

OMBUDSMAN: THE POPULATION'S RIGHTS ADVOCATE IN THE INSPECTION OF PUBLIC ADMINISTRATION

OMBUDSMAN OU OUVIDOR:
DEFENSOR DOS DIREITOS DA POPULAÇÃO NA
FISCALIZAÇÃO DA ADMINISTRAÇÃO PÚBLICA

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ABSTRACT

The research intends to analyze the Ombudsman institute as the population's rights advocate in the inspection of Public Administration and the guardian of legality against impropriety and abuse of power in administrative activities. Although the 1988 Constitution has resumed democracy and the rule of law, the National Constituent Assembly rejected the proposal that would institute the Ombudsman. The method adopted is the hypothetical-deductive one, based on legislation, doctrine and jurisprudence. Even though there is no explicit reference to the Constitution, the study concludes that the Ombudsman, as an external part of Public Administration, has the mission of impartially inspecting it in defense of fundamental rights, through the Constitution, the principles and the rules that govern the Brazilian Democratic State.

Keywords: Public Administration. Advocate of Population's Rights. Inspection of Public Administration. Ombudsman.

RESUMO

A pesquisa tem por objeto analisar o instituto do Ombudsman ou Ouvidor como defensor dos direitos da população na fiscalização da Administração Pública e guardião da legalidade contra a improbidade e os abusos de poder no exercício da atividade administrativa. Com a Constituição Federal de 1988 o Brasil retomou o caminho tradicional da Democracia e do Estado de Direito. Todavia, apesar do clima democrático instaurado, a Assembleia Nacional Constituinte rejeitou a proposta que instituiria a figura do Ombudsman no País. O método adotado é o hipotético-dedutivo, com base na legislação, doutrina e jurisprudência. Conclui que o Ombudsman ou a Ouvidoria, como órgão externo da Administração Pública, embora não esteja pre-

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visto expressamente na Lei Maior, tem a missão de fiscalizar de forma imparcial a Administração Pública, em defesa dos direitos fundamentais, à luz da Constituição Federal e dos princípios e normas que regem o Estado Democrático de Direito Brasileiro.

Palavras-chave: Administração Pública. Defensor dos Direitos da População. Fiscalização da Administração Pública. Ombudsman. Ouvidoria.

INTRODUCTION

The exercise of individual and collective rights must not be dissociated from the Democratic State and, for its preservation, particularly in a globalized world, it is necessary to establish mechanisms to fulfill them.

Currently, States "are not limited to guaranteeing minimum rights to individuals, but also to acting in the promotion of individual, social and collective fundamental rights" (REMEDIÓ; FARIA, 2019, p. 723).

Among the existing instruments available to the citizen for the protection and implementation of fundamental rights, the Ombudsman normally acts in the control of Public Administration activities, although it can also control private activities.

The Ombudsman appeared almost two centuries ago in Sweden as an integral part of public administration's control and gained wide acceptance, especially after the Second World War, as a democracy and inspection mechanism of Public Administration.

According to the São Paulo's Brazilian Association of Ombudsman, there are Ombudsmen in many countries, with different nomenclatures but similar attributions, such as the *provedor de justiça* in Portugal, the *defensor of the Pueblo* in Hispanic-speaking nations, the *meditér de la republique* in French-speaking countries, the *procurador de los derechos humanos* in Guatemala (ABO SÃO PAULO, n.d).

Ombudsman is a Swedish word that means citizen's representative. In Scandinavian countries, the referred term designates the Ombudsman-General, with "the public function created to channel population's problems and complaints" (UNIVERSIDADE, n.d).

The Brazilian Constitution of 1988 resumed the path of democracy and the rule of law after a long period of exception started in 1964. However, despite the established democratic climate, the National Constituent Assembly rejected the proposed amendment, which would expressly institute the figure of the Ombudsman.

The Ombudsman was decentralized by the Constitution of 1988 enabling any Executive Power to establish, by law or decree, its Ombudsman. Thus, the Ombudsman was converted into a direct representative of the citizen, which means the figure became the defender of the citizen, identifying whether the public service is good or bad (SÃO PAULO, n.d).

