

The Importance And The Place Of Ombudsman In Law State

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Abstract

In analyzing the ombudsman from the respect of its historical roots, it is understood that this institution has been inspired by Islam state system and Otoman state system. The institution ombudsman has been implemented in countries more than 100 today and overtaken the mission of protecting the citizens against the maladministration, securing the fundamental rights and liberty and constituted security for both governing and governed. In this study, it is offered that the fundamental rights and freedoms should be under the security, all activities of the government should be under the control of jurisdiction and the significance of this institution should be aware in realizing the legal governance.

Keywords: Ombudsman, law state, fundamental rights and freedoms, justice, control and judicial control.

1. INTRODUCTION

The democratic state of law aims to provide the legal security of governed against the governing body. This aim requires the efficient and effective control of the governmental activities and operations. In the control of the public administration, it is frequently mentioned that the control mechanisms are not adequate enough, far from the providing the legal framework of the individual, political control is not effective, the administrative control have the priority for preserving the interests of government rather than the citizens and the information about the security setting has some fallacies, and the administrative discipline has been overemphasized. This mechanism of tutelage control has subjected of some political considerations and thus, the expected results can not be obtained. In case of the judicial control, it is costly, formative, constrained with the legalistic control, inadequate according to the assertions of scientific circles (Baylan 1978: 146-157; Temizel 1997: 26-33; Akıncı 1999: 357-358; Avşar 1999: 27).

The institution ombudsman as a control mechanism which is established in order to protect the rights of the citizens against the government, search the solution against the maladministration, and providing the contribution for the sake of improvement of the government has been widely implemented since it has emerged firstly in history. In this context, it will be very important to analyse this institution in order to guide the countries which are not using this mechanism by referring the practices of more than hundred countries with its different types and structures. In this presentation, the role of the ombudsman in preventing the problems arisen from the state of law has been elaborated and the process, trajectories and stages which the ombudsman institution has been followed from its initial point has been explained.

2. THE NOTION OMBUDSMAN: EMERGENCE AND DEVELOPMENT

It is widely known that the governed had some troubles against the governing body during the history and the governed always was search of constituting a legitimate instruments and suitable grounds to put their complaints into words. The emergence of the ombudsman can be seen as the results of these kinds of attempts. It is known that the ombudsman institution in today's meaning was established the first time in history in Sweden and spread on a large area of the world.

Ombudsman in original respect is a Swedish word means spokesman, representative, nominee, depute, delegate, advocate and protector (Schwarzler, 1992: 1; Al-Wahab 1979: 19; Ataman, 1997: 779). The term ombudsman implies a public servant or private office whom receives the

complaints of the people pertaining with the affairs committed by the various bureaucratic bodies (Pickl, 1986: 37). Ombudsman institution has been implemented within the international level, in some countries national level and the rest of them regional or provincial levels in respect of local authorities and state economic enterprises. Ombudsman institution has been implemented both in private and public sectors in different types and entitled in different names.

In analysing the historical roots of the ombudsman institution, it can be easily seen that this ombudsman institution has been derived by the the divinal opinions of Islamic state system and Ottoman Empire. In Islam religion, the creation of justice is one of the principles to constitute the Islamic thought and philosophy. In this understanding, in executing the justice there would be a kind of executive and complaint mechanism had very significance. Nevertheless, Khalif Ömer created the institution “muhtesip” (official for public order) performed the duties of protecting the general morality, managing the market places, protecting the seller and purchaser and settling the disputes and conflicts (Pickl, 1997: 800-805).

In Islamic state (Emevid, Abbasid, Mameluk, Seljuk) there had some institutions to evaluate the complaints of people and to rule the case among institutions entitled as “Divan-ı Mezalim” (diwan for atrocities) or Dar’ul adl (house of justice) and “muhtesip” (official for public order). This mission has been performed by “Divan-ı Hümayun” (supreme court) in Ottoman Empire (Eryılmaz 2000: 312). In Ottoman state had very important post called as “Kadilkuzat” who monitors the implementation of Islamic law in every field of life and the protect the life of people originated from the abusement of government executives and unlawfulness (Pickl, 1997: 800-805). Kadı al Kudat who had a position who operated the complant and control mechanism with ombudsman-like logic in Ottoman state as well as tthe other councils and officials and “Divan-ı Mezalim” (diwan for atrocities) or Dar’ul adl (house of justice)

In creating the ombudsman institution with nowadays understanding, it is supposed to mentioned about the intersection of Sweden and Ottoman states in order to comprehend the inspiration among these cultures. That is, Seweden King Charles XII who as defeated to Russia in Poltava 1709 stayed in Bender for three and half years and Dometika for two years with political asylum and thank to that long –time residence, he had an opportunity to aware the Ottoman political and social life and examine closely the rapid decision-making process of supreme court “Divan-ı Hümayun” (supreme court), “muhtesip” (official for public order) “Kadilkuzat” who monitors the implementation of Islamic law in every field of life and the protect the life of people originated from the abusement of government executives and unlawfulness “Divan-ı Mezalim” (diwan for atrocities) or Dar’ul adl (house of justice) for the name of Sultan. He witnessed that these councils and persons such as kadı (muslim judge) and kazasker (soldier judge) was analysing the complains of people by public servants and

protecting them from the unlawful, purposeful operations and activities and compensating the damage produced by these transactions and inspired by these institutions and actors who tries to remove the disorder and restlessness and sent his country Royal Writ in 1713 (Odyakmaz, 2000: 488). With this Royal Writ, a person (Hogste ombudsmannen) who is supposed to monitor the obedience of the judges and administrators in accordance with the laws and rules for the name of king has been appointed to Stockholm (Uler 1990: 1022).

