

The Republic's Mediator in Comparative Law

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Abstract

This article examines an administrative body whose name varies from one country to another and which has become established in many countries under the name of Ombudsman. It also agrees on the purpose of its creation, which is to bring the administration closer to citizens in the context of building a democratic state and a state governed by the rule of law, based on the protection of citizens' fundamental rights.

This study includes a comparison between the Ombudsman of the Republic in Algeria, which was considered an independent administrative authority when it was first established, and a study of the basis for its establishment in other countries, particularly European countries such as Sweden and France. The Ombudsman of the Republic will therefore be studied in both Algerian legislation and comparative legislation, highlighting its legal basis, legal nature and most important powers.

Keywords The Omboudsman, Bringing the administration, closer to the citizen, the defender of rights.

Introduction

Bringing the administration closer to citizens and restoring their trust in it has become one of the most important endeavors of modern states, especially with the spread of nepotism and corruption in all its forms and at all levels, the most serious of which are bribery and abuse of power. The mechanisms used by states to implement their programmes and plans aimed at improving the relationship between citizens and the administration and ensuring or limiting administrative corruption and its economic and social consequences, as well as protecting public rights and freedoms, have varied and diversified.

The need to manage the administration in new ways has led to the emergence of a new category of administrative bodies within the institutional apparatus of the state, outside the administrative organization, all of which fall under the single heading of 'independent administrative authorities'. These authorities first emerged in Anglo-Saxon countries, then were adopted in European countries in the 20th century. These new bodies were tasked with activities related to strategic sectors that, in order to succeed in their primary mission of control, regulation and oversight, needed to operate within a political framework that was not based on subordination to and oversight by the government. The Ombudsman of the Republic is considered an independent administrative authority in France. This study aims to define this body and compare it with its counterparts in European countries.

The aim of this study is to highlight the place of this body within the institutional framework of the various countries that have adopted it. In this context, the descriptive and analytical approach was adopted.

The problem at hand: What is the status of the body in the institutional system of the state? What are its most important powers?

This problem will be addressed through three main points:

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- **Adoption of the Ombudsman System in Algeria**
- **The Ombudsman in the Swedish system.**
- **The Ombudsman of the Republic in the French system.**

Section I: Adoption of the Ombudsman System in Algeria

Algeria introduced the mediation system in 1986 with the creation of the administrative mediator at the provincial level pursuant to the ministerial circular issued on 22 January 1986, which approved the creation of a local administrative mediator appointed by decision of the governor from among the employees of the governor's office, where he had an advisory and guiding role between the citizen and the governor.

The Ombudsman of the Republic is an administrative body and one of the mechanisms and means introduced in Algeria to improve relations between citizens and the administration and to monitor the actions of the administration, which often constitute abuses of citizens' rights. Algeria adopted this system in 1996, and the Algerian legislature named it the Ombudsman of the Republic, and was considered an independent administrative authority.¹

The mediation system was created to serve political interests. Despite the important status of the position of Ombudsman, it remains subordinate to the political authority, which undermines the credibility of the institution. It is considered a trump card in the hands of the authority, as it is appointed by the President of the Republic and its term of office is indefinite, with no provision for its removal or termination of its functions. What is the point of considering it an independent

¹ Presidential Decree No. 96-113 of March 23, 1996, concerning the establishment of the Ombudsman of the Republic, Official Gazette No. 20, issued on March 31, 1996

administrative authority if it is subordinate to the executive authority, especially since the legislator has not classified it as such?

First requirement: Definition of the body

The Ombudsman of the Republic is a person who oversees the work of the administration by submitting complaints from citizens in order to preserve their rights and defend their freedoms in cases of injustice or mismanagement of public facilities. It is considered a non-judicial oversight body that intervenes after all judicial and non-judicial avenues of appeal have been exhausted by natural persons in order to preserve their rights and freedoms from administrative abuse of power. However, this mediator did not last long in Algeria, as it was abolished three years after its creation by Presidential Decree 99/170 decree.¹

This body was re-established by Presidential Decree 20/45², which provided for the establishment of the Ombudsman of the Republic after it was re-established as a constitutional body. It was replaced by a body called the Sub-Committee for Mediation at the level of the Advisory Committee for the Promotion of Human Rights, with Article 1 stipulating that ‘the provisions of Presidential Decree 96-113 establishing the Ombudsman of the Republic and all subsequent texts are hereby repealed.’

It should also be noted that the President of the Republic stated that the reasons for abolishing the Ombudsman of the Republic were that it was the most appropriate and successful measure for the state, and that many citizens still turn to the central departments of the state.