In order to have an idea of its dimension, in the State of São Paulo, considering the public area only, there are about 165 ombudsmen, 26 of which are public service concessionaires. At the same time, numerous private companies noticed the need to move beyond basic customer service and also started to use the Ombudsman (SÃO PAULO, n.d).

At the Brazilian private initiative, the Ombudsman position was created in 1986 by the *Folha de São Paulo* newspaper. Among other attributions, this professional used to receive, to investigate and to forward the complaints of readers and to conduct the internal criticism of the newspaper. The Ombudsman, in that case, could not be dismissed during his respective term (UNIVERSIDADE, n.d).

Currently, the Ombudsman is an instrument that enables popular participation in the control of governmental action, contributing to the exercise of citizenship.

The research intends to analyze the Ombudsman's institute, sometimes also entitled Population's Advocate or just Ombudsman. It is underpinned on the concept of being one of the guardians of legality in defense of citizens and against the impropriety and abuses practiced by the Public Administration in the exercise of its functions. Also, it seeks to investigate the historical trajectory, the importance, the scope of operation and the application of the Ombudsman in the Brazilian legal system.

Although there is no uniformity in this point, the most of authors, according to Wanderley Batista Silva³ (n.d), and Gustavo Costa Nassif (2010), there is no difference amid the meanings of Ombudsman, understanding that is adopted in this research.

Among the Ombudsman's actions, one of the most important is the assistance given to citizens in their relations with the State, representing a link between the people and the Public Administration. It is worth mentioning that the Brazilian Public Prosecutor's Office has been operating with an emphasis on the defense of public assets, through an act of administrative impropriety and criminal actions against managers and public administrators, acting in relation to these activities as a true Ombudsman.

On the other hand, the Ombudsman's individualized role as an impartial population's advocate, who acts on behalf of fundamental rights and controls of public activity.

Since the political system must guarantee the participation of citizens in Public Administration, the role of the Ombudsman in the Democratic State is essential. However, the figure has not come to replace the contentious, administrative and political means of conflict resolution, but to contribute to fill the deficiency of such means.

In 1995, the Brazilian Association of Ombudsmen was created with the initial purpose of "stimulating the implantation of new Ombudsmen (public and private) based on the defense of citizen rights". Its performance was broadened due to "the promotion of citizenship and social participation in the conduction of state actions and also in its concessions as the most legitimate form of control and inspection" (NASSIF, 2010), idea which underpins the Ombudsman.

Regarding the structure, the research begins with an analysis of the emergence and history of the Ombudsman and then focuses on the concept and importance of the institute; following that, it deals with its scope of action and ponders on the possibility of its implantation in Brazil. Continuing, it addresses its relationship with the Federal Court of Accounts, the Executive Branch, the Public Ministry and the Judiciary Branch.

The method used is the hypothetical-deductive, based on legislation, doctrine, and jurisprudence.

It is hypothesized that the Ombudsman, as an external body of the Administration, has the mission of impartially inspecting the Public Administration in defense of fundamental rights, through the Constitution, the principles and the rules that govern the Brazilian Democratic State.

1. THE EMERGENCE AND HISTORY OF OMBUDSMAN

The Ombudsman first appeared in Sweden, in 1809⁴, when the King Gustavo Adolfo was dethroned, and the role of the Ombudsman took action to inspect the organs of Public Administration (NAPIONE, 1969).

Finland was the second country to adopt the figure of the Ombudsman, with an interval of more than one hundred years compared to its Swedish predecessor. The country lived under Swedish rule until 1809, because of the Napoleonic wars. Until 1917, Finland was governed by a Governor-General appointed by the Emperor; this prevented the establishment of the Ombudsman. It was only during the government of Karlo Castrén, in July 1919, that the role of the Ombudsman was introduced in Finland (AMARAL FILHO, 1993, p. 44).

