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Governing The Ombudsman As An Independent State Institution In The Constitution: An Attempt To Strengthen Public Service Supervision In Indonesia

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Abstract

This article aims to examine the urgency and the probability of regulating the Ombudsman in the constitution, as an effort to strengthen the supervision of public services in Indonesia. This article finds that the existence of an Ombudsman is important to oversee excellent public services, as this is part of Human Rights. However, the supervision of the Ombudsman in Indonesia is not strong enough to guarantee a truly complete public service. By using the doctrinal normative juridical research method in collaboration with the Reform Oriented Research method, the statutory, conceptual, and case approach, this article finds that in addition to the executive, judicial, and legislative institutions, there is a fourth branch of power that accommodates the existence of independent state institutions such as the Ombudsman. After trying to compare the Ombudsman regulations in South Africa and Thailand, this article offers to legitimize the Ombudsman philosophically and politically in the constitution, as a form of guarantee for the implementation of excellent public services.

Keywords: Constitutional Amendment; Ombudsman; Public Service

INTRODUCTION

The quality of public services in Indonesia is believed to be able to fully reflect the fulfillment of community demands in discussions about the ideal of public service delivery.¹ To achieve their own well-being in a country that believes in a welfare state model, citizens – in this case, the community – are given the role of employers who hire

¹ Public services or services encompass all sorts of commodities and services provided to the general public. In general, central government agencies, regional government agencies, state-owned enterprises, and private enterprises are responsible for providing public services. This service is meant to meet the requirements of the community, as stipulated by the law. See Nabila Firstia Izzati, "Ombudsman Sebagai Lembaga Pengawas Pelayanan Publik di Indonesia" (2020) 26:2 SASI 176–187 p. 176.

the state (government).² Therefore, citizens have civil rights to demand products, services, and administration in order to meet their basic requirements. Because this country was established with the express objective of fostering prosperity, the provision of public services must be able to do so. As a result, excellent public services should be provided by the government.³

In the context of public services, the existence of government authority to act does not rule out anomalies or bad administration.⁴ Maladministration is a major issue in Indonesia. Public complaints about bad public services are a clear indication of this. There has been an increase in alleged maladministration⁵, as evidenced by the very high reports/complaints up to 14,333 in 2019 and 2020, according to the findings of Sulistyowati and Dwi Anggraeni in their journal article entitled "Analyzed the role of the Ombudsman of Indonesia as Public Service Oversight" in 2016.⁶

There were 1,749 public complaints about substandard public services in the first quarter of 2021, according to a report from the Ombudsman of the Republic of Indonesia. There were 1,536 community reports, 87 Ombudsman Quick Response reports, and 26 Ombudsman investigations on their own initiative.⁷ Even so, the Ombudsman was only able to resolve 473 cases throughout the same time period. Human Rights (HAM) violations have even happened as a result of the implementation of the National Insight

² The following can be found in Paragraph IV of the Preamble to the Constitution of the Republic of Indonesia, which was ratified in 1945: "...to form a Government of the State of Indonesia that protects the entire Indonesian nation and all of Indonesia's bloodshed and to promote public welfare, educate the nation's life..." The meaning of this term immediately conveys the rationale behind the establishment of the Republic of Indonesia.

³ According to the ideology that underpins the concept of the welfare state, the role of the state is to serve as an agent of the people and to be accountable for their well-being. For this reason, the government is obliged to play an active role by participating in public affairs in different sectors including social welfare, the economy, health, education, and housing. This is because the government is compelled to play an active role. In the 21st century, the notion of the welfare state has evolved into a more broad one that many countries throughout the world have adopted. See Solechan Solechan, "Memahami Peran Ombudsman Sebagai Badan Pengawas Penyelenggaraan Pelayanan Publik di Indonesia" (2018) 1:1 Adm Law Gov J 67-89 p. 70.

⁴ A behavior or action that violates the law, exceeds authority, or uses authority for purposes other than those for which the authority is intended is considered maladministration. Maladministration also includes negligence or neglect of legal obligations in the administration of public services carried out by State Administrators and the government, which results in losses that are either material or immaterial for communities and individuals. Refer to paragraph 3 of article 1 of Law No. 37 of 2008 on the Ombudsman of the Republic of Indonesia for more information.

⁵ Septianingtiyas & Sulistyowati - -, *supra* note 2 p. 35.

