

The Ombudsman: Different Terminologies Same Missions

Khodr Fakhri

Abstract—The Ombudsman is a procedural mechanism that provides a different approach of dispute resolution. The ombudsman primarily deals with specific grievances from the public against governmental injustice and misconduct. The ombudsman theory is considered an important instrument to any democratic government. This is true since it improves the transparency of the governmental activities in a world in which executive power are rising. Many countries have adopted the concept of Ombudsman but under different terminologies. This paper will provide the different types of Ombudsman and the common activities/processes of fulfilling their mandates.

Keywords—Administration, Citizens, Government, Mediator, Ombudsman, Presidential Mediator.

I. INTRODUCTION

THE primary aim of any developed country is to protect its citizens, provide their needs, and ensure their rights. Administration now cares more than ever to emphasize the concept of trust of citizens in all the government constituencies. Government started to implement principles of transparency and citizens' welfare in all its dealings with citizens in order to polish its image in front of its citizens. The administration played that role to make citizens believe that the government is in the process of achieving an equal prosperity to all its citizens and that the government respects the law and justice.

In order to implement the trust of the people was important to create an essential tool to evolve the communication between the population and the administration. It was also vital to establish a lenient and straightforward instrument that allows citizens to submit their claims against any administrative body.

For those reasons, lawmakers had created many devices to solve any dispute that might arise between the administration and the citizens. First, government and petitioner used to communication in order to reach a settlement. Second, citizens were allowed to submit a request to the department that made a decision that has affected their right to change it. Third, citizens always can bring a claim against any officials before the officials' boss. Forth, lawmakers allow the administration to conciliate with citizens in order to end a dispute. Fifth, administrators permit the government to arbitrate with citizens in individual case. However, if all the above-mentioned scenarios came to an end without settling the dispute, case will be solved by the State Advisory Council (Majless Shoura Al

Dawlet), which is competent to solve any dispute that the government is part of it.

After the unpleasant solutions that the above-mentioned devices had reached, Lawmakers considered that the creation of Ombudsman or the Presidential Mediator Entity is a must. The concept of Ombudsman can be traced back to the 19th century. The name is derived from "Ombud" that means representative in Swedish. Ombudsman is a person or entity that has many responsibilities that are related to implementing justice in any given society. Ombudsman has the jurisdiction to investigate and resolve problems between citizens and government. It is competent to receive complaints from citizens about the governmental activities. Ombudsman is an entity that "receives, investigates, and reports on complaints about the action (or lack out of that) by the public admiration" [1]. While Presidential Mediator Entity is a mechanism, which gives the petitioner the opportunity to have a fair solution with the administration regarding its claim away from any legal action. This device achieved tremendous success in many countries that have adopted it. For example, Morocco names this mechanism the Council of Grievances (DIWAN AL-MAZALAM), while Jordan gives this tool to the National Center of Human Rights, which is an independent entity that has its autonomy. In Sweden, solving problems between the government and citizens according to the above-mentioned system is done by the Ombudsman, in Britain is done by the Parliamentary Commissioner that was in 1967. In 1973, the Precedential Mediator was created in France with an independent authority [2]. In Spain, "The People Defender" is the title the ombudsman. Whereas in Portugal, they address him as "The General Prosecutor", and in African countries that are based on the francophone his title is "The Mediator."

The concept of Precedential Mediator is applied by states, and by international organizations such as the European Union and the United Nations. The first Mediator in the United Nations was Mrs. Patricia Durant, who was appointed on April 26, 2002. This position was created by the general assembly late 2001. In the European Union, the Mediator was established by Article 8D and 138E of the treaty that form the European Union that was signed in Maastricht February 7, 1992. The first Mediator in the European Union was the Finland Ombudsman Jacob Soderman in 1995 and reelected in 1999.

The Precedential Mediator is an old mechanism that was known in the first Islamic era. The scholar IbnKhaldoun describes the Ombudsman as "An office that represents an amalgam of authority's influence and judiciary justice and it requires great powers and outstanding veneration to [be

K. Fakhri is with the Lebanese American University, Beirut, Lebanon (phone: 009611786456; ext.: 1534; e-mail: khodr.fakhri@lau.edu.lb).

capable of] repressing the oppressor” [3]. During that era, the Emam Ali Ibn Abi Taleb was the first who settle a grievances submitted by employees, officials, and princes. This paper will discuss the type of Mediators (I), and consider the common activities/process that is done by the Mediators (II).

II. TYPES OF MEDIATORS

The Mediator is an entity that works to improve the relationship between the administration and the citizens. It also helps to find a way for people to deal with the administration. The French and the British legislation similarly issued laws to create the position of the Mediator. However, each country stipulates different rules regarding the appointment. In France, the law gives the Executive branch to appoint the Mediator thru a Decree issued by the government. While in England, the Mediator is designated by a royal order according to a governmental proposal. The Mediator receives complaints not directly by the petitioners but through a parliament member.

Generally speaking, there are two types of Presidential Mediators, the Parliamentary Ombudsman that existed in the early 19th century and the Administrative Mediator that was established late 20th century.