In Norway, 1912, the Armed Forces were restructured, establishing the creation of representative bodies. However, the role of the Armed Forces' authoritarian organizational structure has become increasingly complex, as always, the last voice on any matter of interest to a soldier was conditioned by the goodwill of his superior authorities. In 1946, a special commission was created to investigate the functioning of the military administration and its system of representation. Marcos Jordão Teixeira de Amaral Filho (1993) states that this commission started to elect the Ombudsman not only with the role of knowing the complaints of recruits or officers, but also of knowing matters on their own initiative, of acting as an advisory body to the main military authorities and civilians, as to maintain close contact with the representative commissions (AMARAL FILHO, 1993 p.63).

In Germany, 1952, the creation of the Ombudsman was proposed by deputy Ernst Paul, of the Social Democratic Party, who was exiled to Sweden during the Nazi period. However, only five years later, in 1957, the constitutional law, called the German Military Ombudsman Law, was passed, with the aim of monitoring the facts that would violate the fundamental rights of soldiers (FONSECA, 2000).

Denmark, with the end of World War II, also felt the need to expand individual guarantees against State abuses. Thus, on September 11th of 1954, the Ombudsman Law was enacted, supplemented by Instructions from Parliament on March 22, 1956 (FONSECA, 2000).

In Great Britain, 1964, the Ombudsman was created following the pattern of Sweden and the Nordic countries, to control the administration of the United Kingdom (VENTURA, 2008). It had the competence to investigate cases of maladministration arising from purely executive activities of the government (AMARAL FILHO, 1993, p. 88).

⁴ The birthplace of the Ombudsman, for Walter Gellhorn (1966), is the Swedish Constitution of 1809, which relied on Montesquieu's theory of separation of the Executive, the Parliament and the Courts, and thus to supervise the fulfillment of their official duties. (GELHORN, 1996, p.194).

In the United States, despite the presentation of projects to create an Ombudsman, the proposal hasn't progressed, and the American experience has been restricted to some States, such as in Hawaii, 1967, in Nebraska, 1969, in Iowa, 1972, in New Jersey, 1974 and in Alaska, 1975 (FONSECA, 2000).

In Portugal, with the Carnation Revolution, of April 25, 1974, along with the democratic transformations demanded by Portuguese society, an Ombudsman was introduced. It acts as an officer or mediator, receiving complaints against any administrative employee, aiming to correct errors and illegal administrative acts and to improve services (AMARAL FILHO, 1993, p. 106). The establishment of the Ombudsman has become indispensable in Portugal, in order to prevent and to promote the defense of rights in general as well as public and private freedoms (VENTURA, 2008, p. 5).

In Brazil, although there is no formal Ombudsman, a similar figure emerged in 1823, in a constituent project of José de Souza Mello, who created the People's Court, so that the population could complain of oppression and injustice before the Court.

The first concrete Brazilian experience took place in 1986, with the creation of the General Ombudsman's Office of the Municipality of Curitiba, with the purpose of acting in the defense of individual and collective rights against illegal acts and omissions committed by the Municipal Public Administration. In 2007, the General Ombudsman's Office of the State of Paraná was created, through State Complementary Law number 117 of 2007, with the objective of contributing to raise the standards of transparency, promptness and security in the activities of the Institution's members, bodies and auxiliary services (SILVA, n.d.).

The Federal Law number 13.460 of 2017, which provides on the participation, protection and defense of the rights of users of public services of the direct and indirect Public Administration of the Union, the States, the Federal District and the Municipalities, under the terms of subsection I of paragraph 3º, article 37 of the Federal Constitution, stipulates that the user may submit statements to the Public Administration regarding the provision of public services (article 9), which will be addressed to the ombudsman's office of the responsible body or entity and will contain the identification of the applicant (article 10), and the ombudsman's office must forward the final administrative decision to the user, within a period of thirty days, extendable for an equal period, in a justified manner and for a single time (art. 16).