⁶ The reported institutions from highest to lowest are local government, police, and ministries. Meanwhile, based on the calculation of the Community Satisfaction Index conducted by the Indonesian Institute of Sciences, the procedure and service time are 2 indicators with a very low category. *Ibid* at 36.

⁷ *Laporan Triwulan I 2021*, by Ombudsman Republik Indonesia (Jakarta: Ombudsman Republik Indonesia, 2021) at 10.

Test (TWK) for Corruption Eradication Commission (CEC) workers (KPK). Maladministration resulted in the inability of 57 KPK personnel to be transferred to the status of State Civil Apparatus. Ombudsman investigation revealed infringement of constitutional rights to just and fair treatment in employment relations, including the right to justice and legal certainty, a legal basis for terminating employment, and protection of personal information by the Ombudsman themselves.⁸

The Ombudsman, on the other hand, has been looking for policy changes and remedies to these issues. A series of initiatives led to by the Ombudsman have been undertaken in order to better safeguard the community against actions that have the potential to cause significant financial harm, beginning with the establishment in each region of Friends of the Ombudsman and culminating in the ratification of Ombudsman Regulation No. 31 of 2018 concerning Mechanisms and Procedures for Special Adjudication. As a last resort, the Ombudsman issued recommendations after conducting inspections and other forms of monitoring. The goal of this oversight is to ensure that the quality of public services is maintained in order to achieve good governance.⁹

For reasons that are difficult to understand even in the face of the Ombudsman's position as an independent state agency, reported parties continue to resist Ombudsman recommendations so that public service quality is being questioned more frequently, including 40 Ombudsman recommendations not complied with in the first quarter of 2021. On the one hand, this essay will analyze the weakening of the Ombudsman's monitoring in ensuring public service quality as an appraisal of the significant gap between expectations for public services and the fulfillment of citizen rights.

The purpose of this article is to provide answers to the two primary issues posed at the outset. To begin with, why should the Ombudsman be included in the constitution? For the sake of bettering Indonesia's public service oversight, is it possible to include an Ombudsman in the country's constitution at this time? The Ombudsman's oversight of public services has been the subject of several studies. Many studies have examined the Ombudsman as a public service supervisory agency for public service providers in

⁸ Komnas HAM Republik Indonesia, "Pelanggaran HAM atas Proses Asesmen TWK di KPK", (16 August 2021), online: *Komnas HAM Repub Indones* <<https://www.komnasham.go.id/index.php/news/2021/8/16/1864/pelanggaran-ham-atas-proses-asesmen-twk-di-kpk.html>>.

⁹ Good Governance is a measure of the extent to which government administration can achieve the targets outlined by laws and regulations in order to create people's welfare (welfare society). Currently, the concept of good governance has become the political will of various laws and regulations. See Izzati, *supra* note 1 p. 179.

Indonesia,¹⁰ its role in the oversight of those providers,¹¹ the concept of public services,¹² the concept of Ombudsman oversight on public services,¹³ and its role and function in the effectiveness of law enforcement in the 2016-2016 period.¹⁴ Aim for 2021 in terms of overseeing government services. As a result, there has been a dearth of discussion on how to strengthen the Ombudsman's role in the constitution through constitutional reform. As a result, the goal of this article is to establish the Ombudsman as a state entity responsible for monitoring public services. When this article was at its height, it was the first to propose creating an independent governmental agency to oversee public services in the future.

There are four sections to this article's content: These sections describe why it is critical to include the Ombudsman's role as a constitutional provision, as well as its relationship to public services and the need of defining autonomous state institutions. In the third section, we'll take a look at how autonomous state institutions are being implemented around the world. Lastly, this essay will explore how to write the fifth amendment to the Constitution in order to regulate the Ombudsman.

METHOD

The Reform Oriented Research approach is used in conjunction with doctrinal normative legal research in this study. Normative legal study involves research on legal goods, legal principles, legal systematics, legal synchronization both vertically and horizontally, and legal comparisons, including a look at the history of current laws.¹⁵

In Indonesia, regulations governing the Ombudsman's position and responsibilities were examined through doctrinal research. Starting with the current law (doctrinal), the inquiry then moves on to look at the problems that affect law and legal politics.¹⁶

The Reform Oriented Research approach is also used in this study. This method is used to determine whether or not existing regulations can be implemented effectively and to make adjustments to those rules that are judged essential. In order to make recommendations for changes in existing legislation, this model uses legal reform

¹⁰ Izzati, *supra* note 1 at 176.

¹¹ Solechan, *supra* note 4 at 67.

¹² Desiana, *supra* note 11 at 172.

