

## **Ombudsman in the Third World: The Latin American Case**

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### **Introduction**

Literally translated from its origins in Old Norse, the word “ombuds man” is a gender neutral term which means “representative”. It is also used in other Scandinavian languages such as Norwegian (“ombudsman”); Icelandic (“umbo”); and Danish (“Ombudsman”). The expression Ombudsman, however, originates from the Swedish usage, initiates with the establishment of the parliamentary ombudsman in 1809, whose function was to protect citizens rights through an independent (from the executive branch of the government) institution. Both the word and its meaning have been adopted by other languages (Friedery, 2008).

Some scholars believe that the origins of the ombudsman institution in Scandinavia lie on Turkey. According to this view, In 1712, when the Swedish king Charles XII lost the Poltava battle against the Russian Czar and sought refuge in Turkey, where he stayed over a decade, under the protection of the Turkish Emperor. Charles XII would have been inspired by the Diwan al-Mazalim, a Turkish institution that loosely translates as “board of grievances”, whose office holder (Muhtashib) was entitled and obligated to check complaints of individuals against authorities, by using a non-legal review to protect those people who were victims of the official’s injustice, discrimination and unfairness. Charles XII adopted

this concept and implemented the King's Ombudsman. In 1809, the Swedish Ombudsman idea gained force when a constitutional reform gave the Swedish legislative body the right to elect an Ombudsman of justice, after having disputed this right with the king for almost a century (Friedery, 2008).

The ombudsman offices started to spread to other states in the 20<sup>th</sup> Century, being adopted first by Finland (1919), Norway (1952), Denmark (1953) and Germany (1957). By the end of the 1970s the Ombudsman institution had spread like wild fire. It was adopted in most Western European states; Commonwealth states (e.g. New Zealand, in 1962; UK and Canada in 1967 and Australia in 1977); and other countries (Israel in 1967; Tanzania in 1968; Puerto Rico in 1977, and others). Today, the Ombudsman institution is present in a large number of countries including those with well-established democracies and states with younger democracies (Friedery, 2008). Amongst the adopting countries with relatively young democracies are the Latin American Countries where the Ombudsman Institution has been widely incorporated.

This paper focuses on the spread of the Ombudsman offices in third world countries, particularly Latin America. It aims at analysing the following aspects of this massive process of transnational institutional transfer:

- Necessary conditions for the efficient adoption of the Ombudsman institutions;
- Challenges to the adoptions of the Ombudsman institution in third world countries;
- The degree of success, efficiency and efficacy in the adoption of the Ombudsman institution across the Latin American territory.

The analysis will be limited to the classical Ombudsman in the public sector.

## The Ombudsman Office's Role

### Ombudsman as an agent of Rights, Justice and Democracy

Taking a step back in looking into the role of the Ombudsman from an international standpoint, three aspects draw attention (Abraham, 2008):

- **Rights**, which has become a common denominator in the moral and ethical discourse in Western Europe and North America after the World War II, and in most of the world after the collapse of the Soviet Union in 1989. Each domestic Ombudsman deals with public service complaints and, in practice, stand to the protection of human rights by contributing to the states' good administration. There is direct relationship between good administration and human rights;
- **Justice**, as the Ombudsman's objective is delivering justice, with the observance of rights as an essential component of this process. "The endgame (...) is will be the guarantee of individual benefit to the particular complain in the form of a restored sense of worth and dignity, over wider public benefit in the form of restored collective trust in the ability of the public agency in question to deliver a service that conforms to human rights principles" (Abraham, 2008); and
- **Democracy**, as the Ombudsman covers the "small places" where the citizens, most of the times, encounters the state in the form of the services rendered by the later. Those "small places" are where the citizens discover their standing before the public authorities and how they respond to them in their human particularity. The actions of the Ombudsman

and its relationship to the Parliament potentially includes, through the Ombudsman reports, the issues faced by the citizens in their encounters with the state, leaving therefore, open the possibility that those facts and findings will influence policy making in the future. The role of the Ombudsman includes, therefore, the reduction of the democratic deficit.

### **Ombudsman Institution: important features and modus operandi**

In general terms, the Ombudsman's primary responsibility is "to protect rights and liberties of the members of society against undue bureaucratic encroachment, to redress the grievances and complaints of the individuals of groups against administrative actions or decisions, and, thus, to resolve conflicts between private citizens and the bureaucracy in order to ensure good governance and transparency. His/Her success will depend to a considerable extent on the support of the legislature" (Abedin, 2006).

