrative Court provides the limitation of filing a lawsuit. The lawsuit may be filed within a period of 90 (ninety) days since the announcement, or receipt by the party, of the administrative decision.<sup>6</sup> Based on Article 53 (1) and Article 1 (4) of Act No. 5 of 1986, a lawsuit in the Administrative Court against the agency or official who issued the administrative decision shall be filed by a person or civil legal entity. A plaintiff alleges that an interest of a person or civil legal entity is abridged, seeking a declaratory judgment that the decision is invalid.

According to art. 56 of Act No. 5 of 1986, the complaint filed by a plaintiff must include following information:

- (1) Identity of the plaintiff, and the defendant or his lawyer;
- (2) Material terms:
  - a. The basis of the claim (position);
  - b. Demands (petition).

**2) Administrative Examination**

Administrative examination is the first stage to check incoming claims. That examination shall be conducted by the Register's Office. After the plaintiff pay the administration fee, the officer will give a registration number.

Art. 56 provides an authorized officer shall perform administrative checks to make sure that the complaint has correct information that

the law required.

**3) Dismissal Process**

After the administrative research, the head of the Administrative Court will conduct research on materials submitted by the plaintiff. Dismissal process is conducted to investigate whether the lawsuit filed by the plaintiff to be continued or not. The chairman of the court conducts the dismissal process at a consultative meeting. The chairman of the court may appoint a judge as a reporter. Before deciding a dismissal, the chairman of the court can summon and hear the statements of the parties, if necessary.

The substantial examination shall be done based on art. 62 (1) of Act No. 5 of 1986. In a consultative meeting, the head of the court is authorized to decide that the complaint filed is not legitimately accepted because of following reasons:

- a) The principal claims are not included in the authority of the court;
- b) The problems contained in the complaint are not redressed by the plaintiff even after the plaintiff was directed to do so;
- c) The contents of claims are not based on proper reasons;
- d) What is sought in the lawsuit has actually been fulfilled by a late administrative decision;
- e) The lawsuit is filed too early or too late.

**4) Examination Preparation**

Before the principal examination begins, the judge must hold a preliminary examination to complete the plaintiff's lawsuit. In the preliminary examination, the judge may question the plaintiff and defendant to get more detailed explanations from them on a certain issue. Preliminary

examination conducted in the deliberations in a trial shall not be opened to the public.

### 5) Open Trial

When a lawsuit survives the pretrial process through the administrative examination and dismissal review, the lawsuit proceeds to the trial in open court. The administrative court examination is a test of the validity of the decision by an administrative agency or governmental officials in the form of written administrative decisions. Article 70 (1) provides that the court is formally led by the chairman of the trial judges. And if the chairman determines that the dispute relates to public order and the state safety, the chairman declares that the trial will not be opened to the public.<sup>7</sup>

### b. The Procedure in The Ombudsman System

Victims of maladministration in the public service process can complain to the Ombudsman. In art. 1 (4) of Act No. 37 of 2008 on the Ombudsman of Republic of Indonesia, a letter of grievance, or public complaint, is to describe the material fact, and it shall be reviewed by the Ombudsman. The grievance is usually submitted in a written form, but also could be made orally, by anyone who is the victim of maladministration. In certain cases, the public complaints can also be submitted via SMS or phone.

#### 1) Examination of public complaints

A public complaint or a letter of grievance must be written to include certain information. Article 24 mentions that:

- (1) The letter of grievance has to comply with the requirements as follows:
  - a. Mention name, place and date of birth, marital status, occupation, and complete

address of the complainant;

- b. Mention the material facts of the event and the content of the action or decision by the administrative agency; and
  - c. Mention the fact that the complainant already filed the letter of grievance directly to the party or his/her superior, but they didn't take the grievance properly.
- (2) In limited situations, the name and identity of the complainant may not be disclosed.
  - (3) The event, action or decision as complained or filed has not exceeded two (2) years since the occurrence of the event, action or decision.
  - (4) In limited situations, a third party may file a letter of grievance with helps from attorney.<sup>8</sup>

#### 2) Investigation

The investigation is one of the Ombudsman's authorities in resolving a maladministration problem. In the investigation process, the Ombudsman may refer to various information including from the mass-media to know the public sentiment, and also it may do investigation its own initiative (own motion investigation). The Ombudsman needs to collect information and evidence related to the case. Those information and evidences should be complete, accurate, balanced and objective.