¹³ Conie Pania Putri, "Peranan dan Fungsi Ombudsman Republik Indonesia dalam Efektivitas Penegakan Hukum" (2020) 3:2 SOL JUSTICIA 142-153 at 142.

¹⁴ Septianingtiyas & Sulistyowati - -, *supra* note 2 at 25.

¹⁵ Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2001) at 13-14.

¹⁶ Mike McConville & Wing Hong Chui, *Research Methods for Law* (Edinburgh: Edinburgh University Press Edinburgh, 2007) at 20.

research methodology. Research into the legal basis for law enforcement is one of the model's highest goals.

RESULT AND DISCUSSION

1. The Critical Need to Include the Office of the Ombudsman in the Constitution of Indonesia

1.1. The Ombudsman of the Republic of Indonesia in Charge of All Matters Concerning Public Services

The government's job is to provide public services in order to achieve the stated purpose of the state, which is to ensure the well-being of its population. The provision of services to the community by the government or private parties on behalf of the government is one possible interpretation of the term "public service." This service can be provided for free or at a cost to the community to fit its needs or interests.¹⁷ For government employees, public service means providing outstanding service to the community as a way of fulfilling their duties as public servants.¹⁸

Good governance is a set of principles that must be met in order for public services to be properly implemented. Using the standard as a guide, the government may ensure that public services are of the highest quality while also protecting citizens' rights to equitable treatment in law and government.¹⁹ Effective, efficient, transparent, and responsible public services are all part of these guidelines. According to Government Regulation Number 101 of 2000, Civil Servants' Education and Training, these standards are outlined.²⁰

Despite this, the concept of the welfare state is often put into reality in a way that leads to both ineffective public service delivery and grave breaches of human rights. The welfare state model allows the government to have immense ability to do as it pleases, especially when it comes to the execution of public services, especially if there is no strong and effective monitoring mechanism.²¹ This can lead to bad administration. The welfare state allows the government the flexibility to act at its own discretion (*freies ermessen*) in order to achieve this goal.²²

¹⁷ Neneng Siti Maryam, "Mewujudkan Good Governance melalui Pelayanan Publik" (2017) 6:1 J Ilmu Polit Dan Komun 1-18 at 5.

¹⁸ Desiana, *supra* note 11 at 180.

¹⁹ Once again, the presence of these rights is a logical consequence of the adoption of the concept of the welfare state, which places the people/citizens as masters and government officials as servants.. Putri, *supra* note 23 at 1..

²⁰ Siti Maryam, *supra* note 22 at 1.

²¹ Desiana, *supra* note 11 at 176.

²² Freedom of action is only limited to the government in the sense of the executive. Look Solechan, *supra* note 4 at 70.

In the administration of public services in this republic, maladministration has evolved into a dreadful bureaucratic pathology.²³ An examination of events dating back to New Order times shows an administration plagued by bribery, collusion, and nepotism in the delivery of public services (KKN).²⁴ Returning to today's reality shows that execution of public services is still tainted by bad administration, as was witnessed most recently in the implementation of the TWK for KPK personnel.²⁵ TWK implementation had harmed human rights and resulted in KPK personnel losing their constitutional right to be treated equally in their workplaces, according to a report by Indonesia's National Human Rights Commission (Komnas HAM).²⁶

Talking about mal-administration and the tragedy of human rights abuses that cover it, of course, cannot be divorced from the work of the Ombudsman as a supervisory agency for the execution of public services.²⁷ Bung Hatta remarked that the Ombudsman's role is to oversee that the power and discretion inherent in the government are not exploited.²⁸ That is, the oversight of the Ombudsman is a logical result of the implementation of the concept of the welfare state, particularly with regard to the

²³ Bureaucratic pathology is a disease that appears in the government bureaucracy as a result of the behavior of bureaucrats who are influenced by the political, economic, socio-cultural, and technological conditions that surround it. Bureaucratic pathologies can be in the form of conflicts of interest, abuse of authority, and bribery. Look at Siti Patimah Juous, "Masalah Patologi Birokrasi (Hipocracy) dan Terapinya" 32:2 J Huk Pembang 144-154 at 150.

²⁴ Solechan, *supra* note 4 at 80.

