

# The Institution of the Ombudsman. The Latin American experience\*

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## I. Introduction

A key element for the consolidation of democracy is the creation of control mechanisms on the exercise of power by State authorities through a system of checks and balances. During the past fifteen years we have witnessed the establishment of institutions that permit the citizenry to present proposals, express opinions and demand respect for its rights and interests.

This evolution has strengthened democracy by making it more participative and by creating opportunities for society to make its voice heard in a more organized manner. The institution of the Ombudsman<sup>1</sup> has played a significant role in this consolidation of democracy in Latin America.

A State policy that encourages the establishment of bodies such as the Offices of the Ombudsman, as has occurred in Latin America, must be accompanied by a policy that strengthens these institutions and provides them with complete political, administrative and budgetary independence. In other words, the Ombudsman must be able to perform their functions without governmental interference and must have an adequate budget. The Ombudsman must also have

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<sup>1</sup> In Latin America, the Ombudsman is also known as Defensor del Pueblo; Procurador de los Derechos Humanos and Comisionado Nacional de Derechos Humanos. For the purposes of this paper, the generic term Ombudsman will be used.

the freedom to organize their offices, manage their economic resources and have the final word regarding their powers.

This paper attempts to explain the process of consolidation of the institution of the Ombudsman since the creation of the first Office (Guatemala, 1985), the different laws that have established it, as well as to understand the challenges that the Ombudsman have had to confront and those that they will face in the future.

## II. Origins of the Ombudsman

The institution of the Ombudsman has existed throughout history. It began with the functions of controlling and supervising the activities of governmental employees and has recently added that of monitoring respect for human rights.

The history of the Ombudsman begins in the Greek cities of Sparta and Athens, which as a practical matter were unified from 700 to 500 B.C., when the “Eflora” in Sparta and the “Euthynoi” in Athens oversaw the activities of governmental employees and municipal activities.<sup>2</sup>

Around 300 B.C., the Romans created an institution for the protection and defense of fundamental rights. With the fall of the monarchy and the rise of the Republic, the division between the social classes -patricians and plebeians- became more evident, so the latter left Rome in order to obtain social equality, or at least better living conditions. The plebeians retreated to Mount Aventino around 509 B.C. and obtained an important concession from the patricians who allowed them to choose two plebeian Magistrates to represent them and watch out for their interests. These civil employees were known as the Tribuni Plebis. They had the right of veto and could oppose the decisions of the Magistrates, the Consuls and the Roman Senate.<sup>3</sup>

During the reign of Cyrus in the Persian Empire -from 560 to 529 B.C.- he appointed an “Eye of the King,” a comptroller over the activities of all governmental employees.

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<sup>2</sup> <http://boards2.melodysoft.com/app?ID=ombudsman&msg=63>

<sup>3</sup> <http://www.defensoriadelpueblo.gob.pa>

During the Han dynasty in China -from the 3<sup>rd</sup> century B.C. to 220 A.D.- the Emperor assigned a civil employee called the Yan to exercise a systematic and permanent control of the imperial administration and its civilian employees. The Yan also received petitions from the public against what were called “administrative injustices.”

During the Byzantine Era -from 395 to 1453 A.D.- the figure of the Civitatis Defender or Defender of the City was established and given the mission to protect the humble against abuses of the rulers.

In 15<sup>th</sup> century Venice, the Council of Ten controlled the bureaucratic excesses of the city with proven effectiveness.

In the following century, the Great Senescal of Sweden, who acted as a true inspector of the courts of justice, brought before the king the abnormalities that he noted in the administration of justice, thus becoming the predecessor of administrative control that would be exercised by the Ombudsman. In 1713 King Charles XII named the first Supreme Solicitor, who was charged with ensuring that the civil servants faithfully obeyed the laws of the kingdom. In fact, it was in Sweden where the figure of the Ombudsman was created with its present characteristics. This figure was institutionalized in 1809 as a result of a dispute between the king and Parliament.

When the parliamentary monarchy was established and the attributes of the three branches of the State were assigned, the Justitie Ombudsman was created as the representative of Parliament to act totally independent of Parliament and to control the observance of the law by courts and government employees. He was authorized to bring to justice those who in the exercise of their functions committed illegal acts or neglected the performance of their duties by being partial, by doing a favor or for any other motive. As the representative of the Legislative Branch, he looked out for the rights, guarantees and interests of the citizenry.

The Ombudsman, given constitutional rank, soon provided innumerable examples of effectiveness. Finland adopted the institution and included it in its Constitution of 1919.

Nevertheless, the evolution of the figure was delayed until the end of World War II. Denmark included it in its Constitution of 1953 with the purpose of creating guarantees for the proper exercise of the

civilian and military administration of the State. In 1952 Norway established the office for military purposes and in 1962 broadened its mandate. Due to the international interest that this figure had created, this type of representative was established throughout the world as “Comptroller of the State” in Israel; “Supplier of Justice” in Portugal; “Mediator” in France; “Civic Defender” in Italy; “Parliamentary Commissioner” in Great Britain and “Defender of the People” in Spain, among others.<sup>4</sup>

This is a short history of how the institution of the Ombudsman, such as we know it today, began to be included in the legislation and Constitutions of the different countries. Its history in Latin America covers the last two decades and had as its main inspiration the Spanish Ombudsman.

At present the institution of the Ombudsman has extended far and wide and has been established in countries with solid democratic systems as well as in more recent democracies. In addition, the European Union appointed the first European Ombudsman in 1995, in accordance with the Maastricht Accord.<sup>5</sup>

### III. Origins of the Ombudsman in Latin America

The beginnings of the Ombudsman in Latin America can be found in the Inca Empire, in which a figure called the “Trucuyricuy” (the one who sees all) existed and was in charge of overseeing the operation of the Imperial Council.<sup>6</sup> With the arrival of the Spanish, the “Protector of the Indians” was created through the initiative of Fray Bartolomé de las Casas. There are also historical antecedents in the Law of the Indies, in which the Supervisor of the King communicated to the monarch claims or injustices committed by the Viceroy.

Nevertheless, the process of creating and incorporating the institution of the Ombudsman into the Latin American modern legal systems dates from the decade that just ended,<sup>7</sup> when the so-called

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<sup>4</sup> <http://boards2.melodysoft.com/app?ID=ombudsman&msg=63>

<sup>5</sup> [http://www.law.ualberta.ca/centres/ioi/esp/history\\_s.html](http://www.law.ualberta.ca/centres/ioi/esp/history_s.html)

<sup>6</sup> A type of police organization that was responsible for order and compliance of the laws of the sovereign, supported by “michues,” who acted as advisors, inspectors and investigators.

<http://www.moais3.8k.com/antepasados/inca/incas.html>

<sup>7</sup> The only Office of the Ombudsman created prior to this time was that of Guatemala (1985).

“transition to democracy” began at the same time that the cold war, the bi-polar world and the doctrine of national security, which dominated the region during practically the entire second half of the 20<sup>th</sup> century, were coming to an end.