Twenty-one years after the abolition of the Ombudsman of the Republic, this body was re-established by Presidential Decree No. 20-

¹ Presidential Decree No. 99-170 of August 2, 1999, abolishing the Ombudsman's Office, Official Gazette No. 52, 1999

² Presidential Decree No. 2045 dated February 15, 2020, establishing the Ombudsman of the Republic, Official Gazette No. 9, issued on February 19, 2020

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45 with the aim of maintaining good relations between the administration and citizens on the one hand, protecting rights and freedoms on the other, and improving public services.¹

Second requirement: Duties and powers of the Ombudsman

The Ombudsman is considered more of an advisory body than an independent administrative authority, given the limited role assigned to it. The main tasks for which the position of Ombudsman was created are to protect the rights and freedoms of citizens and to ensure the legality of the functioning of public institutions and administrations. The texts establishing and regulating the work of this body show that its role is limited to identifying the shortcomings and deficiencies of the Algerian administration and submitting an annual report to the President of the Republic containing proposals and recommendations. It does not have the right to issue decisions and cannot give orders to any administration or employee to implement or refrain from implementing any decision or administrative action.²

The Ombudsman of the Republic is a non-judicial body whose purpose is to activate means of oversight of the administration's actions. Its establishment falls within the scope of combating bureaucracy, but it does not reach the level of judicial oversight, as there is no functional or membership relationship between the two bodies. Citizens may resort to this body when all judicial remedies have been exhausted, which is a formal condition for acceptance before the Ombudsman of the Republic.³

The Ombudsman system was established to support Decree No. 88-131 on the regulation of citizens' relations with the administration. It is an external means for citizens to monitor the administration through

¹ Articles 6 à 9 du décret présidentiel 20-45

² Articles 3, 5, 10 and 11 of the presidential decrees 20-45

³ Shorfi safia , The previous reference, pages 381-406

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complaints, with a view to preserving the legitimacy and appropriateness of the administrative system in the state and protecting citizens from abuse and deviation by public authorities.¹

Section II: The Ombudsman in the Swedish system

This is a body that exists in France and a number of European countries, and has even been adopted as a body in the European Union². This topic will be addressed through

First requirement: Definition of Ombudsman.

Before the Swedish Ombudsman system was established in the 1809 Constitution, it was a correspondent (agent) le mandatories affiliated with Parliament who monitored the application of laws by courts and administrations, because parliamentary sessions were held every four years, then every three years, and then annually in 1866. This system was characterized by the dominance of parliament over the king. The Ombudsman was a representative of justice (chandelier de justice) and, with its establishment in 1713, it was a body that exercised general oversight of laws and regulations. However, it was soon taken over by Parliament (the legislative body), and at the end of the century, its power was restored by the royal authorities, and the powers of Parliament were defined by the Constitution of 1809. This defender, the chandelier, was found alongside the justice ombudsman, justice ombudsman, where both had different powers. The former was appointed by the king to represent the state in civil disputes before the

¹ For further details regarding the role of this body in regulating the relationship between public institutions, public administration, and citizens, and the extent to which the principle of neutrality is achieved, please refer to the doctoral dissertation of Abdel Hamid Ben Aisha entitled "The Relationship between Politics and Public Administration in Algeria," University of Algiers 1, 2010.

² The European Ombudsman is recognized by European treaties and is a non-judicial mechanism made available to European citizens in case of a problem with the European administration. See ; www.arobic.euro news.com

courts and administrative organizations, and worked to ensure that judges and administrative officials respected the laws. With the promulgation of the 1809 Constitution, the political system shifted from an absolute monarchy to a limited monarchy.

Second requirement: Functions of the body

This institution has undergone developments in terms of its functions, structure and legal system. It is no longer the body that maintains the constitutional balance between the powers imposed by the parliamentary system, but has become a supervisory body whose sole concern is to protect citizens from the administration, contrary to what it used to be politically, as an extension of parliament, and has become, in the broad sense, a defender of legitimacy.¹ Therefore, the year 1890 is considered a turning point towards democracy in Sweden. Through the 1809 constitution, which organized the Ombudsman as an appendage to parliament with the task of monitoring and screening laws before their enactment, this body initially aimed to monitor the administration and the government.

Later, its mission expanded to protect the rights and freedoms of individuals. This body developed in Sweden in the absence of an administrative judiciary in order to protect the rights of citizens and act as a deterrent to the administration. The founder of the 1781 constitution adopted the features of the Swedish constitution, under which the Ombudsman enjoyed independent powers. It was no longer an institution that created a balance between the powers under the parliamentary system, but became, in the general sense, the overseer of the legality of the administration's actions and the guarantor of

¹ André Legrand, *Scandinavian Ombudsman : A Comparative Study on Administrative Control*, doctoral thèses, Paris, Librairie générale de droits de la jurisprudence - R pigeon et R Durand auzias, 1970, p. 34

² Shorfi Safia study of the Ombudsman's experience in Algeria, from its establishment to its abolition, compared to the Swedish and French models. Master's thesis, Faculty of Law, University of Algiers, 2002, p. 16