The Decree number 9.492 of 2018, which regulates Law number 13.460 of 2017, instituted the Federal Executive Power Ombudsman System, integrating, as central body, the Ministry of Transparency and the Office of the Comptroller General of the Union, through the Office of the Union Ombudsman, and as sectoral units, the ombudsman of the organs and entities of the federal administration covered by the Decree itself, having as objectives (article 5): to coordinate and articulate the ombudsman activities to which this Decree refers; propose and coordinate actions with a view to developing social control of users over the provision of public services, and facilitating the access of public service users to instruments for participation in the management and defense of their rights; ensure the effective dialogue between the user of public services and the agencies and entities of the federal public administration responsible for these services; and monitor the implementation of The Letter of Services to the User referred to in article 7º of Law number 13.460 of 2017, according to the procedures adopted by the Decree number 9.094 of 2017.

The Federal Ombudsman's Office is linked to the Ministry of Transparency and the Brazilian Office of the Comptroller General (CGU), and is responsible for "receiving, examining and forwarding complaints, complaints, compliments, suggestions and requests for information regarding procedures and actions of agents, organs and entities of the Federal Executive Branch" (CONTROLADORIA-GERAL, n.d).

Currently, the Ombudsman institute, despite the inapplicability of the term in the legislation in an explicit way, is a reality in Brazil, usually called *Ouvidoria*, being used by several entities, including a National Association and various state associations at its disposal, as it occurs in the State of São Paulo.

2. CONCEPT AND IMPORTANCE OF THE OMBUDSMAN

The word Ombudsman is of Germanic origin and means "the one who makes the procedure" or "the intermediary". The figure is known for being the people's advocate, who is not limited to just listening, but also to solving problems related to the Public Administration. The Ombudsman is an independent body from the Public Administration. It is endowed with functional independence to supervise the performance of public servants (BEZERRA, 2010).

According to Antonio Rovira Viñas (2002):

That is the reason of the Ombudsman's necessity, because in advanced democratic societies every day more instances are needed with authority that limits and controls this all-encompassing trend of power, which, although constitutionally divided, is very concentrated, and this could be one of the reasons to explain the news and its rise in the world (VIÑAS, 2002, p.67)

According to Catarina Sampaio Ventura (2008), the "Ombudsman is defined as an independent and impartial public body (tending to be one-person), based on its creation, as a rule, as a parliamentary legislative act"(VENTURA, 2008, p.34). It is instituted as a control mechanism of the Public Administration, in order to ensure the legality and justice of administrative behaviors. For Jorge Carlos Fonseca (2000), the Ombudsman is guided by informality, and the sayings of this body contribute decisively to the strengthening of the protection of citizens, by implementing mechanisms of legal protection present in the Constitution or in the law.

Regarding the Ombudsman, Celso Barroso Leite (1975) asserts that

Since this is an instrument of defense of the people against the Public Administration, it is placing itself in front of the administrated, in benefit of both, both protecting the citizen against public investments, and defending the legal fulfillment of its activity (LEITE, 1975, p. 64).

In the States that adopt the Ombudsman's legal and administrative institute, "it overcomes its maximum function, consisting in preventing and filling gaps and omissions of other types of administrative and /or judicial control, concerning the three Powers, especially the Executive Branch (Public Administration)" (GUALAZZI, 1991, p. 146).

Ana Fernanda Neves (2005) reports that the institution of the Ombudsman assures each citizen the certainty of the power to live in conditions of freedom and security, insofar as, with

total independence, it censors and controls the errors, excesses and abuses of constituted powers (NEVES, 2005)

According to Gustavo Costa Nassif (2010), Ombudsman of Finance, Patrimony and Public Tenders of the State of Minas Gerais, the organ is responsible for constructive criticism within entities and corporations, acting in defense of the rights of citizens /consumers, receiving and investigating complaints and denounces regarding the quality of services provided by the government or private companies and, after filtering the information, it must recommend and influence the sectors involved to take measures to promote the correction of dysfunctions.

Catarina Sampaio Ventura (2008) highlights the duality of Ombudsman models, in the following terms:

In outlining two Ombudsman models - one focused on the rule of law and good administration, the other focused on the protection and promotion of human rights - and finally suggested a delusional tension between the two, as far as the protection of human rights is concerned, without prejudice to the narrower delimitation, in on case, of the respective function, in the other, let us now consider some of the possible dimensions of relevance of human rights in the activity of the Ombudsman, including those institutions that are closer to the classic model of strict administrative surveillance of public authorities. [...]. The Ombudsman, the guardian of human rights, the defense of social order, and popular democracy. (VENTURA, 2008, p.101).