²⁵ The Ombudsman of the Republic of Indonesia found that there was mal-administration in the process of transitioning the status of KPK employees to ASN employees. This maladministration occurs in the process of policy formation, implementation of the TWK assessment, to the determination of the results of the TWK assessment. Among the mal-administration is the abuse of authority in signing the minutes of harmonization by parties who were not present at the harmonization meeting of KPK Regulation No. 1 of 2021, namely the Head of the Legal Bureau of the KPK and the Director of Legislation, Translation and Publication of Legislation Directorate General of Legislation Ministry of Law and Human Rights. Ombudsman Republik Indonesia, "Ombudsman RI Temukan Mal-administrasi Dalam Proses Alih Status Pegawai KPK," Ombudsman Republik Indonesia, diakses 31 Maret 2022, <https://ombudsman.go.id:443/news/r/ombudsman-ri-temukan-mal-administrasi-dalam-proses-alih-status-pegawai-kpk>.

²⁶ A total of 57 KPK employees were declared not to have passed the TWK. Komnas HAM in its official release stated that there were 11 indications of human rights violations in the implementation of TWK, especially in terms of policies, actions, and words that occurred during the status transfer process. Among them are violations of the right to obtain justice and legal certainty, the right to terminate employment on a legal basis, and the right to protection of privacy as guaranteed by the constitution. More see Komnas HAM Republik Indonesia, *supra* note 9.

²⁷ Etymologically, Ombudsman comes from the Swedish word which has equivalents, among others: agents, proxies, deputy, or authorized representative. According to Roy Gregory, these terms clearly refer to someone who works on behalf of others to deal with problems between them and the government or power organizations in general. Look at Putri, *supra* note 23 at 144.

²⁸ Bung Hatta in his first premise also positioned the state – the government – as the administrator of the needs or interests of citizens/society, especially in terms of public services.. Izzati, *supra* note 1 at 183.

management of public services by the government.

From the standpoint of state administrative law, the oversight of the Ombudsman aims to guarantee that the implementation of public service delivery is in compliance with the mission of the laws. In other words, the oversight of the Ombudsman is a type of legal protection for the community from actions of mal-administration of the State Administration Agency or Official. Concretely, this supervision is important as a preventative effort to prevent mistakes, both purposeful and unintentional, and as a repressive effort to remedy problems that have already occurred. This oversight is carried out by opening public reports/complaints as well as investigations on their own initiative.²⁹

In Indonesia, the role of the Ombudsman as a supervisory agency for the implementation of public services is at least regulated in Law no. 37 of 2008 concerning the Ombudsman of the Republic of Indonesia (UU 37/2008). Once the importance of the oversight duty carried by the Ombudsman has even made it positioned as an independent state organization. It is envisaged that with this independence the Ombudsman will be able to carry out stronger and more effective oversight because it has more freedom of movement; liberated from the barriers of three other institutions as the notion of *trias politica*.³⁰

However, the fact is that the establishment of this form of institution is not strong and effective enough to ensure that the delivery of public services is in keeping with the principles of good governance. There are major problems as indicated above, which ultimately result in human rights breaches, whereas great public services are part of human rights. Therefore, as the most fundamental element, the institutional arrangement of the Ombudsman should be examined.

1.2. Clarify the Status of Independent State Institutions in the Constitution

Since the year 2000, the post of the Ombudsman as an autonomous state institution has existed. The Ombudsman has played a significant role as a government entity overseeing the administration of public services for the past 22 years.³¹ With this oversight, it is intended that the community would obtain public services that are truly

²⁹ Solechan, *supra* note 4 at 80.

³⁰ Septianingtyas & Sulistyowati - -, *supra* note 2 at 178.

³¹ The Ombudsman (originally named the National Ombudsman Commission) was first established in Indonesia with Presidential Decree No. 44 of 2000 concerning the Establishment of the National Ombudsman Commission. Its establishment is intended to help create and develop conducive conditions in eradicating Corruption, Collusion and Nepotism as well as to improve the protection of people's rights so that the public can obtain fair public services. As is known, in the New Order era during 1966-1998. More see Izzati, *supra* note 1 at 180.

good and capable of meeting their basic requirements, which are also tied to their human rights.³² Regrettably, there is currently no optimal solution for the placement of the Ombudsman. As evidenced by Indonesia's systemic legislation, the Ombudsman is only partially regulated by law and has a clear constitutional basis.³³

When viewed historically, the presence of an independent institution represents a progression in state governance. State entities, like all biological organisms, require equipment in order to move (state institutions). This equipment helps the state achieve its objectives.³⁴ Theoretically, the basic logic suggests that a single organ serves a single purpose.³⁵ For instance, if it is equivalent to the hand, the hand's organs are only employed for feeding food (eat).