The figure of the Ombudsman can be seen as evidence of this change because, until recently, the nations of the region lacked institutions to supervise the performance of government employees with respect to human rights.<sup>8</sup>

The phenomenon of the expansion of the Ombudsman can be said to be an answer to an institutional weakness in some countries and to the serious violations of human rights committed during the military dictatorships and the internal conflicts that afflicted Latin America in the 1970’s and 80’s, which has led to an emphasis on human rights by the Ombudsman. The Mexican jurist, Jorge Madrazo, describes the Latin American prototype as the “Criollo Ombudsman.”<sup>9</sup>

The Latin American Ombudsman is based on the Swedish and Spanish models and has evolved according to the needs of each country, in an attempt to respond to the demands of the people who need a mechanism to control the abuses of the authorities and private individuals.<sup>10</sup>

Although this figure is based on previously existing models, the Latin American model, tied to the constitutional developments of the transition to democracy and the end of authoritarian regimes, adds two fundamental elements to the classic figure. On the one hand, explicit priority is given to the protection of human rights, without relinquishing control of the *ultra vires* acts of the public administration. On the other hand, it may transfer files to the Public Ministry so that the latter can initiate, when appropriate, a criminal prosecution. The Ombudsman also has promotional and educational functions.<sup>11</sup>

In Latin America, the Ombudsman is often more effective than the courts in protecting human rights and also has an important

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<sup>8</sup> FIO and IIDH, *Informe de La Secretaría Técnica*, period 2000-2001 November 2000- September 2001.

<sup>9</sup> Madrazo Cuellar, Jorge, *El Ombudsman Criollo*, Mexico, D.F.: CNDH, 1996.

<sup>10</sup> <http://www.defensoriadelpueblo.gob.pa>

<sup>11</sup> García Laguardia, Jorge Mario, *Reflexiones sobre el Ombudsman en América Latina y su proceso de nombramiento*, Guatemala, 1997.

complementary role in the resolution of conflicts. The Office of the Ombudsman is able to do this because of its particular characteristics, such as not being subject to formalities or legal restrictions for the handling of cases of violations of human rights; being an organization that does not charge a fee; and being independent of other State bodies.<sup>12</sup>

Today an institution of this nature exists in all of the countries of the region, except Chile,<sup>13</sup> The Dominican Republic<sup>14</sup> and Uruguay.

We now turn to the social and political situation in Latin America prior to the creation of the Offices of the Ombudsman in order to have a better idea of their particular characteristics, legal order, mandate and limitations.

### **1. During the era of military dictatorships and internal conflicts**

Until the beginning of the 1980's, the governments of several Latin American countries were headed by the military, which in some cases succeeded one another through fraudulent elections<sup>15</sup> or perpetrated themselves in power -as was the case of Paraguay and Nicaragua-<sup>16</sup> where the rule of law or independent democratic institutions that enabled the citizenry to present claims for the violations of its most fundamental rights did not exist. During this period, there were massive human rights violations: some governments were responsible for multiple forced disappearances<sup>17</sup>

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<sup>12</sup> See Note 8.

<sup>13</sup> At the beginning of 2003, as a result of cases of scandals affecting the government, the Administration and the opposition in Chile agreed on an agenda of legislative projects regarding the modernization of the State and transparency, which includes the creation of the Office of the Ombudsman.

<sup>14</sup> In February 2001, the Congress of the Dominican Republic adopted Law 19-01 that creates the Office of the Ombudsman. However, to date the first Ombudsman has not been named.

<sup>15</sup> In Guatemala, from 1970 to 1982, four fraudulent elections were held that allowed a succession of military governments. On March 23, 1982, a few days after general elections -also fraudulent- a military coup overthrew General Romeo Lucas García and imposed General Efraín Ríos Montt as the new Head of State.

<sup>16</sup> General Alfredo Stroessner governed Paraguay from 1954 to 1989 and three generations of Somozas held power in Nicaragua from 1933 to 1979.

<sup>17</sup> In Argentina, human rights NGOs claimed that more than 25,000 persons had disappeared during that time and presented documentation regarding 7,000 disappearances.

and for the killing of those persons who worked in the field of human rights or criticized the military governments.<sup>18</sup>

The first Office of the Ombudsman in Latin America was created by the 1985 Constitution of Guatemala and given the task of ensuring compliance of human rights. The Constitution also created a Parliamentary Commission of Human Rights.<sup>19</sup> Subsequently, in the “Global Agreement on Human Rights” that the Government and the rebel group *Unidad Revolucionaria Nacional Guatemalteca* (URNG) signed in 1994, it was agreed that any behavior that limits, restricts or opposes the functions assigned to the Ombudsman in the area of human rights would undermine the fundamental principles of the rule of law and thus this institution had to be endorsed and fortified in the exercise of its functions. In that Agreement, the Guatemalan government agreed to support and strengthen the work of the Office of the Ombudsman and to improve its technical and material conditions.<sup>20</sup>

In El Salvador, the Office of the Ombudsman was established in the constitutional reforms of 1991, which came about as a result of the Peace Agreements,<sup>21</sup> that had as its basic function the promotion and protection of the fundamental rights and freedoms of the citizenry, in order to terminate the armed conflict and to achieve coexistence among all sectors of the nation. The Ombudsman was thus a product of the peace negotiations and his legal and constitutional powers had their origins in the serious violations of rights and freedoms of the immediate past.<sup>22</sup>

In the case of Argentina, several members of the House of Representatives presented in 1975 a draft law to establish the Office

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<sup>18</sup> On March 24, 1980, the Archbishop of San Salvador, Monseñor Oscar Amulfo Romero, was assassinated while he celebrated Mass. It is clear that he was killed for his strong defense of human rights.

<sup>19</sup> García Laguardia, Jorge Mario and Edgar Alfredo Ballsells Tojo, *El Procurador de los Derechos Humanos*, Colección Cuadernos de Derechos Humanos, Guatemala, 1997, p. 47.

<sup>20</sup> See Global Agreement on Human Rights, Section 2, COPREDEH, Guatemala, 1997.

<sup>21</sup> Peace Accords signed by the Government of El Salvador and the Farabundo Martí Front for National Liberation (FMLN).

<sup>22</sup> Alamanni de Carrillo, Beatriz, *Cuadernos de la Procuraduría para la Defensa de los Derechos Humanos*, “Fundamentos de la labor de la Procuraduría para la Defensa de los Derechos Humanos”, in San Salvador, 2002.

of the Commissioner of Congress. This initiative was not successful because of the political situation that resulted in the *coup d'état* that took place the following year and that led to military governments until 1983.<sup>23</sup> Ten years after the military dictatorships, the Defensoría del Pueblo was created in 1993 by presidential decree during the administration of Carlos Menem. An Ombudsman was not named, however, until the Office was created by law at the end of that year. In 1994, the institution was granted constitutional rank.

Paraguay, which was ruled by a dictatorship from 1954 to 1989,<sup>24</sup> incorporated the figure of the Ombudsman into the Constitution of 1992. Nevertheless, the Paraguayans had to wait nine years before the first Ombudsman was named. It is noteworthy that the office was authorized to hear compensatory claims of the victims of the dictatorship, which meant that the process to obtain indemnification was through the Ombudsman (Law 838 of 1996).

In Nicaragua<sup>25</sup> and Honduras<sup>26</sup> the institution of the Ombudsman arose at end of the military and dictatorial regimes and when the transition towards democracy had begun. In Nicaragua, the office was given constitutional rank in 1995.<sup>27</sup> In Honduras, the Ombudsman was first created by means of an executive decree in 1992, with a Commissioner appointed by the President. Later, in the constitutional reform of December 1994 and its entry into force in February 1995, the National Commissioner of Human Rights was institutionalized.

In the case of Bolivia, Col. Hugo Bánzer Suárez governed from 1971 to 1978<sup>28</sup> and was followed by a series of alternating military *coup d'états* and presidential elections between 1979 and 1983.<sup>29</sup>

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<sup>23</sup> Fix Zamudio, Héctor, "Posibilidad del Ombudsman en el Derecho Latinoamericano", in *La Defensoría de los de la UNAM y la institución del Ombudsman en Suecia*, UNAM, Mexico, D.F., 1986.

<sup>24</sup> General Alfredo Stroessner governed from 1954 to 1989.

<sup>25</sup> The dictatorship of the Somoza dynasty ruled Nicaragua from 1933 to 1979 and was succeeded by the Sandinistas until 1990.