After coming back to his country, the King witnessed that Hogste ombudsmannen (Swedish counterpart of omdusman instiution) performed the same job with the Ottoman one and carried out his mission and appointed him permanatly as the observer of the King. As a result, as the observer of the King, this institution became into a constitutional body entitled as "Justitieombudsmen" in Sweden Constitution prepared in 1809 (Rudholm 1968: 18). By the settlement of democracy in Sweden, it is determined that the ombudsman would observe the executive body and all public institutions on behalf of legislation and with some constitutional amendments the athorization and effectiveness of omdusman were enlarged and widened and thus, transformed into an independent body against the Parliament (Baylan: 1978: 7).

The omdusman institution today have been implemented more than 100 countries with different types and forms and overtaken the mission of securing the fundamental rights and freedoms and contributing the improvement of the administration and constituting a trust or guarantee. The ombudsman institution was charged with protecting the human rights and liberties against the power and government in Scandinavian countries (such as denmark and Norway) and Sweden which arisen the first time in history. Parliament ombudsman and local authority ombudsman in Britain was responsible from the the protection of governed against the maladministration, French Mediateur was tasked with the equity and fairness in govoning and governed relations.

3. THE FUNCTIONS OF OMBUDSMAN

In considering the historical evolutionary period from the beginning in Sweden and today and different implementation of the countries, we witness that the ombudsman institution had very important tasks and mission such as giving advise to the government and domanstrate the prudential way of solution, preventing the maladministration, preventing the arbitrary, illegitimate and improper attitude and behaviors, hearing the citizen compliamnet arisen from the unlawful practices (Eken 1999: 135).

The significance of the ombudsman institution increases because nowadays the expectations from the public service increases. the ombudsman institution with its independence,

impartiality, rapidity, inexpensiveness and easily available character makes surveillance and inspection much more effective, efficient and qualified.

3.1. Its Protection Function

Ombudsman undertakes the in practising countries the protection mission of citizen against the maladministration, securing the rights and liberties (Temizel 1997: 767). One of the most important tasks of the ombudsman institution is the protection of populace against the single-sided, unrightful and mistaken decisions of public administration and their arbitrary implementations (Seneviratne 1994: 132). The ombudsman institution in case of suffering damage and incurring losses because of the transactions, activities and operations of the government investigates, probes, searches, hears and inspects the situation depending upon its authorities and takes necessary precautions.

The ombudsman institution serves the mobilization of the protection mechanism against the abusing and exploiting the public power which the government possess against the governed (Woolf 1990: 92). Sometimes protection of the governmental rights against the rumours of corruption, unrightful demands and requests of the populace and recommendation of the equal instead of justifiabe decision are among the teaks and duties of the ombudsman institution.

Thus, the acquittal of the governmental authorities from the accusations and allegations and the protection of the public servants form the untrue and rootless blame, imputations and indictments and restoration of trust over the governed citizens.

3.2. Its Inspection Function

Systematic, productive and regular performance of the government, its production of the service which is convenient with the expectations of the governed populace and the provision of the popular respect can be possible with the perminent, effective and efficient inspection (Akıncı 1999: 292). The ombudsman institution undertakes the mission of removing the insufficiency and ineffective of the existing the inspection and surveillance mechanisms and institutions and becoming supporter, auxiliary and complementary part of them in setting solutions in respect of surveillance against the incerasingly enlarging athorties of the public servants and governments.

The ombudsman institution facilitates the participation of the people into the inspection of the government as a mechnism which is costless, free to claim the populace's rights, informalist, allowing the easily obtain the result (Odyakmaz ve Erhürman, 1998: 3762). This character of ombudsman institution increase the influence of the inspection and this function contributes

the prevention of maladministration and enhancement of the well- administration by reforming the attitudes and behaviours of the governing elites.

3.3. Its Reformative Function of Government

The ombudsman institution serves the contribution for the development of the democracy, human rights, supremacy of law, and the settlement of the human rights within the society and the provision of effective participation of citizen into the inspection and lastly, the emergence of plural democracy, cultural plurality, multiculturalism, deliberative democracy and the inveteration of new plural government strategy (Ayeni 1997: 543). The ombudsman institution undertakes the responsibility of awaring the people to protect their rights and warning the governing bodies to ameliorate the maladministration and take the necessary precautions for impartial, rapid and effective solutions (Seneviratne 1999: 165).