However, with the passage of time, its function has evolved. Beginning with the functions of the state and expanding into specific state activities. The evolution can be summarized as follows: first, the equipment supports the purpose of the state, then the purpose of the state evolves into functions, and finally, the functions evolve into state detail jobs. In other words, the development of state institutions is necessitated by the execution of certain roles and responsibilities derived from state objectives.³⁶

The primary objectives of organizational development, according to organizational theory, are effectiveness, efficiency, and justice. This theory also asserts that the implementation of a single function or duty is not always limited to a single institution,³⁷ thus it is not surprising that new state institutions are forming swiftly in the modern day. The purpose of this innovation is to facilitate the achievement of governmental objectives in an effective, efficient, and equitable manner.

As a result of the post-reform development of various independent state entities, which is a novel occurrence in terms of state institutions. In actuality, its development is a response to the failure of pre-existing conventional state institutions to address difficulties arising from democratization, which necessitates reforms. In addition, its existence is the result of popular mistrust in these conventional governmental institutions

³² *Ibid.*

³³ The Ombudsman is regulated in Law no. 37 of 2008 concerning the Ombudsman of the Republic of Indonesia. Meanwhile, other independent state institutions such as the Judicial Commission and the Supreme Audit Agency are regulated in the constitution of the 1945 Constitution. See Karmila Sinen, "Kinerja Ombudsman di Maluku Utara" (2021) 1:1 JIP UNIMUDA J Ilmu Pemerintah 18-33 at 20.

³⁴ Fajar Laksono & Oly Viana Agustine, "Election Design Following Constitutional Court Decision Number 14/PUU-XI/2013" (2017) 2:2 Const Rev 216-233 at 216.

³⁵ Andi Suherman, "Implementasi Independensi Hakim dalam Pelaksanaan Kekuasaan Kehakiman" (2019) 1:1 SIGn J Huk 42-51 at 45.

³⁶ Nuriyanto Nuriyanto, "Urgensi Pengaturan Lembaga Negara Khusus dalam Undang-Undang Dasar 1945" (2019) 16:1 J Konstitusi 105-126 at 110.

³⁷ Arie Ambarwati, *Perilaku dan Teori Organisasi* (Malang: Media Nusa Creative, 2018) at 30.

due to their poor performance.³⁸ With independence, a state institution is anticipated to have adequate operational flexibility in order to fulfill its objectives effectively, efficiently, and fairly.³⁹

Regarding the roles and functions of the Ombudsman in overseeing public administration, the Ombudsman is responsible for ensuring that the government's execution of public services satisfies the citizens' human rights to receive good public services. As with the universal definition of human rights, superior public services are a component of the first and second generations of human rights that should not be diminished or canceled. The first generation of human rights relates to the civil and political rights of citizens and comprises of fundamental elements, including the principle of human integrity, basic human needs, and the principle of civil and political liberty. While the second generation of human rights focuses on the socioeconomic characteristics of individuals, its fundamental tenet is the right to achieve economic, social, and cultural advancement.⁴⁰ In the framework of public services, the first generation of human rights includes, for instance, administrative services for obtaining Identity Cards (KTP), Building Permits (IMB), and citizenship status. The second generation of human rights includes, for instance, the right of citizens to receive subsidized housing and gas.⁴¹

In the meantime, constitutionalism theory interprets the constitution as a forum for regulating governmental institutions and protecting the human rights of citizens. James Bryce defines the constitution as a law-based political framework that incorporates state institutional arrangements with clearly defined functions and rights. Hans Kelsen considers the constitution to be the highest legal standard in a hierarchical entity, giving it some credibility. This criterion, according to Kelsen, has ramifications for the recognition of the constitution as the highest standard in the state, which means that all branches of state authority are obligated and required to conform with the highest standard.⁴² In addition, according to Erwin Chemerinsky, the government is bound by the constitution because it establishes the structure of the government and guarantees

³⁸ Rizki Ramadani, "Lembaga Negara Independen di Indonesia dalam Perspektif Konsep Independent Regulatory Agencies" (2020) 27:1 J Huk Ius Quia Iustum 169–192 p. 180.

³⁹ Rommy Patra, "Arrangement of Relationship between State Institutions through the Fifth Amendment of the 1945 Constitution in Indonesia" (2018) 4:1 Hasanuddin Law Rev 88–102 p. 100.