From a strictly legalistic standpoint, the US Ombudsman Association (USOA), points out that the Ombudsman office means: "(i) an office provided by the constitution or by action of the legislature or parliament and headed by an independent high level public official who is responsible to the legislature or parliament; (ii) who receives complains from aggrieved persons against government agencies, officials and employees or who acts in his own motion; and (iii) who has the power to investigate, recommend corrective actions and issues reports" (Abedin, 2006).

There are, therefore, three essential features in the original Ombudsman system (Abedin, 2006):

- Independent, non-partisan office of the legislature who supervise the administration;
- Deals with public complaints against administrative injustice of maladministration; and
- Has power to investigate, criticize and publicize, but not to reverse, administrative actions.

The investigation carried on by the Ombudsman is usually speedy, inexpensive and informal. It is accessible to the public and requires little or no payment. Once a complaint is made, the Ombudsman becomes the “moving party” by initiating the investigations and taking all necessary measures, using its power to inspect agencies and departments calling upon involved persons and require them to produce the necessary documents (Abedin, 2006).

### **The Impact of the Ombudsman on Developed Countries**

Modern government is characterized by the executive authorities’ growth of power, since there has been an enormous expansion in the scope and reach of the government activities; the power and the authority of the official agencies. Government services have expanded not only in volume, but in areas. While citizens gained access to more services, by the same token, they become more vulnerable to the decisions of civil servants. Given this evolving environment, the control over the actions of the government becomes more and more important to the citizens. The Ombudsman Office provides an additional tool for such control (Abedin, 2006).

Since its introduction in the Scandinavian countries and its adoption by the developed world, the Ombudsman Institution has enjoyed, in those countries, a considerable amount of success and has not run into major operational problems. It seems that the reasons for such a success in the developed economies are (Abedin, 2006):

- Those are reasonably well administrative states;

- The democratic systems in those countries are established and, therefore, the Ombudsman office is less subject to partisan pressure and its work is not truncated;
- There are relatively few complaints against maladministration;
- Corruption is rare and officials generally seek to serve rather than defeat citizens.

### **The Ombudsman Institution in the Third World and the Latin American Case**

#### **Challenges to the implementation of the Ombudsman Institution in the Third World**

Generally speaking, the implementation of the Ombudsman Institution in third world countries is riddled with doubts about its usefulness, suitability and success. Most of those doubts come from the unavoidable and undeniable fact that the political, social and economic environments in the third world are remarkably different from those in the developing economies. Those factors have a direct impact in the efficiency and effectiveness of the Ombudsman institution in third world countries (Abedin, 2006):

- Economic pressures due to the need for rapid socioeconomic development;
- Authoritarian and non-egalitarian history, social structures, societies and values;
- Powerful and dominant executive vis-a-vis to the other branches of government due to Colonial or feudal traditions or recent authoritarian governments;
- Widespread patronage and corruption in civil service;
- Uncertainty about the stability of the office due to partisan pressures;
- High number of complaints generated by unstable and unfair societies;

It is a paradox that the Ombudsman Institution has better conditions to succeed where it is needed the least. However, while the efficiency and efficacy of its adoption is reduced in the

third world, at the same time, the argument for its implementation there is stronger than in any other case.

### **The Latin American Case**

After almost 30 year of authoritarian regimes backed by the developed world as a reaction to the cold war, the 80's and 90's brought to Latin America: elected governments; increased respect for human rights and institutional reforms associated with democratic governance, such as popular participation, rule of law and accountability. The relative effectiveness and efficacy of those reforms varies from one country to another and fluctuates in time. However, there is no doubt that the region made significant progresses.

From the strictly legal and formal standpoint, the Ombudsmen in the Latin American countries have similar legal framework that of the Spanish Ombudsman, instituted in 1978. While lacking coercive power, the Ombudsman in Latin America can emit resolutions on the basis of the citizens' concerns and are potentially important for the strengthening of democracy in the Latin American countries.

