

Ombudsman or not?

Introduction

Mr. Chairman, distinguished members of the National Assembly, experts, Ladies and Gentlemen! Firstly, please allow me to thank the organizers of this seminar for their excellent work that makes it so easy for all of us here today.

Let me also thank the Board of Petition and the Danish Embassy for inviting me and my office to take part in a unique cooperation that now comes to an end with this seminar. To us at the Ombudsman Office this cooperation has been an exciting challenge – at the professional level we have met open and inspiring discussions, and at the personal level we have found new friends. For all this and more, I want to express my gratitude here today.

I have been asked to say a few words about the question of “Ombudsman or not?”

It is very difficult for anybody to make recommendations – for me it would definitely be unbecoming to recommend the implementation of an Ombudsman Office in Viet Nam. As we all know, anybody would need a thorough knowledge of the Vietnamese legal, historical and administrative context before recommending anything – and such knowledge can only be gained after intensive analyses, discussions and deliberations.

Instead of jumping to conclusions on insufficient grounds, I would like to approach the question of “Ombudsman or Not?” from another angle. On the basis of the two previous seminars, in Cat Ba and in Ha Noi, I will try to list some of the fundamental features of an Ombudsman Office and some of the prerequisites for implementing an Ombudsman Office – in this way leaving the conclusions up to you – an approach I find to be more appropriate!

A brief survey

In 1983 Professor Gerald E. Caiden from the University of Southern California launched this general definition of the Ombudsman and his specific nature: *The ombudsman, as an independent, nonpartisan officer appointed by one of the principal organs of state, deals with specific complaints from the public and is in a position to research these cases and make public findings and recommendations. Solutions are sought through conciliation, or, where necessary, through exposure of wrongdoing. The ombudsman has no power to reverse administrative decisions or to issue orders but has effective channels of investigation and influence* (International Handbook of the Ombudsman, 1983, p. xvii).

To a very large extent, this definition is still applicable worldwide. Please allow me to use the definition as a point of departure and elaborate a bit further on some of the key elements.

Independence

At the Seminar at Cat Ba on 28 and 29 June 2007, the issue of independence was discussed. It is a crucial element in the understanding of the Ombudsman, so let me once more dwell on it for a while.

No Ombudsman can, of course, be totally independent – his or her powers derive from another state power such as Parliament, a President or maybe even a King. In terms of resources and manpower, the Ombudsman will also have to have the budget approved by somebody else. No Ombudsman is born out of a vacuum.

In Denmark, we have separated the powers of the state, and the Ombudsman is not a fourth power of state. He refers to Parliament and has no competences versus Parliament or the Judiciary. In Denmark, the Ombudsman oversees the Executive on behalf of Parliament.

The Ombudsman's independence is normally described as being free – at his or her discretion – to perform the duties of the office in an objective and impartial way; the basic idea being that citizens will trust the findings and words of the Ombudsman if he or she is not subordinated to personal or other external in-

struction, only concentrating on finding the solution to the complaint or case as dictated by law and equity.

Independence and stating views on the basis of law and equity is the first condition for gaining trust from the complainants. But, of course, to the complainant the proof of the pudding is in the eating, meaning that the success of any ombudsman depends on more, interrelated elements, like for example the ability of the Ombudsman Office to explain the background for the findings and the insistence on pursuing the final result and findings of the cases.

Independence in relation to the principal, like the Parliament in Denmark, is complex. The fact that the Ombudsman in complaint cases voices his own personal opinion on the basis of law and equity, and cannot come under suspicion of being influenced by extraneous consideration, does not mean that there cannot be any contact or exchange of ideas and experience between Parliament and Ombudsman. The Ombudsman may very also act as an adviser to Parliament on certain questions and problems, usually in relation to regulating the rights of individuals and enterprises vis-à-vis the Executive.

Complaints

At the conference here in Hanoi on 26 and 27 September, focus was also put on the question of who does the Ombudsman serve? The people or the State?

As we just saw, the Ombudsman is appointed by the State and in that sense the Ombudsman serves the State – in Denmark the Parliament.

But in the Danish Ombudsman Act it is stated that *any person* may lodge a complaint with the Ombudsman against the authorities – meaning the Executive – and in this sense the Ombudsman is serving the public.

To me, this is perhaps the most important aspect of the Ombudsman idea: the fact that this office basically is put into operation to safeguard the rights of each individual in the country – be it a child, an elderly, a disabled or any person who is unhappy about the way in which he or she has been met by the Executive. This single person might be a member of a group or segment of the population like for example a union. The point is that that person does not need assistance from any other per-

son or group to achieve the help of the Ombudsman. Of course, if the complainant wants to be assisted, or a group gets together to file a complaint – that is fine, but the basic thinking in relation to the Ombudsman Office is that this office is ready to assist any individual that confronts the mighty Executive.

Thus, the Ombudsman will automatically become a sanctuary for those citizens who have grievances with the authorities. Not in the sense that the Ombudsman always will be able to help them with their cases which we have seen must be settled according to law and legal principles – but the Ombudsman Office must be a place where the complainants can count on meeting staff that will listen and understand, and where someone will do their utmost to explain to him or her why – if so – the case cannot be decided in another way.