⁴⁰ Jefri Porkonanta Tarigan, "Akomodasi Politik Hukum di Indonesia terhadap Hak Asasi Manusia Berdasarkan Generasi Pemikirannya" (2017) 14:1 J Konstitusi 168–187 p. 175.

⁴¹ Nur Fatimah, "Pelayanan Publik: Pengertian, Karakteristik, Hingga Tujuannya", online: *Pelayanan Publik* <<https://pelayananpublik.id/2019/07/13/pelayanan-publik-pengertian-karakteristik-hingga-tujuannya/>>.

⁴² F A Samekto, "Menelusuri Akar Pemikiran Hans Kelsen tentang Stufenbeautheorie dalam Pendekatan Normatif-Filosofis" (2019) 7:1 J Huk Progresif 1–19 p. 10.

fundamental rights; the constitution in this case prevents dictatorships, maximizes minority protection, and ensures the protection of human rights.⁴³

By incorporating the Ombudsman into the constitution based on the presence of public services as human rights as constitutionalist teachings, the Ombudsman's oversight will have great legitimacy. In a more concrete manner, the reported parties will comply to the Ombudsman's recommendations, correlating them with an increase in the delivery of great public services. Through the implementation of effective, efficient, and equitable public services, there will also be legal clarity and a quickening of progress toward the country's aims - the welfare of the people.

2. Probability of Constitutional Ombudsman Provision

2.1. An Overview of The Implementation of Independent State Institutions in A Number of Nations

Public calls for autonomous state institutions as a remedy to the inadequacy of conventional state institutions to solve the difficulties of contemporary constitutional issues, such as the quality of public services, are not unique to Indonesia.⁴⁴ In addition to this reason, there is a global consensus among nations that the contemporary state administration reality has shifted so drastically as to necessitate additional modifications to the constitutional law framework. As a novel state phenomena, the development of autonomous state institutions necessitates further norm regulation through micro-institutional level reform, restructuring, and re-functionalization activities.⁴⁵

On the basis of current evidence, it was discovered that worldwide nations likewise addressed this issue by incorporating independent state institutions into their constitutions. This regulatory step was effective, achieving the maximum level of conformity in the implementation of its oversight of the government's administration of public services in a wide sense. The anticipation of improvements in the management of state administrative issues and public services is growing.⁴⁶

In recreating autonomous state institutions into their constitutions, countries have diverse histories. Nonetheless, the underlying cause remains the same: the incapacity of traditional state institutions to handle the difficulties of modern state administration (society) in a context of democratization and the growth of capitalism. Parliament's

⁴³ Anna Triningsih, Achmad Edi Subiyanto & Nurhayani Nurhayani, "Kesadaran Berkonstitusi bagi Penegak Hukum terhadap Putusan Mahkamah Konstitusi sebagai Upaya Menjaga Kewibawaan Peradilan" (2022) 18:4 J Konstitusi 898-917 p. 900.

⁴⁴ Ramadani, *supra* note 41 p. 175.

⁴⁵ *Ibid* p. 180.

⁴⁶ Nuriyanto, *supra* note 39 p. 110.

institution of special commissions in England can serve as a point of reference.⁴⁷ It arose as a result of changes in sociopolitical situations during the industrial revolution in the 18th and 19th centuries. In addition, the establishment of a supporting institution known as an administrative agency as a response to the rise of capitalism in the United States can be examined.⁴⁸

Even though it is subordinate to the executive branch, the agency is autonomous and not subject to presidential direction. Additionally, congress, not the president, is responsible for appointing and dismissing its members.

In response to the political tragedy of apartheid, South Africa has now integrated its country's commission into the constitution. Article 181 paragraph (1) of the South African Constitution specifies the composition of the commission with the following formula: "Public Protector, Human Rights Commission, Commission for the Promotion and Protection of Cultural Rights, Auditor General, Commission for Gender Equality; and Electoral Commission." In Southeast Asia, Thailand had established the funds for an independent governmental commission in Article 75 of its Constitution long before Indonesia. There are currently more than thirty countries in the globe whose constitutions include provisions for the material support of independent state institutions. There are also the Netherlands, Denmark, Finland, the Philippines, Argentina, and Mexico, in addition to the countries already named.⁴⁹

Thus, it is evident and convincing that the incorporation of independent state institutions into the constitution is an urgent necessity in light of the current phenomena of the expansion of state administration. In addition, the arrangement addresses not only the institution's definitive level, but also its hierarchical relationship with conventional state institutions, the appointment and removal of its members, and the institution's operational budget.