Democracies in the region are relatively recent. They were preceded by "governments generally characterized by the lack of accountability and responsiveness on one hand and the pervasiveness of graft and state abuse of citizens' rights on the other hand" (Uggla, 2004). In Latin America, the relationship between human rights and the Ombudsman Office is even stronger, as the institution is a key factor in addressing some of the dilemmas and omissions facing those new democracies.

The challenges to the establishment, success, efficiency and efficacy of the Ombudsman institution in Latin America cannot be underestimated. Such are manifested in several different

areas and variables, such as: the volume of cases; the strong executive powers; and independency/autonomy.

**Volume of Violations.** Whereas in the developed countries the Ombudsman typically deals with a small number of individual claims, in Latin America they tend to deal with a massive number of human rights violations on a general scale (Uggla, 2004).

**Strong Executive Powers.** The Ombudsman Institution has matured in environments where parliament is strong. This is not the case in Latin America, where a series of very strong Presidential systems prevail and the independency of the judiciary is, in most cases, at least debatable (Uggla, 2004).

**Independency/autonomy.** As a new institution in Latin America, the Ombudsman Office tends to face a considerable challenge by the other government institutions whose natural reaction is to try to avoid being controlled by other powers and actors. Since this is an institution that may potentially concentrate political power, the Ombudsman is likely to become a target for attempts to control or constrain its actions. In Latin America, these attempts have been manifested in several forms (Uggla, 2004):

- In political systems where the executive is disproportionately strong, its influence in the appointment of the Ombudsman is strong. As an example, in El Salvador, an incompetent but docile Ombudsman was appointed in 1998, resulting in discrediting the institution. In both Peru and El Salvador, the executive used its influence on congress to make sure that the appointment of an Ombudsman was impossible by making sure that no name would reach the necessary qualified majority.



- While the Ombudsmen are appointed every 4 or 5 years, their budget is approved annually. Many Latin American governments used budget cuts to restrain or punish the Ombudsman Institution. Guatemala, El Salvador and Honduras are clear examples of this practice. The side effects of these practices on the Ombudsman Institutions are: (i) increasing reliance and dependence on international funding (countries such as Bolivia, Colombia, Honduras and Peru receive more than 40% of their funding from abroad); and (ii) a negative relationship between the quality of the service provided the society by the Ombudsmen and the likelihood of them to be able to sustain itself on national funds alone.
- Since this institution lacks coercive powers, its ability to ensure the cooperation of the other government branches will depend heavily on the degree of respect which the Ombudsman commands within the society. In ensuring the compliance to their resolutions, the Ombudsman Offices in Latin America face additional challenges:
  - Lack of Resources, as non-compliance may be generated by weak administrative practice and power of supervision within the state bureaucracy. In this case, even if politically the government wants to comply with the Ombudsman recommendation, it may lack the resources to do so.
  - Lack of Cooperation between the Ombudsman and the Judiciary System as, generally speaking, there is little cooperation between the Judiciary and the Ombudsman Offices in Latin America. This lack of cooperation is a function of: (i) Judiciary systems in Latin America which are, in most part, inefficient and politically motivated; (ii) Competition, in some countries, between the judiciary competes with the Ombudsman Office for international and domestic funding and

attention; and (iii) the fact that Part of the Ombudsman`s role include process cases against members of the judiciary.

- State Policy, as non-compliance may be a product of the arbitrary power of the bureaucracy which may choose not to comply with resolutions that impact their interests or those of their constituencies. In Colombia, for instance, the concerns expressed by the ombudsman with regards to the coca eradication campaign have been ignored by the executive.

### **Conclusion**

Despite their difficulties, the Ombudsmen have been major constitutional players in Latin America. In countries like Argentina, Guatemala and Colombia, they have performed a vital role as protector of human rights after a long period of dictatorship. Such performance is not a result of formal and legal disposition, but rather the product of the political process where the citizens are, in Latin America, slowly but surely, progressing towards the consolidation of the democracy that has been long sought by the region.

In the face of the fact that the implementation of the Ombudsman Institution in third world countries will necessarily be imperfect, one must ask if it is worth implementing it in such countries. As argued in this paper, the Ombudsman represents an additional tool in the protection of the individual rights and the pursuit of democracy and justice. In this sense, it is fundamental that those countries persist in their effort to consolidate and improve the democratic institutions, which include the Ombudsman Office.

The path will be hard and long, but, in our opinion, the journey is worth it.

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