<sup>26</sup> Honduras lived under military regimes from 1963 until 1981.

<sup>27</sup> Known as the *Procurador para la Defensa de los Derechos Humanos*.

<sup>28</sup> With the support of the *Movimiento Nacional Revolucionario* (MNR) political party.

<sup>29</sup> The presidency was occupied by Juan Pereda Asbún, David Padilla Arancibia and Alberto Natusch Busch through *coups d'états* and by Walter Guevara Arce and Lydia Gueiler in elections. In 1980, Hernán Siles Suazo won the election but



From this latter date, Bolivia has had elections that have even returned the ex-dictator Bánzer to the presidency in 1997, but he resigned in 2001 for reasons of health. It is in this context that the Office of the Ombudsman was created in 1997 with constitutional rank. It is important to point out that its mandate emphasizes respect for the multi-ethnic and multi-cultural nature of the country<sup>30</sup> as well as the promotion and defense of the rights of women, the police and the military.

The cases of Peru and Colombia are special because, although the two countries have enjoyed civilian rule, they have been the scene of lengthy and serious armed conflicts<sup>31</sup> that have involved massive violations of fundamental rights, many of which have gone unpunished. In that context, the Ombudsman was created in the Constitution of 1993 in Peru but the first Ombudsman did not take office until 1996. In Colombia, the Ombudsman was created in 1991 with constitutional rank.

## 2. Institutional weakness

There are also States in the region that, although they were not governed by the military, had institutional weaknesses that caused their democracies to be fragile. Such is the case of Mexico, which, in spite of having had periodic elections and civilian presidents, was ruled for 70 years by the same political party. In 1990, the Office of the Ombudsman was created following the example of Honduras; by presidential decree with the President naming the Ombudsman. At first, the Office was under the Ministry of Government.<sup>32</sup> With the Constitutional reforms of 1992 the National Commission on Human Rights is given full autonomy as part of the slow and progressive democratic transition to fair elections from one-party rule that,

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was prevented from assuming power by a *coup d'état* perpetrated by General Luis García Meza. In 1982 the military regime was ousted and in October of that year Siles Suazo assumed the presidency.

<sup>30</sup> There are a total of 33 ethnic-linguistic groups in Bolivia.

<sup>31</sup> In Peru, the *Sendero Luminoso* (Shining Path) group intensified its attacks at the beginning of the 1980s, but lost its effectiveness after the capture of its leader, Abimael Guzmán. The internal conflict in Colombia persists and is characterized by drug trafficking, paramilitary forces, etc., which makes a short-term solution very difficult.

<sup>32</sup> Fix Zamudio, Héctor, "Los Derechos Humanos", in *Memoria del 4º Congreso Nacional de Derecho Constitucional III*, Instituto de Investigaciones Jurídicas de la UNAM, Mexico, 2001.

between the end of the 80's and the beginning of this century, has taken place in countries such as Mexico. In 1999 the Mexican Constitution was amended so that the Senate elected the President of the National Commission and gave the Commission autonomy under the Constitution.<sup>33</sup> The Mexican legislation also envisions the formation of State Commissions in each of the 33 States and the Federal District.<sup>34</sup>

In Panama, after the ten years of the government of Omar Torrijos that ended in 1978, there were a parade of Presidents, some of whom did not finish their term,<sup>35</sup> and a weakening of the public institutions. From 1983 to 1989 the Head of the National Guard, General Manuel Noriega, was the strong man of Panama.<sup>36</sup> The law creating the Office of the Ombudsman (*Defensoría del Pueblo*) was enacted in 1996, during the second democratic period, but the Office has not been included in the Constitution.

Ecuador, in turn, adopted the Organic Law of the Office of the Ombudsman (*Defensoría del Pueblo*) in 1997, in spite of a situation of weak institutionalidad,<sup>37</sup> and gave it functional, economic and administrative autonomy.

In Venezuela, at the beginning of 1992 the Government<sup>38</sup> was without popular support because of administrative corruption and an economic crisis in the country that had caused instability. On February 4, 1992, there was an attempted *coup d'état* and the following year President Carlos Andrés Pérez was removed from office and succeeded by J. Velásquez for the rest of his term. Later, Rafael Caldera governed for five years until the presidential elections of 1998 won by Hugo Chavez, who immediately convoked a Constitutional Convention.

In December 1999, the Constitution of the Bolivarian Republic of Venezuela was adopted, which contains a structure of five branches,

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<sup>33</sup> Ibid.

<sup>34</sup> Santiestevan de Noriega, Jorge, *El Defensor del Pueblo en Iberoamérica*, Gaceta Jurídica S.A., Lima, 2002, p. 23.

<sup>35</sup> From 1978 to 1989, Panama had seven Presidents.

<sup>36</sup> In October 1989, an insurrection against Noriega by a group of young officers failed. Two months later, the United States of America invaded Panama.

<sup>37</sup> Between 1996 and 2000 Ecuador had three presidents: Abdala Bucaram; Fabian Alarcón and Jamil Mahuad.

<sup>38</sup> In 1992, the President of Venezuela was Carlos Andrés Pérez, who had been elected on December 4, 1988.

among them the Citizen's Branch with the Ombudsman (*Defensoría del Pueblo*) among them.<sup>39</sup>

### 3. Democracies

Of the countries that currently have an Ombudsman, Costa Rica is the only one that did not suffer armed conflicts nor alterations in the democratic order. Nonetheless, creating an Office of Ombudsman was not easy. It was first attempted in 1979 when an amendment to Article 48 of the Constitution was proposed.<sup>40</sup> In 1982, the Organic Law of the Public Prosecutor was passed, which established the Office for the Defense of Human Rights, with the function to protect the human rights of all of the inhabitants of the country. It was not until 1992 that the law of the Office of the Ombudsman (*Defensoría de los Habitantes*) was passed.<sup>41</sup> The Office is under the Legislative Branch but carries out its work with functional and administrative independence. The case of Costa Rica is one of the few in Latin America in which the Office of the Ombudsman has been created by law without including it in the Constitution.

### IV. Comparative analysis of the mandate of the Ombudsman in Latin America

The Latin American countries referred to in this study are those that have an Ombudsman.<sup>42</sup> They are: Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panama, Paraguay, Peru and Venezuela.<sup>43</sup>

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<sup>39</sup> The Citizen's Branch is made up of the Ombudsman, the Public Prosecutor and the Comptroller General, in accordance with Article 273 of the Constitution.

<sup>40</sup> Article 48 of the Constitution regulates the referring issue on the writ of amparo and the proposal was to create a Defender of Human Rights. Muñoz, Hugo Alfonso, "El Ombudsman: posibilidad de incorporarlo en Costa Rica", in *Revista Jurídica de Costa Rica*, No. 10, San Jose, December 1978.

<sup>41</sup> Trejos, Gerardo, *El Defensor de los Habitantes: el Ombudsman*, Editorial Juricentro, San José, 1992; and, Muñoz, Hugo Alfonso, "El Defensor de los Habitantes", in *Revista Parlamentaria*, volumen 11, No. 2, San José, 1993.

<sup>42</sup> The Dominican Republic has a law that created the Office of the Ombudsman since December 29, 2000, but the Ombudsman has still not been appointed. The legislatures of Chile, Uruguay and Brazil have not yet adopted the pertinent laws.

<sup>43</sup> Included in this study is the Commonwealth of Puerto Rico, as it belongs to the Ibero-American Federation of Ombudsman.

In beginning the analysis of the Office of the Ombudsman, it is important to point out its legal basis since some of the offices are included in the Constitution and others owe their existence to a law. This is important because the Ombudsman's legal standing influences his job security, independence, impartiality and privileges and immunities in carrying out his mission.