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individuals' rights against the latter's abuse. This institution underwent structural reform in 1919, when a military ombudsman was established to oversee the military and disciplinary aspects of the military, with the same powers as the civil ombudsman. In 1968, the institution was unified into a single structure, with powers distributed among three types of ombudsmen according to their assigned tasks under the name Riasdgens Ombudsman. One oversees the areas of social disability and construction (reconstruction), and the first area is official, the second is related to justice and the military, and the third is related to civil administration outside the first area of jurisdiction.¹

Section III: The Ombudsman in the French system

The Ombudsman was established in France to develop administrative oversight and address what is known as administrative malpractice. The Ombudsman was established on 3 January 1973 under the executive framework, rather than the legislative or judicial framework, as was the case with the establishment of the Council of State, which was created following a legal dispute.

This body was recognized as an independent authority in Article 1 of Decree 73-06 of 3 January 1973, amended and supplemented by Decree 76-124 of 24 December 1976 and Decree 89 -18 of 13 January 1989, amended by Law 92-125 of 6 February 1992, which states that 'the Ombudsman of the Republic is an independent body that receives, within the limits of the law, complaints from citizens concerning their relations with administrations, state officials, local groups, public institutions and any facility providing a public service. 'An independent authority, the Ombudsman of the Republic, acts under the conditions set out in this law, receiving complaints concerning citizens' relations

¹ Robert Pierrot, the mediator, rival or ally of the administrative judge, *mixes articles*, Valine 1986, p 41

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with public administrations and any other body entrusted with a public service mission.’¹

It is therefore an independent body whose task is to receive complaints lodged by citizens, including the general administration, with the French Ombudsman, who is appointed by government decree for a non-renewable term of six years, which guarantees them a degree of independence from the body to which they are appointed.²

Since the French system recognized two bodies in the field of protecting public freedoms and the citizen's relationship with the administration—the Ombudsman and the Guardian of Rights—each will be given its own area of study.

The first requirement: the Ombudsman of the Republic

Firstly: Approval of the Ombudsman of the Republic in France

The Ombudsman of the Republic in France was approved under the law issued on 3 January 1973 and was recognized as an independent authority in Article 69 of the law issued on 13 January 1989, without being considered or classified as an independent administrative authority. This places it beyond the control of the judiciary and gives it broad independence in dealing with the administration, especially since the Ombudsman of the Republic does not have to be a judge and is not a party in the consideration of requests from citizens complaining about the actions of the administration.³

The mediation system in France represented by the Ombudsman, who is appointed by the Prime Minister and whose budget

¹ Decree No. 73-06 dated 3 January 1973, Official Gazette No. 1 of the French Administrative Code of 1976

² Shorfi Safia, , the previous reference, the previous reference.p 139

³ Michèle Gentot, Independent Administrative Authorities, 2nd World Edition, Mont Christien,E,J,A,1994,Paris,France,p139

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is included in the Prime Minister's budget. His relationship with the President of the Republic is limited to the annual report he submits to him. Among all institutions, it remains the only one that is not subject to judicial oversight. Despite its independence from the government and the state's administrative apparatus, its legitimacy must be examined and compared with some institutions that remain independent of the administration and are classified as independent administrative authorities, even though the Ombudsman of the Republic can intervene in individual decisions.

In France, he has been assigned specific tasks and his advantage is that he is not appointed by parliament but by presidential decree. Parliament determines his powers and is the only body that gives him instructions. The term of office must be six years in order for him to gain the trust of citizens, which will not be achieved if he is subject to criticism.

Secondly: The mediator's duties

Compared to some independent administrative authorities and in certain sensitive areas regulated by the legislature, the scope of intervention of the Ombudsman focuses mainly on administrative tasks, in accordance with the 1973 law, whereby he receives complaints from citizens in their relations with the administration in the context of the exercise of local administrative tasks, as well as public institutions and any administration or body performing tasks in the public interest.¹

In France, parliamentarians act as intermediaries between parliament and the Ombudsman by submitting complaints. They are the official channel for receiving complaints before supervisory bodies, where the Ombudsman's sphere of intervention is broader and the conditions for its cancellation are very limited. The difference with regard to the Ombudsman is that complaints are submitted by any

¹ Ipid p139

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member of parliament in order to convey the complaints of citizens, whereas the regional representative of the institution has the right to intervene in 4/5 of the issues brought before the Ombudsman. However, the regional representative only has the right to advise citizens not to bring the issue to parliament, but rather to resolve it at the local level after the regional representative has intervened with the relevant administration. Government Commissioner Franc M.,¹ speaking about the Ombudsman of the Republic, explained that "..... When we talk about the Ombudsman, we do not mean a traditional administration within the administrative law, because the Ombudsman is not linked to any existing administrative hierarchy and is not considered a member of the administrative apparatus in the strict sense of the term, which is headed by the Prime Minister in accordance with Article 20 of the French Constitution. In fact, the Ombudsman considered an original administrative body, but is integrated into the executive branch." In addition to the Ombudsman of the Republic as an independent administrative authority defending citizens' rights, particularly in the context of their relationship with the administration, we also find the defender of rights.²