Since the ancient Greek democracy, "passing through the nineteenth-century Scandinavia, finally reaching modern democracies, it is evident the importance of the Ombudsman for the improvement of the political system, producing maximum satisfaction for the largest number of citizens" (FERRES, 2019, p. 53).

It is important to highlight that the Ombudsman is one of the most important channels for the exercise of popular participation and for social control in favor of citizens and the protection of individual rights (BASTOS; PEREIRA, 2029, p. 34).

The Ombudsman, in essence, endowed with functional independence, acts as a supervisory entity of the Public Administration, with special emphasis on the protection of fundamental rights and democracy itself.

3. SCOPE OF ACTION OF THE OMBUDSMAN

The competence of the population's advocate should be as broad as possible, and may even act in an official capacity, on any matter related to the civil administration of the country, which they deem of interest to be investigated (AMARAL FILHO, 1993, p. 128).

For the Office of the Comptroller-General of the Union, while the ombudsman is a space where suggestions, compliments, requests, complaints, and denunciations can be presented. Thus, the Ombudsman "acts in the dialogue between the citizen and the Public Administra-

tion, so that the manifestations arising exercise of citizenship lead to continuous improvement of the public services provided" (CONTROLADORIA GERAL, s.d).

Intervening based on complaints from citizens or on its own initiative, the Ombudsman's scope of action covers, generally, the administrative function of the State. However, the control of political, legislative, and judicial powers is out of its purview (VENTURA, 2008, p. 34).

Francisco Ferreira de Almeida (2003) complements:

The Ombudsman, therefore, has no power to modify, revoke, or annul the acts of public authorities. [...] It is strictly bound by its behavior, the cases brought to his appreciation, or that he itself understands that he must analyze. [...] Ombudsman "who watches over the watchman" (ALMEIDA, 2003, p.31).

Hence, regarding its scope of action, the Ombudsman is limited to the control of the Public Administration and must present annual reports, especially in order to bring the behaviors that prompted the intervention to public knowledge and judgment. Therefore, the Ombudsman's reports assume an important function of providing the examination and analysis of the state of the Administration (VENTURA, 2008, p. 38).

However, for Marcos Jordão Teixeira de Amaral Filho (1993):

Although the Ombudsman's competence may not affect the activities carried out by the National Congress and its members in the exercise of their functions, the advocate of the population shall also have the prerogative of investigation when a deputy or senator is exercising functions within the administration, including in ministerial functions (AMARAL FILHO, 1993 p.121).

In order to guarantee the proper functioning of the Ombudsman, one must assure and guarantee the success of its functions, among which are the following:

Direct access by every citizen, without the mediation of parliamentarians; access to all documents necessary for the investigation, including the possibility of summoning officials to testify and witnesses; simple motivation of your decision and quick referral to the competent authority for measures; in the event of resistance from the authority, the possibility of filing a complaint against the employee or asking the top hierarchical authority to modify the decision. (AMARAL FILHO, 1993, p. 127)

Ana Fernanda Neves (2005) explains that the Ombudsman, with or without prior notice, visits the facilities of the entire Public Administration sector, aiming to ensure that all activities are being carried out with due care and following the guidelines for their operation.

In accordance with art. 2nd of the Statute of the Brazilian Association of Ombudsmen – ABO, a national institution, the Association aims, among others, to stimulate and to promote the reconciliation and relationship between all those who exercise the Ombudsman function in Brazil. The *ouvidor/ombudsman*, in turn, has the duty to defend the rights and legitimate interests of citizens, whether in public administration bodies of any level or power, or in a private company, "acting, always, with autonomy to ascertain the questions that are presented to him and independence to express what he sees fit to the institution to which he is linked"(ABO NACIONAL, 1995).