In the investigation, there are five requirements:

- a) The obligation to keep secrecy.
- b) The obligation to be objective and impartial.
- c) The obligation to listen and pay attention to the statements from the complainant, the reported (defendant), and witnesses.

- d) Treating the complainant and the reported as equals.
- e) The Ombudsman is prohibited to handle a case that may cause a conflict of interest.<sup>9</sup>

Based on the result of the substantive investigation, the Ombudsman may rule that they stop, or extend, their investigation.<sup>10</sup>

### 3) Clarification

One of the obligations of the Ombudsman is to clarify a case dealing with public complaints before the case proceeds. Clarification is an act to get information from the complainant, the reported and witnesses on the maladministration.<sup>11</sup> In performing the clarification, art. 8 (1) of Act No. 37 of 2008 states that the Ombudsman has the power;

- a) to request information from the Complainant, or other parties related to the Complaint as filed to the Ombudsman. The Information can be given by orally or in a written form;
- b) to investigate the decision, correspondence or other documents from either the complainant or the party complained, or both of them to obtain the truth of the grievance;
- c) to request further information and/or copy or photocopy of documents as required from any agencies and the party complained for the investigation of the grievance;
- d) to summon the complainant and other parties related to the grievance;
- e) to dispose the grievance through mediation and conciliation at the request of the parties;
- f) to make recommendations on the disposition of the grievance, including

the recommendation for the payment of compensation and/or rehabilitation which is given to the party damaged;

- g) for the interest of public, to reveal the result of the finding, conclusion, and recommendation.

The Ombudsman is authorized to clarify the case and request a copy of the required documents from any agency to complete the investigation process. This clarification request can be made in writing or made orally. In some cases, clarification is done by phone or SMS.

In the process of clarification, the Ombudsman normally doesn't go to the field. But if the documents are not obtained, or found inadequate, the Ombudsman may conduct field research. The ombudsman will do cross-checking in the field to test whether the explanation given by public officials is true or not. The Ombudsman may conduct an interview to cross check the information they gathered in the clarification process. The clarification request is conducted actively. So there is little difference with the request for clarification made in writing through official letter.<sup>12</sup> The request for clarification is necessary to ascertain and determine the results of the analysis before the Ombudsman finally gives a final opinion, which is used as a basis for preparing a recommendation.

### 4) Mediation

Mediation is an alternative way to resolve a dispute out of court. This method has been used by the Ombudsman to resolve maladministration. In the Columbia Encyclopedia, the Ombudsman is interpreted as a government agent and is serving as an intermediary between citizens and



the government bureaucracy. The Ombudsman is usually independent, impartial, universally accessible and authorized only to make a recommendation.<sup>13</sup> In carrying out its duties, the Ombudsman positions itself as a third party to mediate the conflicting parties.

According to art. 1 (10) of Act No. 25 of 2009 on the Public Service, mediation is defined as an effort to resolve a dispute in the public service through aid, either by the Ombudsman itself or a mediator appointed by the Ombudsman. Mediation conducted by the Ombudsman is the process of resolving complaints from a community, private entities and individuals to public officials. It is conducted by a mediator of the Ombudsman in order to reach a settlement that is acceptable to both parties (win-win solution) through negotiations between the parties.<sup>14</sup>

#### 5) Conciliation

Conciliation is a dispute resolution outside the court by agreement or consultation conducted solely by the parties. It is facilitated by one or more neutral third party as a conciliator. Conciliator is more active than the mediator in giving encouragement to the parties to resolve their conflict.<sup>15</sup> In art. 1 (10) of the Ombudsman Regulation No. 2 of 2009, conciliation is defined as the process of resolving a complaint or dispute of public services between the community and public officials. The conciliation process is facilitated by the Ombudsman as a conciliator to reach a settlement that is acceptable to both parties.