Of the 14 Latin American countries that have a functioning Office of the Ombudsman, eleven include the Office in the Constitution and only Costa Rica, Panama and Ecuador exist solely by law.

In the case of the aforementioned eleven States, the Ombudsman has greater job security because to change or eliminate the Office it would be necessary to amend the Constitution, which is a more complicated process than the simple change or repeal of a law because of the hierarchy of the Constitution over a domestic law. The case of Panama is an example where the Supreme Court, in a decision of February 12, 1998, voided several articles of the Law of the Office of the Ombudsman, which had the effect of reducing the Ombudsman's mandate to investigate matters involving the Legislative and Judicial Branches, the Office of the Public Prosecutor and the Electoral Tribunal or to investigate deficiencies in the administration of justice. In the same decision, the Supreme Court declared unconstitutional the immunity of the Ombudsman and his Deputies.

## **1. Basic conditions for the selection of the Ombudsman**

### **a. The Ombudsman and the selection process**

The importance of the process of selection of an Ombudsman deals mainly with the attributes that applicants to the position should have because the post is that of a kind of "magistrate of conscience." As the decisions of the Ombudsman are not binding, their effect depends greatly on the credibility of the person holding the Office. This means that the Ombudsman must have a recognized moral integrity in order to give credibility to his work and he must be able to bring together different sectors of civil society.

Each State has established its own procedure to select the person to hold the Office. The importance of this point, although apparently

only a question of form, lies in the fact that the Ombudsman must be independent in order to carry out his functions without favoring, or having an interest in doing so, any political party or sector of the government. Support for the Ombudsman depends on the manner in which he is selected and the importance or power of those who choose him.

The countries of Latin America have devised a number of ways to choose their Ombudsman. Most are elected by the legislature but there is no consensus on the number of votes necessary. In some cases, the Ombudsman is elected by a vote of two-thirds of the pertinent body.<sup>44</sup> In other cases, the election is by two-thirds of those present,<sup>45</sup> an absolute majority,<sup>46</sup> a qualified majority<sup>47</sup> or a majority of votes.<sup>48</sup> We also have the case of Nicaragua where the Ombudsman is not named by a qualified majority or by two-thirds of the vote but rather by 60% of the votes of the Assembly, which is a healthy measure that means that the candidates must meet a certain profile in order to be elected by consensus.

In a few States, it is the Executive Branch that appoints the Ombudsman. Such is the case of Colombia, where a short list is presented by the President, and in Panama, where the President can change the suggested candidate of the Assembly.

Worthy of mention are the cases of Bolivia, where the law calls for an open process and civil society can propose or oppose candidates,<sup>49</sup> and Nicaragua, where the candidates are proposed by Deputies in consultation with organizations of civil society.<sup>50</sup> In

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<sup>44</sup> In Paraguay, the Ombudsman is elected by a vote of two-thirds of the House of Representatives; in Mexico, by a vote of two-thirds of the Senate, and in Venezuela, by a vote of two-thirds of the National Assembly.

<sup>45</sup> In Argentina, the Ombudsman is elected by a vote of two-thirds of those present in both the Lower and Upper Houses; in Bolivia, Ecuador, Guatemala and Peru by a vote of two-thirds of those present in the National Congress.

<sup>46</sup> In Costa Rica and Panama, the Ombudsman is elected by an absolute majority of the Legislative Assembly.

<sup>47</sup> In El Salvador, the Ombudsman is elected by a qualified majority of the Legislative Assembly.

<sup>48</sup> In Honduras, the Ombudsman is elected by a majority of votes in the National Congress.

<sup>49</sup> Article 7 of the Law of the Ombudsman of Bolivia.

<sup>50</sup> Article 138, subsection 9 of the Constitution of Nicaragua, and Article 8 of the Law of the Ombudsman.

Peru, the Ombudsman is selected by means of a notice in the Official Gazette and then a list of candidates is published in order to make up the official list.<sup>51</sup>

Sometimes the process to name the first Ombudsman has taken more than a reasonable period. Such is the case of Paraguay, where the Constitution of 1992 created the institution and the Congress adopted the Organic Law of the Office in 1995, but it was not until 2001 that the first Ombudsman was named.<sup>52</sup>

In order that the selection process be transparent and to avoid delays in naming the Ombudsman, or so that the Deputies of the Office do not assume the post for prolonged periods,<sup>53</sup> the legislatures should adopt rules that state clearly the procedures and precise time-limits so as to avoid vacuums that would facilitate a crisis or leave the Office without a head for long periods. It is also important that civil society be able to monitor the process so that it transcends politics and in order that the person chosen is legitimated so that he can carry out his work in accordance with the requirements of the post.

The Deputy Ombudsman is an important figure because some laws permit the Ombudsman to name or remove his Deputies.<sup>54</sup> In some cases, such as Bolivia, the Ombudsman can name or remove his Deputy only with the consent of the Senate. In Argentina and Costa Rica, the Deputies are named by the legislature upon the proposal of the Ombudsman. In Nicaragua and Paraguay, the legislature elects the Deputy. In order to avoid a political arrangement in the Parliament that would lead to the appointment of deputy Ombudsman of a different political party, and given that the

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<sup>51</sup> Article 161 of the Constitution and Article 3 of the Basic Law of the Ombudsman of Peru.

<sup>52</sup> This unjustified delay might be explained by the fact that Law 838 of 1996 recognizes that the State must indemnify the victims of violations of human rights during the dictatorship from 1954 to 1989 and establishes that the Office of the Ombudsman must substantiate the claims, by evaluating the proof and decide on the pertinent indemnization.

<sup>53</sup> As of October 2003, four Offices of the Ombudsman in the Andean Region (Bolivia, Colombia, Ecuador and Peru) do not have an Ombudsman elected by the legislature and many of these Offices have been filled by persons for longer than a year.

<sup>54</sup> In El Salvador, the Ombudsman by law selects five Deputies; in Panama the Ombudsman may designate two Deputies and in Honduras there is no limit to the number of Deputies that the Ombudsman may name.

office should not be a political one, we believe that the best solution would be to give the Ombudsman three months to nominate a Deputy and to present that name to the Parliament for approval.

### **b. Duration of the mandate**

Once elected, the Ombudsman remains in office until his period is complete. Eight of the Latin countries included in this survey have fixed a term of five years and most allow re-election for the same period.<sup>55</sup> In three countries, the term is four years.<sup>56</sup> Honduras has a period of six years with the possibility of re-election; El Salvador sets the term at three years and finally Venezuela fixes the term at seven years without the possibility of re-election.

With respect to the personal attributes that the aspirant should have, some countries expressly require that the person be native-born<sup>57</sup> and, in other cases, the law implicitly or expressly permits the candidate to be a citizen by naturalization.<sup>58</sup>

Some laws establish the welcome rule that the Ombudsman does not have to be a lawyer,<sup>59</sup> but mention that the candidate should have a background in the study or defense of human rights.<sup>60</sup> Most of the laws require that the candidate not be convicted of a crime that involves the deprivation of freedom or of a crime involving fraud. Only one country, Bolivia, requires the Ombudsman to have completed military service.

### **c. Preservation of independence**

A key element is the independence that the Ombudsman must have so that he can carry out his mission. This is an indispensable, perhaps the most important, attribute that the Ombudsman must have in the control and monitoring of the respect and promotion of human rights within the public arena.

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<sup>55</sup> Argentina, Bolivia, Mexico, Panama, Paraguay, Peru, Guatemala and Nicaragua. The latter two do not permit re-election.

<sup>56</sup> Colombia, Costa Rica and Ecuador. The latter two permit re-election.