But, although the Ombudsman will ensure the rights of the individual, in Denmark he is far from being the advocate of the complainant: The ombudsman is an unbiased investigator and evaluator – he is a nonpartisan officer. The basis of his evaluation of the case is the law and the legal principles in accordance with the rule of law. In this way, the ombudsman assists the complainants as well as the authorities in finding the right way and the right interpretation of the rules and regulations that underlie each specific case.

This is the quest of the Ombudsman: To voice his very professional opinion of what is right and wrong in the individual cases. In bringing administrative malpractice or just sheer poor public relations to the attention of public authorities, the ombudsman promotes administrative reforms.

Of course, one would say, it goes without saying that the Ombudsman is an important player in the development of norms and ethics for the administration. And, indeed, this has been the case in Denmark where the Ombudsmen have paved the way for a finely tuned legal regulation of the activities of the Executive vis-à-vis the citizens and enterprises.

We do not have the time to go into details here, but I do sincerely believe that in Denmark we have a general recognition of the work of the Ombudsmen in this field – as an important fund of experience and specialized knowledge when it comes to regulating the relationship between citizens and Executive.

Reverse administrative decisions?

As mentioned in the definition by Professor Caiden, the Ombudsman normally has no formal powers at his disposal apart from the investigation mechanisms. You may say that if the authorities do not want to follow the recommendation of the Ombudsman and settle the case by arbitration, the authorities are free to do so.

In these very few cases in Denmark where the authorities do not want to follow the recommendations, the Ombudsman has the possibility of getting free legal aid so that the complainant may take the case to court for the final solution. However, the exposure of wrongdoing is a very powerful weapon on condition that the Ombudsman is in line with the Judiciary and what can be described as common sense.

From history we know that it very often has been discussed, when implementing an Ombudsman Office, to add some extra weapons of force and enforcement to the arsenal of the Ombudsman – the argument being that the Authorities will be tempted not to follow the recommendations if they are free not to do so.

Of course, this is true! But international experience show that it is more important to fine-tune the coexistence between the Judiciary, the Executive and the Ombudsman than adding further compulsive measures to the arsenal of the Ombudsman. Very often, as I see it, extra compulsive measures do not improve the impact of the work of the Ombudsman.

Prerequisites

Now that the definition of professor Caiden has served to give us a clearer picture of what an Ombudsman is and how he operates, I will turn to the second part of my answer to the question of *Ombudsman or not*. I will briefly indicate to you some of the basic prerequisites that are necessary for an Ombudsman Office to function well – in other words, what does international experience show in relation to implementing an Ombudsman in a historical, legal and administrative context?

In Denmark we implemented, more or less, the Swedish Ombudsman model in the 1950s. But soon after, it became clear that we had to amend the original Swedish model in order to make the Ombudsman Office work well in Denmark. And this is

an international experience: The characteristic outline of the Ombudsman Office has to be fit correctly into any new context. But some basic conditions or requisites are constant, and must be taken into account before deciding to implement an Ombudsman Office or not.

It goes without saying that the independence of the Ombudsman and his office must be respected. As we just saw, the independence is a crucial characteristic of the Ombudsman and a necessity in relation to gaining the trust of the complainants and thereby for being able to minimise the friction between state and citizen. If the independence of the Ombudsman Office is not respected, then we are talking about quite another kind of institution – and not about an office outside Government, investigating the acts and omissions of the Executive.

It also goes without saying that the Ombudsman must be allowed to investigate the cases completely and thoroughly. It might be that he cannot publicise all parts of his investigation afterwards, but the complainants must be confident that the ombudsman was not excluded from any information in his scrutiny of the case and its circumstances. In the Danish Ombudsman Act this is expressed in this way that *Authorities ...shall be under the obligation to furnish the Ombudsman with such information and to produce such documents, etc. as he may demand ex officio, and The Ombudsman may demand written statements from the authorities.*

The last prerequisite that I would like to mention in this short presentation can be illustrated quite well by quoting the Ghanaian Ombudsman, Mr. Emile Short, when he said that *of course there must be a certain minimum of political will to ensure the survival and smooth functioning of these democratic institutions.*

As we saw in the definition by Professor Caiden, the Ombudsman is dependent on *effective channels of investigation and influence.* This especially means that if a country decides to implement an Ombudsman Office, it must be willing to give it all necessary support – and in Denmark the Ombudsman would not be able to function well and find solutions for the complainants and their cases unless he enjoys the trust of Parliament – not that Parliament has to agree with the Ombudsman all the

time, but respect his independence and support the work of the Office as such.

Conclusions

Let me end here by summarizing my points for discussion:

The Ombudsman Office has certain basic characteristics world-wide: It is independent in its performances and the basis for its evaluation is the laws and legal principles and traditions according to rule of law.

The core function of the Ombudsman is to ensure the rights of the individual or groups whose rights may have been violated by the Executive.

Ombudsmen cannot reverse administrative decisions. They have no formal powers but rely on reputation and effective channels of influence.

Some of these characteristics are prerequisites – meaning that in order to implement an effective Ombudsman Office, these prerequisites must be met – ensuring the independence, the working methods and the support from important players in the State such as Parliament, the Judiciary and the Executive

Thank you.