Conciliation will end with or without the consent to a proposal by a conciliator. After that, the conciliator makes an official report

signed by the conciliator and the parties.<sup>16</sup> If the conciliation ended without agreement, the conciliator will close conciliation with the official report. Then the Ombudsman will make a recommendation immediately.<sup>17</sup>

#### 6) Adjudication

Adjudication is a process of dispute resolution between parties of public service that is decided by the Ombudsman.<sup>18</sup> Adjudication conducted by the Ombudsman aims to determine the amount of compensation to be paid by the agency. This process will be done only after a maladministration is found.

#### 7) Suggestion

As a public service watchdog agency, the Ombudsman of Republic of Indonesia is also given the authority to give a suggestion. Basic authority is regulated in art. 8 (2) of Act No. 37 of 2008 which provides its duties and functions. The Ombudsman is authorized to:

- a) submit suggestions to the President, the head of the region, or the head of the other state officials for improving the organization and/or public service procedures;
- b) submit suggestions to the House of Representatives and/or the President, the Regional House of Representatives and/or the head of the region in order to make amendments the laws and other legislations to prevent maladministration.

#### 8) Recommendation

The recommendation is a written form compiled by the Ombudsman. In the recommendation, the Ombudsman tells final conclusion of the investigation results, and opinion and suggestion to the head of the governmental officials. It is an important part of the Ombudsman system in

order to improve the quality of public services.<sup>19</sup> Recommendations are usually interpreted as a suggestion, but sometimes it can also mean advice.<sup>20</sup> But the Ombudsman's recommendation is more than the usual suggestions or advice to government officials or state officials about what should be done to improve the service that people complain about.

The Ombudsman will give a recommendation to the reported after conducting intensive checks and obtaining evidence of maladministration.

The recommendations made by the Ombudsman shall contain at least the following:

- a) A brief description of complaint.
- b) A description of the results of the examination.
- c) A finding that a legislation or the general principle of administration is violated.
- d) The elements of maladministration proven.
- e) Conclusion and opinion of the Ombudsman on the matter.

In practice, there are several types of the Ombudsman's recommendation; a) Helping resolving issues of the complainant. b) Provision of sanctions. c) Prevention acts of maladministration; d) Changing the process or system.

#### 9) Monitoring

As a step to improve the effectiveness of follow-up reports from the public, the Ombudsman will be monitoring of relevant agencies. Monitoring is done to ascertain whether the recommendations issued by the Ombudsman are properly carried out or not.

The monitoring mechanism is conducted by:

- a) Writing to the relevant agencies to provide further recommendations to matters that

have not received any response or feedback in order to obtain a settlement;

- b) Meeting with the reported to see firsthand how the case is dealt in order to obtain a favorable settlement agreement;
- c) Publishing to the public through the mass media on selected cases that do not get the follow up as appropriate;
- d) Inviting the reported to provide an explanation in the Ombudsman's Office.<sup>21</sup>

### 3. The Legal Effect of the Dispute Resolution Process

#### a. The Legal Effect of the Administrative Court Process

In Indonesian law, any act that harms a legal right of a person can be reviewed by the court. That review shall be done in the Administrative Court. In this regards, the Administrative Court is an instrument of control on the administration.<sup>22</sup>

The existence of the Administrative Court is an evidence that Indonesia is a state that embrace the values of justice, rule of law and Human Rights. The purpose of establishing the Administrative Court is to realize the livelihood of the state and nation that is prosperous, secure and peaceful. Besides, it guarantees constitutional rights of the citizens and ensures a harmonious relationship between the citizens and the government.