4. IMPLEMENTATION OF OMBUDSMAN IN BRAZIL

The Brazilian National Constituent Assembly rejected the amendment by Congresswoman Raquel Capiberibe, of PMDB of Amapá, which proposed the creation of the people's defender or Ombudsman in Brazil. For Hugo Nigro Mazzilli (2007), the people's defender was included in the Draft of the 1986 Constitution, indicated by Senator Afonso Arinos. The Ombudsman would be chosen by the Chamber of Deputies, among the candidates nominated by the population.

According to Marcos Jordão Teixeira de Amaral Filho (1993), powerful corporate lobbies arose against its creation, such as those of the Federal Court of Accounts and the Public Ministry. Still, the pressure exerted by sectors of public opinion and the experience of the Council for the Defense of Citizen's Rights and the ombudsman-general in Curitiba were not enough to convince the constituents, many of whom were ex-public prosecutors or identified in some way with the interests of the Administration.

Wallace Paiva Martins Júnior (2002, p. 78) adds that it was preferred to assign the Ombudsman's duties to the Public Ministry, which was already present in all Brazilian territory, than to create a new body.

According to Cândido Mendes (1987):

The figure of the People's Defender disappeared in the constituent proposal, transferring the task of scrutinizing and promoting responsibility for the abuse of power of any government to the Public Ministry. [...]. Nothing is said about the worst of them, which is exactly the omission of public authorities increasingly protracted by bureaucratic inertia, tied to their strict and immediate dynamic of interests. [...]. There is still time to return to the people's defender. No careers, no perks, no reelections. (MENDES, 1987, p.03)

The 1988 Federal Constitution stipulates that the "Legislative Power is exercised by the National Congress, which comprises the Chamber of Deputies and the Federal Senate" (art. 44). Among the attributions of the National Congress, outlined in Section II of Title IV, Chapter I, lies the possibility of summoning the President of the Republic and his Ministers of State, to personally provide information, in a previously determined matter, regardless of the absence, without justification crime of liability (art. 50). Still, it is privately up to the Chamber of Deputies, under the terms of art. 51, "to authorize, by two thirds of its members, the initiation of proceedings against the President of the Republic and the Ministers of State" (item I) and "to proceed to the accountability of the President of the Republic, when they are presented to the National Congress within sixty days after the opening of the legislative session "(item II). The National Congress may set up permanent and temporary commissions, being their responsibility, under the terms of art. 58, § 2, "to call on ministers of state to provide information on matters inherent to their duties" (item III) and "to receive petitions, complaints or complaints from anyone against acts or omissions by public authorities or entities" (item V) (BRASIL, 1988).

It is noticed that, although the National Congress does not have government responsibility, since the presidential system was maintained by the 1988 Constituent, there was an expansion of its political control action over the ministers and the head of government.

Marcos Jordão Teixeira de Amaral Filho (1993, p. 119) already asserted that the introduction of the right to petition citizens against acts or omissions by public authorities or entities also revealed the concern of our constituents with the preservation of individual rights, a function traditionally delegated to the Ombudsman.

At this point, the creation of the Defender of the People must consider the new Brazilian constitutional reality, and it would be very convenient, in order to avoid conflict of attributions between Parliament and the Ombudsman, that the control of the President of the Republic and his ministers, due to the more political character of its functions, be restricted to the performance of the National Congress, or that the Ombudsman could act, due to the provocation of the National Congress itself, because its role is in function of the people and democracy (BEZERRA, 2010).

It is important to note that the Ombudsman, in the view of Wallace Paiva Martins Júnior (2002), has neither administrative nor jurisdictional attribution, which is the reason for not intervening in the Judiciary. It is only competent to verify the legality and legitimacy of the administrative act, and to recommend its invalidation in the event of nullity, or revocation due to convenience or opportunity.

The Ombudsman also has a relationship with the Parliamentary Commissions of Inquiry.