<sup>57</sup> For example, Bolivia, Colombia, Ecuador, Honduras, Mexico and Venezuela.

<sup>58</sup> For example, Argentina and El Salvador.

<sup>59</sup> Colombia, Ecuador, Guatemala and Peru require that the Ombudsman be an attorney, while the law in Panama indicates a preference that the Ombudsman be an attorney.

<sup>60</sup> In Argentina, Bolivia, El Salvador, Honduras, Nicaragua, Costa Rica, Mexico and Venezuela, it is not necessary that the Ombudsman be an attorney.

The majority of Latin American countries give their Ombudsman independence either by law or by the Constitution. Some laws expressly state that the Ombudsman must only be subject to the law and the Constitution, while others, for example Colombia, state that the Ombudsman must act under the control of the Attorney General.

The Ombudsman's independence is also important because his job is to protect the citizenry from those acts in which the State infringes, limits or suppresses its rights. How can the Ombudsman do his job effectively if he is subject or limited by the government that he must accuse? It is precisely in the matter of independence that we find the main obstacles to the establishment and adequate functioning of the Office of the Ombudsman, because there are ingenious and sophisticated ways to limit its independence. This can happen structurally when, for example, the organic law limits it to certain areas, or when the Office is not given adequate resources or, in the worst of cases, its funds are reduced. On extreme occasions, the independence of the Office has been challenged by threats to those who work there, such as the case of Guatemala, where there was a campaign of intimidation that included threats to the employees in both the central office and the provincial offices; the murder of the head of the Chimaltenango office; and the search of the central office on August 26, 2003.<sup>61</sup> In addition, the UN Committee on Human Rights has expressed its concern over the threats received by the Ombudsman of El Salvador.<sup>62</sup>

The worst enemy of the Ombudsman is the lack of political will that does not allow the Office to be a truly efficient body with broad powers. Thus it is necessary to develop strategies so that these monitoring organizations have the optimal human and financial resources to cover all areas related to the supervision of the administration of the State. The Ombudsman must never be chosen as a result of political maneuvering or be subject to any legal or judicial reform that limits important functions.<sup>63</sup>

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<sup>61</sup> This situation was condemned by the international community. The Central American Council of Ombudsman adopted a resolution demanding an immediate end to the harassment and persecution of the Office of the Ombudsman of Guatemala.

<sup>62</sup> See *Final Observations of the UN Human Rights Committee, El Salvador* CCPR/CO/78/SLV, April 15, 2003.

<sup>63</sup> An example is the amendment to the Law of the Ombudsman of Panama, due to a decision of the Supreme Court, by which important attributes of the Office are limited, such as the possibility of overseeing the administration of the Judicial Branch.



There is a clear proportion between the rules governing the institution -be it under the Constitution or under the law- and the privileges and immunities granted to the Ombudsman. As stated, there are three States that do not regulate the Ombudsman in their Constitutions, of which two -Costa Rica and Panama- do not grant any type of privilege or immunity to the Ombudsman, not even regarding work carried out in conjunction with his Office. Ecuador gives the Ombudsman the same immunity as members of Congress<sup>64</sup> and Colombia -which unlike most of the States that regulate the Ombudsman in the Constitution and grant a broad immunity necessary for the successful carrying out of his functions- says nothing about the subject of privileges and immunities.

#### **d. Vacancies**

The majority of Latin American countries expressly state in their legislation the causes for removal of the Ombudsman, among which are expiration of the mandate, resignation and death. Some States cite political participation or activity<sup>65</sup> or a violation of the legal order -whether it be the Constitution or the law- such as a serious crime. Other States have laws that grant the Ombudsman the right to a hearing before he can be terminated.<sup>66</sup> Only three countries -Colombia, Mexico and Venezuela- do not indicate the causes that can give rise to terminating the Ombudsman.

The cases of Peru and Colombia are very interesting. In the former, the law indicates that the Ombudsman can appoint his substitute when he is unable to continue in office, whether temporarily or upon his resignation. In the case of Colombia, the law allows the President to intervene not only in proposing a slate of candidates but also, in the definitive absence of the Ombudsman, in appointing an Ombudsman to exercise the functions until the Congress elects a new Ombudsman, according to the procedure established in the Constitution.<sup>67</sup>

It is important to note that, in general, the laws in Latin America do not provide clear rules for appointing an Ombudsman in case of

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<sup>64</sup> In the case of Puerto Rico, it only grants immunity with respect to civil and criminal responsibility.

<sup>65</sup> For example, Guatemala and El Salvador.

<sup>66</sup> For example, Costa Rica, Nicaragua and Peru.

<sup>67</sup> By Decree No. 2480 of September 2, 2003, President Alvaro Uribe named Volmar Antonio Pérez Ortíz to replace Eduardo Cifuentes Muñoz, who had been the Ombudsman for three years.

a vacancy, a situation that has resulted in serious problems and delays in appointments.<sup>68</sup> In Paraguay, to fill this gap the Congress passed Law 2103,<sup>69</sup> which establishes that once the Ombudsman's period has expired, the Ombudsman continues to exercise his functions until his successor assumes office.

#### **e. Budget**

The legal framework that governs the institution of the Ombudsman should seek, among others, its budgetary independence, which is essential so that the Ombudsman can completely fulfill his function of overseeing the public administration.

All of the laws in Latin America related to the Ombudsman contain a reference to the budget. The great majority of the laws include it in the budget of the Legislative Branch<sup>70</sup> or in the general budget of the State.<sup>71</sup> Some laws call for a special budget as in the case of El Salvador or its own budget as in Mexico. Others, as in the case of Paraguay, include it in the budget of the Senate. Some States -Bolivia, El Salvador, Honduras and Nicaragua- by law allow it to receive donations, either national or international, to be used or inserted into the budget of the Office of the Ombudsman. Others, such as Colombia and Peru, authorize the Ombudsman to present, explain and defend the draft budget before the pertinent authorities.

It has also been the practice of some Latin American countries to weaken the institution by cutting the budget –which in some cases is among the lowest in the public administration. This has resulted in limiting the adequate functioning of its role in the face of serious needs in view of the national reality in the field of human rights.

This has led to civil society and international organizations to speak out<sup>72</sup> so that the budget of the Offices of the Ombudsman not

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<sup>68</sup> El Salvador waited for more than a year before naming the current Ombudsman.

<sup>69</sup> Adopted in May 2003.

<sup>70</sup> Argentina, Bolivia, Costa Rica, Guatemala and Panama.

<sup>71</sup> Colombia, Ecuador, Honduras, Nicaragua, Puerto Rico and Venezuela.

<sup>72</sup> The Central American Council of Ombudsman adopted on September 2, 2003, at its XXIV Meeting held in Guatemala, a resolution that recommended that the governments of Central America provide the Ombudsman with a budget in line with the role that they play. It also manifested its support for the efforts of the Ombudsman of Guatemala, Nicaragua and El Salvador to achieve a budget that would allow them to fully protect human rights in their respective countries.

be used as an instrument of control, since such adjustments in assigning resources lead to the weakness of these institutions.

#### **f. Competence and limitations**

Before analyzing the competence and limitations of the Ombudsman, we should point out that they can carry out investigations on anything that relates to the services of the public administration that affect the basic rights recognized in the Constitution, international treaties and the law.

Their investigations and activities must meet certain requirements, such as:

- a) they must be without charge, must not be full of formalities and must be prompt;
- b) their resolutions do not replace acts of the administration<sup>73</sup> nor do they have a jurisdictional nature, in that the Ombudsman exercises a type of influence;
- c) their field of action is limited to the public sector;<sup>74</sup>
- d) their resolutions are not binding;<sup>75</sup>
- e) they should publicize both their recommendations and their activities, because this is vital for their strengthening and institutional legitimacy.