The legal effect of the examination process of the Administrative Court is whether the disputed decision be declared void regardless of a claim for compensation and/or rehabilitation. Under the Article 97 (7) of Act No. 5 of 1986, the judicial decision of the Administrative Court can be:

## 1) Rejecting the lawsuit.

It means that the court ruling strengthens the governmental decision.

## 2) Granting the remedy.

If the plaintiff won the case, the court ruling could set obligations to be performed by the agency or official. This obligation can be:

- a) Revocation of the disputed decision;
- b) Repeal of the decision and issuance of new decision; or
- c) Publish the decision (previously unpublished).<sup>23</sup>

## 3) Not accepting the lawsuit.

It means that the lawsuit does not meet the requirements to be heard in the administrative court.

## 4) Termination of the lawsuit.

It happens when the parties do not come to the courthouse even though they were properly called. Besides, the period of amending of a document by the plaintiff is expired.

## b. The Legal Effect of the Ombudsman Process

Most ombudsmen are only authorized to make recommendations and could not give legally binding decisions. However, there are some ombudsmen given greater authority, the authority to give decisions and filing a lawsuit. Indonesian Ombudsman has no authority to make or change laws, the Ombudsman has the authority to recommend an amendment of legislation to the legislature, though.

In examining the report, the Ombudsman shall be guided by the principle of appropriation, justice, non-discrimination, impartiality, accountability, balance, transparency, and confidentiality.<sup>24</sup> To implement the principle, the Ombudsman needs to use a persuasive approach

to resolve maladministration in the process of public service delivery. Using this approach means that all reports must be resolved through the recommendation. This is what distinguishes the Ombudsman from other legal enforcement agencies or courts to resolve maladministration.

Therefore the Ombudsman can make recommendations regarding the settlement of the report, including the recommendation to pay compensation and/or rehabilitation of the injured party. For the interest of public, the Ombudsman has a jurisdiction to reveal the result of finding, conclusion, and recommendation.<sup>25</sup>

**4. Implementation of the Examination Results****a. Implementation of the Administrative Court Examination Results**

The examination result of the Administrative Court must be implemented by the government. According to Art. 97 (8) and (9), it can be:

- 1) revocation of the administrative decision;  
or
- 2) revocation of the administrative decision and issuing a new administrative decision;  
or
- 3) issuance of the administrative decision.

Although the court ruling as an examination result of the Administrative Court is legally binding, an administrative official is only expected to implement the examination result voluntarily. Therefore the successful implementation of the court ruling is heavily relied on the authority of the courts and legal awareness of public officials.<sup>26</sup> If the court ruling doesn't work well, then the Administrative Court Act provides a mechanism in the form of administrative sanction from the superior

administrative official. To avoid a sanction by them, the officials who issued the decision usually make an effort to implement the decision from the court.

Another mechanism mentioned in the Administrative Court Act is the imposition of fine and announcement by mass media. Article 116 (5) of the Administrative Court Act provides that local print media announce that the officials don't implement the court ruling if they failed to do so for 90 working days since the deadline. Once the deadline passes, the plaintiff can file a request to the chairman of the court that the defendant follow the ruling by the court. Article 116 (6) of the Administrative Court also provides that the chairman of the court reports this disobedience to the President of Indonesia as the highest government authority and to Parliament. It is clear that the President has the authority to force administration officials to implement the examination result. Meanwhile, the mechanism of the fine, which is provided at art. 116 (4) of the Administrative Court Act, has not been implemented well. Art. 116 (4) of the Act only mentions the imposition of payment of a sum of money specified in the ruling when a judge ruled in favour of the plaintiff.<sup>27</sup>

#### **b. Implementation of The Ombudsman Examination Results**

The most significant aspect of Ombudsman is its independence from the executive branch. In terms of credible investigation and recommendations both to the community and to the government, the Ombudsman maintains and protects the impartiality and integrity of its business. Follow-up of recommendations from Ombudsman depends on the administrative agency. This

is what distinguishes a recommendation or a decision rendered by the Ombudsman with the decision by the judiciary. The decision of the judge usually has a binding legal force.