A. The Parliamentary Ombudsman

The parliament elects the Mediator and designates his budget. The Mediator enjoys the same immunity as any parliamentary members. The first country that implements the concept of the Ombudsman was Sweden in 1809.

The notion of the Ombudsman was established based on the liberalism belief that aims to diminish the authority of the crown and protect the rights of the citizens. Such concept gives the Ombudsman a permanent mandate from the parliament to oversee the activities of the administration, and ensure that all the administrative behavior is done according to the law. The Swedish Constitution clearly stipulates the existence of the Ombudsman that he/she is elected by the parliament. According to the constitution, every citizen has the right to submit a petition to the Ombudsman whose authority is to protect citizens' rights and freedom. This concept is applied in many countries such as England and the European Union.

B. The Administrative Mediator

The Administrative Mediator is the French version of the Presidential Mediator. The Administrative Mediator was created according to the Law No. 6/73 that was issued on January 1, 1973. However, this Law was amended by the Law No. 321/2000 that was issued on April 12, 2000. That amendment aimed to improve the relation between the administration and the citizens. The primary assignment of the Mediator is to develop a smooth mechanism of communication between the citizens and the government constituency and to settle claims submitted by citizens. The French lawmakers give the Mediator four different tasks; two are insignificant while the other two are major. The first insignificant two roles of the Mediator give it the ability to indict a guilty official and force the administration to implement the decision within a particular time decided by the

Mediator. The second major two roles of the Mediator allow it to be a mediator and to address the public.

Thus, as a mediator, the Administrative Mediator has the authority to amicably solve disputes between any administrative constituencies and citizens. In order to avoid receiving a ton of load of complaints, the law states that a claim must be submitted to the Mediator through a parliament or senate member. The Administrative Mediator handles all those disputes with the aid of many associates who are present in every district. According to its broad authority, the Administrative Mediator can issue recommendations to the pertinent administrative department in regards individual claims to correct its performance. Those recommendations are most of the time respected, which helps to solve many disputes amicably. In addition, the Administrative Mediator is entitled to submit an annual report about its performance to the President and the parliament. The report should mention all the obstacles that the Mediator has faced and the methods that the Mediator has used to fix extraordinary disputes.

III. THE COMMON PRINCIPLE BETWEEN ALL TYPES OF MEDIATORS

Despite differences among countries in regards to the reasons for establishing, the method of appointing and the authority of conducting, the Presidential Mediators have shared characteristics worldwide. This uniformity is related to the nature of the relationship between the Mediator and the administration 1), and the nature of its tasks 2).

A. The Principles Related to the Nature of the Relation between the Administration and the Mediator

The Mediator is an institution that must be given “as broad a mandate as possible [...] specifying [...] its sphere of competency” [4]. However, the Principles did not explicitly mention the order that can be derived from the Mediator's Responsibility, which might include legislative and administrative mandate. The Principles gives the Mediator the ability to act and make a recommendation in “any situation of violation of human rights in any part of the country where the human rights are violated,” [5]. In addition, Mediator is “authorized to hear and consider complaints and petitions concerning individual situation, [accordingly, Mediator can make] recommendation to the competent authorities,” [6]. The UN General Assembly Resolution 63/169 and UN General Assembly Resolution 65/207 both considered that the mandate of the Mediator is to “promoting good governance in public administrations, as well as improving their relations with citizens, and in strengthening the delivery of public services,” [7]. Regardless, the entity of Mediator is entirely separated from the executive, judicial, and legislative authority. In order to settle disputes, the Mediator coordinates with all the above-mentioned authorities. The Mediator is neither an enemy to the administration nor a challenge to the judicial power. The Mediator mandate is to understand the problems of the government and the citizens and suggest solutions through amending regulations or rules of law. The Mediator has no authority to enact laws, or invalid certain activities; it can publish its reports along with its recommendations.

The autonomy that the Mediator enjoys is very crucial. Freedom gives the Mediator a full independence, which allows it to solve disputes smoothly. Thus, lawmakers have issued many laws that give the Mediator a freedom to use any method to settle a dispute, the independence from any hierarchy, and having an autonomous budget.

1. Relation between the Mediator and the Legislative Authority

In principle, the legislative authority is the body that monitors the activities of the administrations and holds them liable in case of any violation of the law. Accordingly, the Mediator is considered a legislative instrument that scrutinizes the performance of the government. However, Mediator can never replace the task of the parliament member. The parliament member can refer a case to the Mediator on behalf of any citizens; However, the decision of the Mediator will be voted on in the house. It is worth mentioning that the Mediator can propose a law but cannot vote on it. It can monitor the performance of the administration but does not have the right to give or not the confidence to the government. Thus, the Mediator has some features of a parliamentary member that are only related to monitoring the activities of the government.

2. The Relation between the Mediator and the Executive Authority

The executive authority is the scope of the Mediator mandate since the Mediator only scrutinizes the activities of public entities. In other words, Mediator does settle disputes between citizens or between private companies. However, the Mediator authority over the executive departments is limited and restricted. The Mediator can only give non-obligatory recommendations and publish the violations of law of the administrative departments in the official journal to inform the public about such violations. The Mediator can monitor the activities of the administrative officers but has no authority to fire, punish, or to give an order to them. The Mediator can ask the pertinent department to punish its officers for violating the law. However, in case the authority does not adopt such recommendation, the Mediator can refer the officers to the pertinent body.