Of the 14 Latin American States surveyed, four<sup>76</sup> do not have laws that expressly limit the Office of the Ombudsman, but do make a very general mention of its functions: Colombia, El Salvador and Venezuela limit the Ombudsman to the protection and defense of human rights and Bolivia refers to the protection of human rights and the guarantees of persons only in relation to administrative acts of

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<sup>73</sup> It is a question of using its influence in making recommendations to the administrative bodies charged with resolving the case in question, but not substituting them.

<sup>74</sup> Contrary to what happens in the administration of justice, the Ombudsman has a strictly limited range of action in the public sphere within which he acts as a mediator or interlocutor of the complainant or of the collective harmed by the action or inaction of the public institution.

<sup>75</sup> They consist of warnings, recommendations or reminders that may or may not be paid heed to by the public bodies. In the case that they are not accepted, the Ombudsman has other possibilities: file a judicial appeal, look for a public censure through the mass media or present the case to the Legislature.

<sup>76</sup> Bolivia, Colombia, El Salvador and Venezuela.

the public sector.<sup>77</sup> The rest of the States also give the Ombudsman the task of defending rights with respect to the public administration and establish that that sector conform to human rights,<sup>78</sup> as well as the defense of those other rights set out in the Constitution and the law,<sup>79</sup> which obviously gives a broader, or at least more detailed, concept to its competence. Although we believe that the Office of the Ombudsman should be allowed to investigate the acts of the Judicial Branch with respect to its service to the public, in some cases there are specific limitations on which the laws agree, such as the fact that it cannot receive complaints concerning the Judicial Branch,<sup>80</sup> nor receive complaints about matters pending resolution or modify them.<sup>81</sup>

With respect to electoral matters, there are four countries that restrict the action of the Ombudsman; the Costa Rican law being the least restrictive in limiting his intervention to resolutions of the Supreme Tribunal of Elections. In the other three countries, the restriction not only refers to the resolutions but also to any matter concerning elections. The basic law of the Mexican Ombudsman states that he is not competent to deal with electoral matters; Panama does not permit him to investigate acts or omissions of the Electoral Tribunal and Paraguay does not allow him to exercise functions that belong exclusively to the electoral authorities. On the other hand, the case of the Ombudsman of Peru -who has no prohibition- is interesting because he presented a complaint to the Inter-American Commission on Human Rights against the State because the National Board of Elections -in a restrictive interpretation of Electoral Law 26859, which establishes among other matters electoral quotas- allows a lesser percentage to that determined by law, thus favoring a discrimination for reasons of gender.

With respect to the competence of the Ombudsman to investigate the military,<sup>82</sup> the laws in Nicaragua and El Salvador expressly state

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<sup>77</sup> The case of Puerto Rico also seems very restrictive since the law states as a sole attribute the power to investigate administrative acts of any body of the Executive Branch.

<sup>78</sup> Argentina, Costa Rica, Guatemala, Mexico, Nicaragua, Panama, Paraguay and Peru.

<sup>79</sup> Ecuador, Guatemala, Honduras, Nicaragua and Peru.

<sup>80</sup> Argentina, Costa Rica, Mexico, Panama and Paraguay.

<sup>81</sup> Argentina, Costa Rica, Ecuador, Guatemala, Honduras and Nicaragua.

<sup>82</sup> In his report of October 30, 2002, the Ombudsman of El Salvador concluded that those responsible for the murder of the Jesuit priests on November 16, 1989

that the military must comply with requests of the Ombudsman. The Ombudsman of Honduras attributes extend to activities of civil servants and the military with free access to all governmental and military offices. In the case of Ecuador, the Ombudsman must by law make periodic visits to centers of social rehabilitation, police stations and military posts to assure that human rights are respected.

The Ombudsman must have broad control and supervision over every type of State activity, encompassing all branches of government<sup>83</sup> and public sectors. In this sense, only in Argentina is the Ombudsman excluded by law from overseeing activities linked to matters of defense and security.

### **g. Principal functions**

The main functions of the Ombudsman in Latin America are those of investigation, mediation and education in human rights. If it is true that not all of the laws in Latin America expressly grant these functions,<sup>84</sup> they have been developed with great success in the majority of countries.

With regard to the area of investigation, almost all of the countries<sup>85</sup> give the Ombudsman this function either when requested or on his own and require civil servants to furnish all information. It is important to note that some countries expressly indicate that even confidential information must be furnished,<sup>86</sup> while some do not allow the Ombudsman to receive confidential information,<sup>87</sup> and others do not refer to this matter.

Some States grant their Ombudsman more functions than those already mentioned. Such is the case of Colombia, the laws of which expressly provide that the Ombudsman must report to the public on

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in the Universidad Centroamericana "José Simeón Cañas", were members of the Armed Forces of El Salvador and requested the Supreme Court and the Attorney General to initiate the appropriate proceedings.

<sup>83</sup> Cf. Laws of Colombia, Ecuador, El Salvador, España, Guatemala, Honduras, Nicaragua and Panama.

<sup>84</sup> Of the 14 States surveyed, Colombia, Ecuador, El Salvador, Mexico, Nicaragua and Panama give the Ombudsman mediating and educational functions. In the cases of Argentina and Peru, these functions are not expressly granted. In Bolivia, Costa Rica, Guatemala, Honduras, Paraguay and Venezuela, there is only an educational function.

<sup>85</sup> It is not expressly granted in Colombia and Mexico.

<sup>86</sup> Such is the case of Honduras, Nicaragua and Panama.

<sup>87</sup> As in Argentina and Costa Rica.

any investigation, which is important because it creates a clear access to the information obtained in the investigations. El Salvador allows the Ombudsman to adopt provisional measures considered necessary and in Guatemala the Ombudsman can request that a civil servant who obstructs an investigation be fired.

The type of infraction that a civil servant commits in not furnishing the requested information -in not collaborating or helping an investigation of the Ombudsman- differs depending on the country. For example, in Costa Rica it is the crime of disobedience; in Ecuador, the crime of failure to obey a lawful order (*desacato*) and civil servants may be fined or have to face the appropriate civil and criminal charges; in Nicaragua, the crime of *desacato* and for administrative responsibilities; in Paraguay, the obstruction of the functions of the Ombudsman and *desacato*, with the possibility that the Public Prosecutor take the appropriate legal action.

Finally, the laws of two countries are somewhat different concerning recommendations of the Ombudsman: Peru, where if the pertinent measures are not adopted and no reason is given, the Ombudsman informs the highest authority or -as appropriate- the Comptroller and Mexico, where the authorities are responsible criminally and administratively for acts or omissions during the handling of complaints.

In order that the investigative function be carried out fully, the law must provide for:

- In-depth investigations of any type that involve the services of the Public Administration.
- Authorization to inspect without prior notice and request any type of information<sup>88</sup> from public offices, including police stations<sup>89</sup> and military posts.<sup>90</sup>
- Carry out acts of clarification and immediate access to prisons.<sup>91</sup>
- The real possibility of requesting information from civil servants.

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<sup>88</sup> An example is the Ombudsman of Costa Rica.

<sup>89</sup> By law, the Ombudsman of Ecuador must make periodic visits to centers of social rehabilitation, police stations and military posts to assure the respect for human rights.

<sup>90</sup> An example is the Ombudsman of Honduras.

<sup>91</sup> Examples are the Ombudsman of Bolivia and El Salvador.

- Sanctioning of civil servants who obstruct investigations or do not collaborate when so required.<sup>92</sup>

In investigations, the Ombudsman should define the priority to handling individual cases or general cases or those whose impact might result in public policies. The choice should be based on criteria of timeliness and suitability, as well as on the effectiveness and impact that his activities might have.