The recommendation of the Ombudsman is final, but it is not binding as a court ruling. Therefore, the quality of the Ombudsman's recommendation is very important in realizing an effective oversight. Additionally, the decisions and the recommendations should be persuasive one to convince the parties. If a recommendation made in a particular case is not accepted by the government, then the recommendation will be forwarded to the legislature.

Although the Ombudsman's recommendation is not like a court ruling, it has the own legal force. Article 38 of Act No. 37 of 2008 provides that:

- (1) The party complained and the superior of the party complained shall comply to perform the recommendation of the Ombudsman.
- (2) The superior of the party complained shall report to the Ombudsman on the compliance of the recommendation once they follow the recommendation within the period of 60 (sixty) days
- (3) The Ombudsman may request to the party complained and/or his/her superior to conduct on the spot investigation to ensure the implementation of the recommendation.
- (4) In the event that the party complained and the superior of the party complained fails to comply the recommendation or have only complied to some parts of the recommendation without a good reason, the Ombudsman may announce to the

public that the superior of the party complained ignore the recommendation. Also it publishes the report of its job annually and submits the report to the House of Representatives and the President.

The party complained and the superior of the party complained violating the provisions as specified under Article 38 (1), (2) or (4) are subject to the administrative sanction pursuant to the provisions of laws and regulations.<sup>28</sup>

### C. Conclusion

The Administrative Court and the Ombudsman basically have the similarities and the differences in their functions. The similarities between the Administrative Court and the Ombudsman are that both aims to resolve maladministration and provide access to justice for person or persons who are adversely affected by a government action. In addition, the existence of the Administrative Court and the Ombudsman is an evidence that Indonesia is a state based on the rule of law.

In the settlement of maladministration, the authority of the Ombudsman is more important than the Administrative Court. The Ombudsman even supervises the Administrative Court in carrying out its functions. Moreover, the Ombudsman does not only passively monitor or wait for complaints from the public, but also can actively conduct investigations based on its own initiative, while the Administrative Court is just waiting for lawsuit from the public. Resolving maladministration by the Ombudsman is done through a dispute resolution mechanism that is simple, fast and free of charge. This process is

different from the administrative court in that it needs a long time process and requires cost too much. There are many ways to resolve maladministration by the Ombudsman either an agreement on mediation and conciliation, adjudication decision or the suggestion and recommendation. The Ombudsman can make recommendations regarding the settlement of the report, including the recommendation to pay compensation and/ or rehabilitation of the injured party. Besides, for the sake of public interest, the Ombudsman is also able to announce the findings, conclusions of the case and recommendations. Meanwhile, the legal consequences of the examination process in the Administrative Court is that the disputed decision by government should be declared void regardless of a claim for compensation and/ or rehabilitation.

The Recommendation of the Ombudsman is final. But it is not binding because it is not a court ruling. The Ombudsman's recommendation should be persuasive one to convince the parties. If a recommendation made in a particular case is not accepted by the government, then the recommendation will be forwarded to the legislature. The Administrative Court Act provides a mechanism in the form of administrative sanction by the superior administrative official. To avoid the sanctions, a head of officials who issued the administrative decision will make a good effort.

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- Act Number 25 of 2009 on The Public Services
- Act Number 30 of 2014 on The Government Administration
- Ombudsman Regulation Number 2 of 2009 on The Procedures of Examination and Settlement of Complaints