2.2. Fifth Amendment to the Republic of Indonesia's Constitution of 1945: Governing the Ombudsman of the Republic of Indonesia into the Constitution

As an institution formed during the reform frenzy, the Ombudsman and independent state entities in general appear to be governed without a cohesive design and concept. This is due to the fact that in such an environment, the conception of

⁴⁷ Independent state institutions have various other terms, including: organs, institutions, agencies, forums, agencies, state auxiliaries, special state commissions, independent state bodies or self regulatory bodies, Quangos (Quasiautonomous non-governmental organizations), and state enterprises. More see Laksono & Agustine, *supra* note 37 h. 220.

⁴⁸ Oleksandr Batanov et al, "Ombudsman Institute: Basic Models and Problems of Reception in Constitutional Law" (2020) 9:29 Amazon Investiga 273-281 p. 275.

⁴⁹ *Ibid* at 278.

constructing independent state institutions was mainly the result of reactionary, sectoral, and spontaneous occurrences, but was cloaked in idealism and heroism. Deny Indrayana also clarified the notion that the development of autonomous state institutions in Indonesia was deemed ineffectual due to formulation flaws.⁵⁰

In addition, constitutional reforms tend to generate public skepticism. Existence of a state commission without a strong position and legal spirit in the state administration system is one of the contributing reasons. This doubt contradicts the notion that a state institution can be classified as an autonomous state institution provided it meets three criteria. First, it has a solid legal foundation for exercising its powers and functions. Consequently, the constitution must classify a state institution. Second, it is independent, which means it is not subject to presidential meddling. Thirdly, the appointment and removal of state commissions is governed by a stringent and specialized system.⁵¹

In fact, in terms of the pattern of community development as revealed by economic, political, and socio-cultural studies, the influence of globalism and localism determines that the structure of state institutions will be more effective and responsive if it is borne from the people's desire to improve public services and achieve the objectives of accountable governance.⁵²

In the absence of a comprehensive design and concept relating to the construction of an independent state institution, two major problem lines have evolved in the discourse on state administration. First, in 2006, the Constitutional Court issued its opinion about the Corruption Eradication Commission (KPK) in its Decision 005/PUU-IV-2006. As a form of checks and balances, the House of Representatives (DPR) must exert strict oversight over the KPK.⁵³ Because the KPK is considered a super body, but lacks supervision, this is the case. Ultimately, these issues provoked a discussion on the constitutionality of the actions of independent state institutions.

This discussion generated a sense of urgency over the necessity to rapidly establish independent state institutions in the constitution. Prior to that, it is also essential to project the layout of independent state institutions, as they would at least interact with conventional state institutions already in place. Similar to the concept of constructing state institutions in other nations, Indonesia has implemented a *trias politica* that divides the legislative, executive, and judicial parts of government.⁵⁴

⁵⁰ Nuriyanto, *supra* note 42 at 110.

⁵¹ *Ibid* at 112.

⁵² *supra* note 44 at 175.

⁵³ *Ibid* at 50.

⁵⁴ The three main pillars of power in legal science consisting of the legislature, the executive, and the judiciary are the basis for Montesquieu in classifying the three as fundamental guidelines in the three organs of the state. First, the legislative power has the authority to make laws. Second, executive power as

Jimly Asshiddiqie remarks that the trias concept is no longer applicable for application in Indonesia. Because it is impossible if the three organs are only concerned with a single power function. The facts demonstrate that the link between organs will always intersect, or even that all three organs have a balanced position and rely on each other in accordance with the principle of checks and balances.⁵⁵ This view was further verified by Moh. Fajrul Falaakh, who believes that as the state administration develops, a great deal of state power is distributed to newly formed institutions.⁵⁶

Indirectly, the concept of separation of power encompasses various autonomous state institutions in addition to the separation of powers between the legislature, executive, and judiciary. In order to be more methodical and organized, this article proposes establishing autonomous state institutions in Indonesia, as suggested by Yves Mene and Andrew Knapp's fourth branch of government.⁵⁷

At its zenith, this branch of government was codified into the Republic of Indonesia's 1945 Constitution through the fifth amendment (UUD NRI 1945). This fourth branch of government consists of human rights and democracy-focused independent governmental institutions, which includes the Ombudsman. To integrate the Ombudsman in the body of the Constitution, it is necessary to alter the composition of the Ombudsman Article for the following reasons:

Tabel 1: Ombudsman Arrangement in the 1945 Constitution of the Republic of Indonesia