As to the development of his role of mediation in social conflicts, his function -regulated by law- is more varied. For example, the law in Colombia states that the Ombudsman mediate concerning collective petitions between beneficiaries and companies in the area of public services. In Ecuador, he shall do so between juridical persons and popular organizations concerning conflicts with the Public Administration. These two countries do not give express authority to an individual to present a complaint to the Ombudsman, such as occurs in the case of Panama the laws of which grant the Ombudsman the power to mediate conflicts between individuals and the administration with the consent of both parties. The laws of El Salvador, Mexico and Nicaragua refer to conciliation and allow the Ombudsman to hear complaints between individuals whose rights have allegedly been violated and the pertinent authorities.

The figure of the Ombudsman in Latin America has recently been strengthened by his direct participation in the solution of conflicts. For example, the intervention of the Bolivian Ombudsman<sup>93</sup> in the dialogue regarding coca growers and the integral development of the tropics of Cochabamba; the mediation of the Colombian Ombudsman in the agreement among indigenous leaders of the Cauca region to end the struggle over land that had lasted for more than 20 years; and in Costa Rica in the crisis of the draft law concerning the electrical utility.

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<sup>92</sup> The laws of Argentina, Costa Rica and Honduras stipulate that it would be a crime of disobedience and those of Ecuador, Nicaragua and Paraguay classify it as *desacato* or failure to comply.

<sup>93</sup> In 2001 the Ombudsman of Bolivia participated, together with the Catholic Church and the National Assembly of Human Rights, in the mediation between organizations of civil society and governmental authorities to search for a solution to the conflict regarding water and the impact of the conflicts caused by the eradication of the coca plants in the Department of Cochabamba. See, report of the Office of the Ombudsman, 2001.

The educational function of the Ombudsman should be understood as the promotion and dissemination of human rights doctrine and of the mandate of the Office and its programs and policies on human rights. This is established by law in El Salvador, Mexico, Panama and Paraguay. Colombia, Nicaragua and Ecuador, in addition to including the aforementioned in their educational function, broaden it slightly by adding -the first two- the dissemination of information on the Constitution and the latter, by indicating that this function should be carried out by the mass media of the State.

It is important to note in this regard the agreements of collaboration by which some Ombudsman support Ministries of Education in the incorporation of the topic of human rights in formal education, as well as agreements with civil society organizations for its incorporation in popular education. Another mechanism is through agreements with universities so that students fulfill a community service in the Offices of the Ombudsman and thus not only learn about human rights but also support the work of the Ombudsman.

In the majority of the States,<sup>94</sup> the Ombudsman is given a series of jurisdictional and/or administrative activities, permitting him to present complaints and follow them up.<sup>95</sup> In the cases of Costa Rica and Bolivia, the law enables the Ombudsman to present writs of unconstitutionality<sup>96</sup> without it being necessary that the laws or norms have been applied to an individual in a concrete case.

The case of Argentina is also interesting. Its laws do not mention this possibility but, through a correct interpretation of its mandate, the Ombudsman presented a writ of *amparo* against the State regarding decrees that “froze” funds that individuals had deposited in different financial institutions in Argentina as a violation of the rights to property and the intangibility of the deposits.

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<sup>94</sup> Honduras and Mexico do not make any reference in their legislation to the judicial or administrative actions to which the Ombudsman may have access.

<sup>95</sup> With the exception of Argentina, which doesn't stipulate as an attribute of the Ombudsman the possibility of making this appeal.

<sup>96</sup> In 2002, the Ombudsman of Bolivia presented eight constitutional appeals on various matters related to the exercise of basic human rights, such as the right to life, to personal security, to health, to freedom of expression and to work. See, V Annual Report to National Congress.



In some States, the Ombudsman can present draft laws. For example, in Bolivia<sup>97</sup> the Ombudsman can propose changes to decrees, laws and non-judicial resolutions; in Colombia<sup>98</sup> and El Salvador he can do so in matters referring to human rights.<sup>99</sup> Some States<sup>100</sup> expressly allow their Ombudsman to suggest the ratification or signing of human rights treaties. Although this function is not expressly defined by law -because the Ombudsman is a parliamentary delegate- we think it important that he be allowed to support or advise Parliament in this material, not only in suggesting the ratification of treaties but also in conforming the domestic laws to the international commitments of the State.

Among the special activities of the Ombudsman, the laws of Argentina and Costa Rica establish that in case the Ombudsman learns of a fact or news of a crime he must communicate it to the corresponding authority. In the other States, special activities may be overseeing conditions in jails and the rights of those deprived of their freedom, as is the case in Colombia,<sup>101</sup> Ecuador, El Salvador, Mexico and Nicaragua. In Colombia and Venezuela, the Ombudsman is charged with overseeing the conditions and rights of ethnic minorities and indigenous peoples. There exist certain particularities in the special activities of the Ombudsman of Ecuador who can oversee the human rights of nationals who live abroad.<sup>102</sup> The Honduran Ombudsman can handle cases of domestic violence and complaints presented by inmates of psychiatric hospitals. Only Paraguay and Venezuela allow their Ombudsman to handle a variety

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<sup>97</sup> Using this attribute, in 2002 the Ombudsman proposed twelve laws or amendments of norms that violated or affected basic rights in matters such as the human rights of persons afflicted with HIV/AIDS and the constitutional reform of the Agrarian and Peasant Regime. See, V Annual Report to National Congress, 2002.

<sup>98</sup> The Ombudsman of Colombia actively participated in 2001 in the amendment to Article 93 of the Constitution, by which Colombia recognizes the jurisdiction of the International Criminal Court.

<sup>99</sup> As a special attribute, he can give his opinion on draft laws that affect human rights.

<sup>100</sup> Examples are the laws of Venezuela, Nicaragua, Peru, Bolivia, Ecuador, El Salvador and Mexico.

<sup>101</sup> See Resolution No. 15 of December 4, 2002 of the Ombudsman of Colombia on the rights of innocent persons deprived of their freedom.

<sup>102</sup> In 2003, the Ombudsman of Ecuador named a Commissioner in Barcelona and announced that one would be named in Murcia.

of matters and Guatemala and Peru expressly state that the mandate of the Ombudsman cannot be suspended for any reason.

#### **h. Resolutions and their effect**

As we have already indicated, the prestige of the Ombudsman is what gives him his effectiveness. The post of Ombudsman is legally and socially legitimated, which gives weight and authority to his acts and recommendations that in any case are not binding. Their effect comes from the prestige of the occupant of the Office and the quality of the work. An analysis of the laws creating the Ombudsman in Latin America shows how in each case the law refers to recommendations, whose compliance is intimately related to the mechanisms of social control that the figure of the Ombudsman is able to establish.

The matter of resolutions and their effect is of great importance since that is where it is possible to truly see the importance or power that the Ombudsman has in each of the States under study; with the exception of Paraguay, the laws of which do not address this question.

The laws of almost all of the countries<sup>103</sup> state that the Ombudsman can formulate recommendations, observations or suggestions. The laws of Colombia and Venezuela stipulate that these recommendations can only be made concerning human rights. Other countries -Costa Rica, Honduras, Mexico, Panama and Peru- are even more specific and limiting in stating that these recommendations are not binding or that they can not modify any other type of resolution. In seven countries, the Ombudsman is constrained to informing the pertinent authority -according to the law- of the complaints, anomalies, infractions that have been brought to his attention, which means that he cannot handle and resolve them but rather only report them: in Argentina, either in an annual or special report; in Honduras, place them in the hands of the Head Prosecutor; in Panama, report them to the Attorney General; in Peru, to the pertinent authority and, where appropriate, to the Comptroller General; in Colombia, once the evidence has been evaluated, the Ombudsman must send the case to the pertinent authority; and in Venezuela, the Ombudsman must request that the Head Prosecutor present the appropriate claims and apply the proper sanctions. The

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<sup>103</sup> Except Ecuador and Guatemala.

opposite occurs in Ecuador where the Ombudsman must present the necessary writs to avoid damage or danger and can also require that the appropriate authority resolve them. In El Salvador, the Ombudsman presents the appropriate judicial and administrative claims and requests that there be due process. In Guatemala, the Ombudsman can order the immediate end to the violation and present the claim before the pertinent body. Finally, in Nicaragua the Ombudsman can also initiate or promote actions of responsibility and the corresponding remedies.