## [Notes]

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- <sup>2</sup> S. Prajudi Atmosudirjo, *Hukum Administrasi Negara* (State Administrative Law), Ghalia Indonesia, Jakarta, 1994, p. 82.
- <sup>3</sup> Article 1 (3), Act Number 37 of 2008 on The Ombudsman of Republic of Indonesia.
- <sup>4</sup> Hartono, *Panduan Investigasi untuk Ombudsman Indonesia* (The Ombudsman Investigation Guide Book for Indonesia), The Asia Foundation Indonesia, 2003, compare with Hendra Nurtjahyo, *Memahami Maladministrasi* (Understanding Maladministration), Ombudsman of Republic of Indonesia, First Edition, August 2013, p. 4
- <sup>5</sup> See art. 1 (3) Act No. 5 of 1986 on the Administrative Court
- <sup>6</sup> See art. 55 of Act No. 5 of 1986.
- <sup>7</sup> See art. 70 (2) of Act No. 5 of 1986 on the Administrative Court.
- <sup>8</sup> See Article 24 Act No. 37 of 2008 on The Ombudsman of Republic of Indonesia.
- <sup>9</sup> Budhi Masturi, *Investigasi Ombudsman Nasional : Sebuah Refleksi Dari Pengalaman di Lapangan* (National Ombudsman Investigation: A Reflection of Experience in The Field), Makalah TOT Investigasi Ombudsman Nasional, Jakarta 5 –7 Februari 2002
- <sup>10</sup> See Art. 26 (2) of Act No. 37 of 2008 on The Ombudsman of Republic of Indonesia
- <sup>11</sup> Art. 1 (8), The Ombudsman Regulation No. 2 of 2009 on Procedures of Examination and Settlement of Complaints
- <sup>12</sup> Budi Masthuri, *Mengenai Ombudsman Indonesia* (Recognize Indonesian Ombudsman), PT. Pradnya Paramita, Jakarta, 2005, p. 56
- <sup>13</sup> The Columbia Encyclopedia, Sixth Edition, Columbia University Press, 2001.
- <sup>14</sup> See in Article 1 (9) of The Ombudsman Regulation No. 2 of 2009 on Procedures of Examination and Settlement of Complaints.
- <sup>15</sup> Rachmadi Usman, *Pilihan Penyelesaian Sengketa di Luar Pengadilan* (The Dispute Resolution

- Options Outside the Court), *Citra Aditya Bakti*, Bandung 2013, p.128
- <sup>16</sup> Art. 64 of The Ombudsman Regulation No. 2 of 2009 on Procedures of Examination and Settlement of Complaints.
- <sup>17</sup> Art. 67 of The Ombudsman Regulation No. 2 of 2009 on Procedures of Examination and Settlement of Complaints.
- <sup>18</sup> Art. 1 (11) of Act No. 25 of 2009 on The Public Services
- <sup>19</sup> Art. 1 (7) of Act No. 37 of 2008 on The Ombudsman of Republik of Indonesia
- <sup>20</sup> Suggestion and advice actually have no a significant difference in meaning. Both are defined as a statement or opinion stated by someone to another for a solution. Yet, in the context of daily life, the suggestion is usually used in conversations between friends. While the advice is a statement or opinion usually used by the older to the younger or someone who has a higher position to another who has a lower position.
- <sup>21</sup> The Annual Report of National Ombudsman Commission, 2005, p.21
- <sup>22</sup> Friedrich Julius Stahl in Siti Soetami, *Hukum Acara Peradilan Tata Usaha Negara* (Procedural Law of Administrative Courts) PT Refika Aditama, Jakarta, 2005, p.9
- <sup>23</sup> See Art. 97 (7) of Act No. 5 of 1986 on The Administrative Court
- <sup>24</sup> See Art.3 of Act No.37 of 2008 on The Ombudsman of Republic of Indonesia
- <sup>25</sup> See Art. 8 (1) point f and g of Act No. 37 of 2008 on The Ombudsman of Republic of Indonesia
- <sup>26</sup> Rozali Abdullah. *Hukum Acara Peradilan Tata Usaha Negara* (Procedural Law of Administrative Courts) , RajaGrafindo Persada, Jakarta, 2005, p. 99
- <sup>27</sup> See Act No. 51 of 2009 on The Administrative Court
- <sup>28</sup> See Art. 39 of Act No.37 of 2008 on The Ombudsman of The Republic of Indonesia