3. The Relation Between the mediator and the Judicial Authority

The Mediator tries to solve problems between the administration and the people according to claims that are submitted by the petitioners. In principle, the task of the judiciary is to settle claims between disputants according to the rule of law. The mandate of the Mediator and the judiciary is much alike; however, there are many differences. The Mediator cannot render final and binding decisions, it only gives recommendation, and this task is given to the judges. Unlike the judiciary, the Mediator issues its recommendation only based on equity and fairness and not bonds by any rules or regulations. The Mediator is not restricted by any formalities while settling disputes.

B. The Principles That Are Protected by the Mediator: Protecting the Rights and Freedom of Citizens

Regardless the types of Mediators, Mediators play a great role in protecting the rights and freedom of citizens. Mediators, also, assist citizens to defend their rights in case of any violation committed by the administration. In addition, Mediators have an exceptional role in the developed countries, which try to strengthen and build reciprocal trust and transparency between the government and citizens.

1. The Mediator is an International Request

The mission of the Mediator or the Ombudsman is fundamental of any democratic nations. The task of the Mediator is coherent with the democratic principles such as respecting human rights and freedom. The Mediator duty is complementary to the undertaking of the administration. Many democratic countries have implemented the notion of the Mediator in order to assist the government in the task of preserving human rights [8]. Giving the importance to the Mediator's notion - as a mean for every citizen to use against the arbitrary use of power from the administration - many International Organizations have pressured the government to adopt such notion. For example, the European Union has put a condition on every country that is interested to obtain an aid from the Union to embrace the concept of the Ombudsman. Accordingly, the concept of the Mediator or Ombudsman became internationally taken through the creation of the International Institution of the Ombudsman. This Institution collaborates with governments around the world in regards to the concept of the Ombudsman. This collaboration is implemented through international conferences/workshops by educating administrations and councils about the notion and its significant impact.

2. The Direct Contact with the Mediator

The main and most important characteristic of the Mediator is the process of contact and communications. Such process is simple, accelerated and exemption from any charges. Citizen has many ways to submit his/her claim. He/she can file applications either verbally before the office of the Mediator, or through mail or e-mail. This straightforward process aims to encourage citizens to file claims without any burden. The application does not require the interference of a lawyer or any administrative fee payment. The process also ensures a legal protection of the petitioner from any retaliation that can be done by the administration.

3. The Annual Report, Publication, and Recommendations

The moral commitment of the Mediator is based on publishing its annual report and recommendation in the Official Journal and local newspaper. Such publication has two impacts; first, notifying all officials and the public at large about the violations that have been committed by the administration and the name of the violators. The report also mentions how the government has dealt with the recommendation of the Mediator and whether or not the violators have been tried before court. Second, the publication of such report would deter the offenders from

insisting on breaching the law that will be known to the public through such report. This is true since the report will stain the violators' reputation that can never be cleaned or polished.

IV. CONCLUSION

According to the abovementioned discussion regarding the meaning of the Ombudsman, Presidential Mediator or other terminologies, this entity is a new notion that must be implemented in all the democratic nations. This is true in order to emphasize the trust in the relation between the administration and citizens and to build the nation of law. This task can efficiently be done by the Presidential Mediator and can never be replaced by any other types of entities. Other types of entities follow bureaucratic formalities that might slow the process for a citizen to acquire his/her right. It also might preclude a citizen from doing so according to the high fees that he/she should pay. Accordingly, the Presidential Mediator is a need for every citizen, public interest, and to everyone who aims to build a healthy society.

REFERENCES

- [1] J-M. Frahm, "Australasia and Pacific Ombudsman Institutions: Mandates, Competences and Good Practice", Springer, 2013, p.4.
- [2] E. Rodgers, "Encyclopedia of Contemporary Spanish Culture", first published by Routledge 1999, re-published by Taylor and Francis e-library 2002, p. 138.
- [3] A. Z. IbnKhuldun, "Al-Muqadimah (the ancient book style—Re-published)", Dar al-Fikr, Beirut, Lebanon, 1979, P. 185.
- [4] Paris Principles, "Competences and Responsibilities," paragraph 2.
- [5] Paris Principles, "Competences and Responsibilities," paragraph 3.
- [6] Paris Principles, "Additional principles concerning the status of commissions with quasi-judicial competency," introductory paragraph and D.
- [7] UN General Assembly Resolution 63/169, 2008, on the role of Ombudsman, mediator and other national human rights institutions and protection of human rights, preamble; UN General Assembly resolution 65/207, 2010 on the role of the Ombudsman and other national human rights institutions in the promotion and protection of human rights, preamble.
- [8] The concept of the Mediator was adopted in Spain in 1976, Jordan in 2001, and Morocco in 2002. However, the concept of the Mediator still under consideration in Lebanon.