Brazil adopted the form of presidential government, inspired by the North American model, which came to know the traditional parliamentary commissions of inquiry as a form of parliamentary control. However, despite the indisputable merits of some of these committees in their supervisory work, they are conditioned to parliamentary majorities, not always willing to create them, and cannot deal with individual cases, since they must be focused on more general administration. In this way, the defender of the people has a wide field of inspection activities, without removing from Parliament their traditional inspection prerogatives, including giving them *status* higher in the exercise of his activity (AMARAL FILHO, 1993, p.124).

As seen, although the Federal Constitution of 1988 did not expressly provide for the figure of the Ombudsman with this nomenclature, the institute is a reality in the country, being provided for in several infra-constitutional norms, under the generic name of Ombudsman.

5. OMBUDSMAN, FEDERAL COURT OF ACCOUNTS, EXECUTIVE POWER, PUBLIC MINISTRY AND JUDICIAL POWER

The Federal Constitution establishes in art. 71 that "external control, under the responsibility of the National Congress, will be exercised with the assistance of the responsible Federal Court of Accounts" (BRASIL, 1988).

Art. 71, § 4, of the Major Law, determines that "the court shall forward to the National Congress, quarterly and annually, a report on its activities". Art. 74, § 2, of the Constitution, states that "any citizen, political party, association or union" is a legitimate party to, in the

form of the law, denounce irregularities or illegalities before the Federal Court of Accounts (BRASIL, 1988).

Marcos Jordão Teixeira de Amaral Filho (1993) analyzes that the 1988 Constituents clearly expanded the list of competencies of the Federal Court of Accounts, which decidedly ceases to be a mere Court of Accounts and becomes the auditor of the Public Power, with great similarities in relation to the classic attributions of the Ombudsman.

Indeed, it is indisputable that the scope of an Ombudsman's activity in Brazil was severely restricted by the text of the 1988 Federal Constitution with regard to the powers of the Federal Court of Auditors. The overload of work that this will result on the Court may lead, in the future, to the possibility of a new development of functions, returning our Court of Accounts to its classic duties and delegating to the defender of the people (Ombudsman) the supervision of administration acts that violate individual or group rights, with the indirect objective of protecting the democratic order (AMARAL FILHO, 1993, p. 123).

According to Helga Maria Saboia Bezerra (2010), in the current condition it would be necessary to revise the constitutional text to avoid a possible conflict of powers between the Federal Audit Court and the Ombudsman.

In Brazil, unlike Sweden, Ministers of State are responsible for the actions of their subordinates, in a hierarchical relationship that is established from the lowest levels up to the President of the Republic. In such a way, with this administrative structure it would be unthinkable that an Ombudsman could not supervise the administrative acts of the ministers of State, who concentrate vast competence in the administrative sphere. In the case of Norway:

the Ombudsman was given the power to appreciate discretionary aspects of administrative action. In Brazil, which has an administration strongly marked by authoritarian traits, it would be convenient, in the same way, for the defender to have such competence, in which administrative actions, although attempted within the existing legality, escaped the principles of reasonableness and equity with the administrator required by the good Administrative Law. (AMARAL FILHO, 1993, p. 125)

For Francisco Ferreira de Almeida (2003), it would be inconvenient if the defender of the people could intervene in presidential affairs, even so, in cases where the law determines or in those acts in which the President has acted only as the hierarchical superior of the Administration, the Ombudsman of the people must have the competence to act, always preserving the institutional figure of the Presidency of the Republic.

However, there are those who maintain in the doctrine that, in Brazil, the role of the Ombudsman is exercised by the Public Ministry.

In this way, in accordance with Hugo Nigro Mazzilli (2007), the constitutional text assigned to the Public Ministry the role of Ombudsman, to supervise social and individual interests, having no hierarchical link with the powers of the State.

According to Ana Fernanda Neves (2005), it is the Public Ministry' responsibility to defend the legal order, the democratic regime and social and individual interests.

In Sweden, the Ombudsman has similar competence to that of the Brazilian Public Ministry. However, as previously stated, the rejection of the Plenary of the National Constituent Assembly to the creation of the People's Defender was largely due to the pressure exerted by

prosecutors linked to the Public Ministry, who saw in its creation a possible limitation to their functions.