**CHAPTER VIII B
INDEPENDENT STATE AGENCY *****)**

UUD NRI 1945	FIFTH AMENDMENT to the 1945 Constitution of the Republic of Indonesia
	Article 28H
	(1) The Ombudsman of the Republic of Indonesia is responsible for ensuring the quality of public services provided by the

executor. And lastly, the power to judge which is commonly referred to as the judiciary. Efi Yulistiyowati, Endah Pujiastuti & Tri Mulyani, "Penerapan Konsep Trias Politica dalam Sistem Pemerintahan Republik Indonesia: Studi Komparatif atas Undang-Undang Dasar Tahun 1945 Sebelum dan Sesudah Amandemen" (2017) 18:2 J Din Sos Budaya 328-338 at 330.

⁵⁵ Xavier Nugraha, Risdiana Izzaty & Alya Anira, "Constitutional Review di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-IX/2011: Dari Negative Legislator Menjadi Positive Legislator" (2020) 15:1 J RechtIdee 1-19 at 5.

⁵⁶ *Ibid* at 7.

⁵⁷ According to Andrew Knapp and Yves Many, this branch of power institution exists because there is a desire in administrative theory to shift administrative and regulatory tasks to be part of the duties of independent state institutions. Look at Tri Suhendra Arbani, "Analisis Yuridis Cabang Pemerintahan Keempat dalam Struktur Ketatanegaraan di Indonesia" (2018) 24:1 Wacana Huk 19-37 at 25.

	State Administrators and the government at the center and in the regions, including those held by State-Owned Enterprises, Regional-Owned Enterprises, and State-Owned Legal Entities, as well as private entities or individuals assigned the responsibility of administering certain public services.*****)
	(2) The Ombudsman is a state entity that is independent and unbiased, and in carrying out its responsibilities and powers, it is unaffected by other powers.*****)
	(3) Members of the Ombudsman are elected by the House of Representatives based on the President's recommendation.*****)
	(4) The Chief Ombudsman is chosen by and from the membership.*****)
	(5) The Ombudsman resides in the nation's capital and has provincial representatives in each province.*****)
	(6) Additional provisions relating the Ombudsman's formation, composition, and working processes shall be governed by law.*****)

Source: Processed by the Author

The formation of this chapter is predicated on the need to position the existence of an Independent State Institution on a solid philosophical and political basis, while simultaneously affirming its independence from the other three branches of government, namely the executive, the judiciary, and the legislature, so that independent state institutions have high value and strong legitimacy. This will practically increase compliance with other governmental entities' policies and regulations. State institutions, including autonomous state institutions, would have a functionally parallel position following the modification of the 1945 Constitution of the Republic of Indonesia to enhance the system of checks and balances as the notion of the fourth branch of power without a head. No longer organized in a hierarchical manner.

In this instance, the 1945 Constitution of the Republic of Indonesia must govern the

Ombudsman since the Ombudsman is a supervisory agency for the implementation of public services that seeks to promote the welfare of citizens. Moreover, the construction is connected to the Ombudsman's supervision responsibility to ensure great public services as part of human rights. With the placement of the Ombudsman in Chapter VIII B of the constitution, it is certain that the Ombudsman's oversight will be strengthened, leading to an increase in the quality of public services, as the products of the Ombudsman's oversight, such as recommendations, will be more effectively implemented by the reported party.

CONCLUSION

Since its inception in 2000, the Ombudsman has been responsible for overseeing the delivery of public services for 22 years. In actuality, the number of instances of maladministration is still incredibly large and pervasive, leading to human rights breaches such as those that occurred during the implementation of the National Insight Test for KPK employees in 2021. Obviously, this is a very paradoxical situation given that outstanding public service is a fundamental right of every person, and in this case the Ombudsman's oversight is crucial despite its inadequacy in preventing and correcting instances of maladministration in the delivery of public services.

In the future, however, the Ombudsman's control of the execution of public services can be improved by including Ombudsman regulatory content into the Republic of Indonesia's 1945 Constitution via the fifth amendment. The Ombudsman setup can be described in further depth in a new chapter titled "Independent State Institutions" in To reinforce independence, the body of the 1945 Constitution of the Republic of Indonesia is founded on the principle of the headless fourth branch of power. More than thirty countries, including the United Kingdom, the United States, and Thailand, have implemented this concept, providing additional empirical support. The incorporation of the Ombudsman into the constitution will ultimately improve the Ombudsman's oversight, which is associated with the expansion of great public services as part of human rights.

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