Ombudsman prepares and publishes the annual and special reports every year about the maladministration, in which ways it can emergence and its ways of solution in order to give imformation to the governmental authorities (Seneviratne 1998: 93-94). The determination of the government and inspection techniques which governments necessiates and their implementation are tasks and duties of the ombudsman institution as volunteer guidance and counselling, conferring inquiry mechanism. Accordingly, by overtaking the role of educating and directing in government enhances the increasing of the productivity, effectiveness and efficiency and the settlement of the understanding for the deliberative and participatory democracy.

4.THE CONTRIBUTION OF OMBUDSMAN INSTITUTION INTO THE STATE OF LAW

The state of law means a kind of state which is devoted to rules of law, secures the legal guarantee for the citizens and limits herself with her legal framework. In the state of law, public servants, state and the citizens were balanced in respect of legal loyalty. Nobody, no institution is not immuned and excepted from the legal bound in any state of law (Kaboğlu 1989: 145). The Constitutional Court describes the state of law as “respectful to human rights, establishing the legal order to protect these rights, undertaking the mission of all transaction, activities and opertaion adapted into the legal framework” (25.05.1976 date and E. 1976, K. 1976/28 number resolution of the Constitutional Court). In the state of law, the executive, juridicial, and legislative bodies are supposed to be loyal to the law (Gözler 2000: 170). The understanding of the state of law is a principle expected from borth governing and governed

(Gözler 2009: 24). The understanding of the state of law is the most important and essential and ultimate stage of the contemporary democratic states.

The legal adaptation of all activities of the state requires the judicial inspection. Judicial inspection is one of the most effective way among the types of inspection over the government. The ombudsman institution may contribute to solve the problems arisen from the process of the judicial inspection. This instituion is not an alternative but auxiliary mechanism which functions as strengthening body of the judicial inspection and removing the obstacle against the jurisdiction.

Inspite of the all positive dimensions of the judicial inspection, it proceeds slowly and thus, its effectiveness and efficiency lessens. In this context, the ombudsman institution can produce the security by solving the peacefull settlement of disputes and conflicts for a short time-limit. As a matter of fact, the number of the claims, disputes and conflicts to be subjected of the judicial inspection will be lessened and thus, trust for the judicial inspection will be provided again (Özden 2004: 569).

The judicial inspection with its expensive and formalist characteris is not preferable and the bureauctaric illnesses is worsening. Whereas the ombudsman institution with its easily available and informalist and inexpensive character may contribute the solution of conflicts and lessening of the judicial burden as an auxilary of the judicial body.

The ombudsman institution could have an opportunity both legality audit and discretionary and expediency inspection and takes action against the transactions and activities which are arising the damage, harm and insuitable to fairness and equity but suitable to the law (Keneş 1997: 791). Whereas, the judicial inspection is a sort of jurisdiction which is limited with the legal adaptation of governmental transactions and activities and excludes both legality audit and discretionary and expediency inspection. Therefore, even if there would be damage for the governed by the legal activities, there couldn't be any intervention by the judicial places and there would be no compensation. Hence, the rights of the governed is protected under all circumstances, the justice feelings and awareness of the citizens were strenghtening and improving the government-citizen relation.

The ombudsman institution gives information to the people who has complain about the transactions and activities of the government and how to apply and to which place of jurisdiction. It plays a kind of counselling role in transmitting the complaints into the jurisdiction and accelarating the judicial process.as a second hearing and inspection, in case of the decisions and activities of the omdusman was litigated, it can provide to create much more prudential resolutions.

The ombudsman institution whose primary priority is the implementation of the inspection over the government (Erhüman, 2000: 157), contributes the settlement of the state of law and the protection of individual rights and liberties. In spreading and penetrating the idea of democracy over the different segments of society and developing the virtual, fair, and just social order, protecting the vested interests and practising the liberties as tangible symbols in social life. Ombudsman with its authorities which does not include any tangible sanction is an indication of respect for law by any society which claims and demands the democracy and the state of law

5.CONCLUSION

In any state of the law, two important elements have been pointed out: Legal dependence of the government and security of the liberties and fundamental rights. In order to realize these two principles, it is inevitably required to create the legal and judicial control in order to solve the problems arisen from the inspection of the judicial control. Beside that legality audit and prudential control has been committed by the ombudsman institution,

Together with the constitution of the ombudsman institution, the removal of all problems within the inspection of the public management, protection of maladministration totally and reformation of the government. Nevertheless, it is not a magical mechanism and institution. The problems in public administration always will be increasingly enlarged because of the interventionist character and the authority widening. As a matter of fact, the ombudsman institution could not solve all of the governmental problems. Due to the fact that the enhancement, adoption, support of the the ombudsman institution by both governing and governed depending upon the time and space, the importance and effectiveness of the ombudsman institution will be increased.

It is not possible the existing inspection mechanisms to provide the exigences of the state of the law and secure the fundamental rights and freedoms and enhance the effectiveness and efficiency as well as the ombudsman institution. For this reason, in order to develop and the ombudsman institution in convenience with the demands of the public opinion and social environment by discussing the problems and the precaution to be taken.

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