According to Cândido Mendes:

We squandered the opportunity to take advantage of the Spanish example and to protect civil society against the State through a Public Defender's Office to denounce and prosecute abuses of power, outside the government corporation. We have not taken the decisive step: the task remains within the competence of the Public Ministry. (MENDES, 1987, p. 03)

For María José Colchete Martín (2001), the head of the Public Ministry should not be chosen by the Executive Branch. At this point, the European Ombudsman is appointed by Parliament, the body that has the task of inspecting the Executive Power.

From another angle, it should be noticed that the Judiciary is not subject to inspection by the Ombudsman.

In this sense, during the work of the National Constituent Assembly, especially in the appreciation of the chapter dealing with the organization of the Judiciary, a great controversy was established around the creation of the National Council of Justice to exercise external control over that organ. However, the Constituent Plenary chose to preserve entirely the independence of the Judiciary.

In Brazil, without harming the independence of the Judiciary, it would be interesting to have a control restricted to the follow-up of lawsuits and the fulfillment of procedural rites, which would regain the trust of society, especially in the cases of the judicial administration, with regard to the execution of criminal penalties, which would be a role for the Ombudsman, as an important tool for dialogue with detainees. No action would be admitted involving a judicial decision or an act performed in the exercise of its prerogatives, which could harm the relationship between the people's defender and the Judiciary, or in any way limit the magistrate's independence (AMARAL FILHO, 1993, p. 127).

However, although not foreseen in the original wording of the Federal Constitution, the National Council of Justice, ended up being created through EC 45/2004, which included art. 103B in the constitutional text, under the terms of § 4 of the aforementioned art. 103, the control of the administrative and financial performance of the Judiciary Power and the fulfillment of the functional duties of the judges, being responsible for the exercise of several attributions provided for in the core of art. 103, in addition to other attributions conferred on it by the Judiciary Statute.

CONCLUSION

The Ombudsman, also known today as Justice Provider, Advocate of the Population or *Ovidor*, appeared in Sweden, in 1809, arising and influencing the implementation of the institute in several countries, such as Finland, Norway, Germany, Denmark, Great Britain and Portugal.

Although the term Ombudsman is not expressly used in Brazilian law, it is, in practice, a reality in the country, usually under the name *Ouvidoria*, with several entities that specifically use the institute, such as the Brazilian Association of Ombudsmen, a national organ, and the Brazilian Association of Ombudsmen of the State of São Paulo.

The figure of the Ombudsman or *Ouvidor*, since its advent, has gained respectability, being very important for the improvement of the political system and for the satisfaction of the interests and rights of the citizens nowadays, in particular, regarding the control of the activities performed by the Public Administration.

The Advocate of the Population, for qualities that were confirmed in several foreign legal systems, enables the search for the promotion of fundamental rights and contributes to the control of activities under the responsibility of the State, especially those related to administrative action.

The slowness of administrative procedures, the inadequate jurisdictional control and the need for impartial inspection over state activity are reasons for the creation of the Ombudsman in Brazil.

In this context, and as an instrument for the exercise of democracy, the creation of the Ombudsman could address possible institutional deficiencies of the control bodies currently existing in the country, such as the Public Ministry and the Court of Accounts.

Due to the Brazilian characteristics and the experience of other countries, it is convenient that the creation of the Ombudsman or Advocate of the population should be done preferably through the constitutional route, thereby avoiding their fragility through infraconstitutional normative interferences.

The Ombudsman's success in Brazil is directly related to the democratic openness and the political participation of individuals and of society itself, and the institute can become an important channel aimed at resolving conflicts among citizens and between them and the State itself.

The Ombudsman, which is an external control body, contributes to the impartial inspection of the exercise of the activities and functions that regard the Public Powers.

In conclusion, the initial hypothesis has been demonstrated, clarifying that the Ombudsman, although the term is not expressly found in Brazilian legislation, the practice should be implemented, aiming at inspecting the exercise of the Executive Branch's activities, in particular acting as guardian of the legality and against the abuses of power practiced by the Public Administration.

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