There also exist a series of interesting peculiarities. For example, in Colombia the Ombudsman can publicly seize the violator of human rights if he is an individual. The Guatemalan Ombudsman can issue resolutions of public censure against the material and intellectual authors of a violation and in El Salvador, if the measures demanded by the Ombudsman are not complied with, he can issue a public censure.

**i. Consequences of not obeying or not collaborating with the Ombudsman**

We now will analyze the consequences in each State for the crime of disobedience for not collaborating with the Ombudsman in his investigations or for not taking into account his recommendations. The laws in Guatemala are the only ones that do not make reference to this matter. Most of the other States indicate the crimes -set out in their legislation- that civil servants or in some cases individuals commit if they obstruct or disobey the requirements or recommendations of the Ombudsman. Some States generally refer to obstruction of the work of the Ombudsman. For example, in Bolivia, the law establishes that in the case of negligence there is a serious infraction; in Colombia, this obstruction is bad conduct and is punishable by firing in addition to the respective criminal sanctions; in Ecuador and Panama, it is criminal or administrative responsibility; in Honduras and Argentina, if there is a refusal or negligence, it is the crime of disobedience.

As to the infractions of not furnishing the requested information, lack of cooperation or not helping with the investigative function of the Ombudsman, the Costa Rican law indicates the crime of disobedience; the law in Ecuador establishes the crime of *desacato* and civil servants are fined in addition to facing the respective

criminal and civil actions; in Nicaragua it is the crime of *desacato* in addition to the pertinent administrative responsibilities; in Paraguay it is an obstruction of the functions of the Ombudsman and *desacato*, with the possibility that the case will be taken to the Public Prosecutor for the appropriate action.

In the case of the failure to comply with the recommendations of the Ombudsman on the part of the employees of the public administration, the laws in Costa Rica state that, if an employee does not follow the recommendations, he will be warned and, in the case of a repeated violation, he will be suspended or fired. Under Nicaraguan law, the civil servant must twice refuse to follow the recommendations to be guilty of the crime of *desacato* and the respective administrative responsibilities and he may be called before the Congress.

There are two States whose laws slightly differ with respect to the recommendations of the Ombudsman: Peru, where if adequate measures are not adopted or no reason is given for not adopting them, the Ombudsman communicates that to the highest authority or -as appropriate- to the Comptroller and Mexico where the authorities incur criminal and administrative responsibility.

On the other hand, only five of the countries studied<sup>104</sup> have laws that refer to the possibility of challenging the recommendations of the Ombudsman. Of these five, only those in Panama indicate that the actions of the Ombudsman are not susceptible to administrative or jurisdictional actions; in Argentina, only decisions on admissibility can be contested; Costa Rica allows only reconsideration of the acts, decisions and reports of the Ombudsman. In Mexico -because it has a federal system- omission or inactivity of the State Commissions can be challenged and, if the matter is considered important, the challenge can be brought and the handling continued. In addition, the decisions of the State Commissions can be impugned. Both recourses must be presented to the National Commission on Human Rights. Finally, in Peru where there is no challenge to admissibility, the acts of the Ombudsman are subject to revision by the judiciary and reconsidered only through a writ of reconsideration.<sup>105</sup>

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<sup>104</sup> Argentina, Costa Rica, Mexico, Panama and Peru.

<sup>105</sup> Articles 20 and 31 of the Basic Law of the Ombudsman.

### **j. Procedures for the handling of petitions**

With respect to the procedure that should be followed in the handling of petitions brought before the Ombudsman or so that the Ombudsman sends it to the competent authority in order that the matter be known concretely, only Venezuela does not have a provision on the matter. The majority of States permit any person -individual, physical or natural or any juridical person- to present petitions.<sup>106</sup> Ecuadorian law indicates that a legitimate interest is necessary in order to present a petition; the law in Honduras refers only to natural persons; Mexico and Argentina do not refer to who can present a complaint; only three countries -Bolivia, Costa Rica and Honduras- establish in their legislation a limit of one year from learning of the events to present the complaint; the rest of the countries do not place any time limit for the presentation of complaints.

Normally, a report<sup>107</sup> is requested from the superior of the employee who committed the error<sup>108</sup> or from the employee allegedly involved<sup>109</sup> or, in some cases, from both.<sup>110</sup> The State sets a time limit for the presentation of the report. Panama allows the Ombudsman to request all the reports necessary from civil servants.

In many cases, the Ombudsman must present his resolutions within a certain time limit. The law in Costa Rica gives the Ombudsman two months to decide a case. El Salvador gives a term of 28 days to issue the pertinent resolution. Guatemala states a term of eight days to issue the resolution with the particularity that the legislation expressly indicates the points to which the Ombudsman must refer in the resolution. Finally, Paraguay gives the Ombudsman 120 days to issue the resolution.

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<sup>106</sup>Such is the case of Bolivia, Colombia, Costa Rica, El Salvador, Guatemala, Nicaragua, Panama, Paraguay and Peru.

<sup>107</sup>Argentina, without indicating a time-limit; Colombia, within five days; Peru, within 30 days and, in the event no report is presented, an additional five days is granted to present it.

<sup>108</sup>For example, in Guatemala there are five days to present the report.

<sup>109</sup>Ecuador, within eight days, with a possible extension for a like period; El Salvador and Nicaragua, a maximum of 71 hours; Mexico, within 15 days; Bolivia, within 10 days.

<sup>110</sup>Costa Rica, within five days; Honduras, within 10 days.

## V. Conclusions

The Offices of the Ombudsman, as bodies that oversee the activities of the State and promote and supervise compliance of human rights, have a fundamental role to play in furthering democracy.

The principal characteristics of the Ombudsman are:

- An autonomous functionary without any ties to a political party.
- A parliamentary delegate who must present an annual report.
- A “magistrate of conscience” whose credibility is measured by his moral standing and efficacy and by his actions; that is, by the results of his efforts.<sup>111</sup>
- Preferably created by the Constitution.
- Oversees all of the authorities of the public administration.
- Watches over respect and compliance of human rights.
- Can investigate alleged violations of human rights, issue reports and resolutions, but does not have the power to revoke any act.
- Must have total political, administrative, budgetary and functional independence in the exercise of his functions.

The Ombudsman must be creative and interpret his mandate as broadly as possible.

The Ombudsman in Latin America is a democratic figure who is capable of mediating social conflicts and promoting democratic standards. There are occasions in which achieving peace, transparency in elections, the search for truth and reconciliation and the very stabilization of the processes involved in the transition to democracy have called for the Ombudsman to be an interlocutor of democratic aspirations.<sup>112</sup>

The staff of the Offices of the Ombudsman must have an adequate level of preparation and training. Likewise, they should have competitive salaries and stability in the workplace.

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<sup>111</sup>Conclusions of the *Jornada de Reflexión sobre el Ombudsman Centroamericano*, organized by the IIHR in September 1999.

<sup>112</sup>Santestevan de Noriega, Jorge, *El defensor del pueblo...*