Second requirement : The Defender of Rights in France

The Defender of Rights is an independent constitutional body established by the French Constitution of 2008 to resolve disputes between citizens and the administration through the simplest procedures possible. It was created by Organic Law No. 2011-333 of 29 March 2011 relating to the Defender of Rights.³ Its origins can be

¹ Michèle Gentot ,Previous reference,p 141

² French Council of State, sitting on July 10, 1981, withdrawal of the conclusion, France era 1982, page 493
www.legifrance.gouv. Fr .C.T-COLLY,p51

³ The French Constitutional Council considered that independent constitutional bodies enjoy more guarantees than independent administrative bodies. See in this context. French Constitutional Council decision number 2011-626 of March 29, 2011, concerning the Defender of Rights

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traced back to the Swedish system, where it was called the Ombudsman, meaning commissioner. This position was created to resolve disputes between citizens and the administration, unlike traditional methods, as a new mechanism for resolving disputes more quickly and achieving justice through the simplest procedures.¹ It is a system adopted by some European countries, such as Denmark in its 1953 constitution, New Zealand and Norway in 1962, and Canada in 1967. The mediator exercised his duties under Law No. 73-06 of 3 January 1973, after being replaced by the ombudsman, who was established under Article 41 of Law 2008 -724 of 23 July 2008 as part of the constitutional amendment and regulated this position under Law No. 2010-371 and Article 71/1 of the French Constitution and Organic Law No. 2011-333 of 29 March 2011 on the establishment of the Defender of Rights.²

Firstly: Legal basis for the Defender of Rights

- Based on Article 71-1 of the French Constitution, the role of the Defender of Rights was established to ensure that state administrations and regional authorities respect rights and freedoms.
- Law No. 2011 -334 of 29 March 2011 on the Defender of Rights, which recognized the financial and administrative independence of this body and repealed a number of provisions governing the establishment of the Ombudsman of the Republic, the Defender of Children and the National Commission on Ethics in Reproductive Medicine, as well as the provision on racial discrimination.

¹ Zaki Muhammad al-Najjar, *Evaluation of the State Commissioner System in Administrative Disputes*, Dar al-Nahda al-Arabiya, Cairo, Egypt, 1994, page 01.

² Under Law 73-06 of January 3, 1973, he is appointed for a non-renewable term of six years by the President of the Republic through presidential decree and enjoys complete independence; he does not receive any instructions from any police force and submits a detailed annual report on his activities to the President of the Republic and Parliament.

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- Law No. 2011-333 of 29 March 2011 on the Defender of Rights, which contains 44 articles in five chapters.
- Executive Decree No. 2011-905 of 29 July 2011 on the organization and functioning of the services of the Ombudsman.
- Executive Decree No. 2011-904 of 29 July 2011 on the procedures applicable to the Ombudsman.¹

Secondly: Nature of the position of Ombudsman

The Ombudsman is an independent administrative authority appointed by presidential decree at the level of the Council of Ministers after consulting parliamentary committees, for a non-renewable term of six years. This appointment is preceded by an election process conducted at the level of both houses of parliament, after which the appointment is made by decree. Notifications are made by natural or legal persons whose rights have been violated by state administrations, regional groups, public institutions or public facilities.²

Third : Independence of the Ombudsman

The Ombudsman derives his independence from Article 71-1 of the Constitution and Organic Law 2011 -333 and the aforementioned executive decrees. With reference to Article 02 of Organic Law 2011-333, he cannot be prosecuted, investigated, arrested, imprisoned, suspended or dismissed while performing his duties and expressing his opinion.

He is not subject to any presidential or supervisory authority, does not receive instructions or orders, and cannot be dismissed from office. In return, he is prohibited from engaging in any other activity or profession and is bound by professional secrecy. His powers consist of

¹ Michèle Gentot ,Previous reference, 146

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protecting the rights and freedoms of citizens, especially children, preventing discrimination, ensuring the respect of security ethics, and performing the duties of the Ombudsman of the Republic.¹

Conclusion:

In conclusion, it can be said, The Ombudsman is considered the alternative to the protection of fundamental rights and freedoms, especially those enshrined in the constitution.. It is considered one of the non-judicial bodies that contribute to protecting citizens and ensuring the proper functioning of public institutions and administrations.

Therefore, the Ombudsman occupies an important place in the Algerian institutional system, embodying the concept of the rule of law and enshrining the principles of democracy.

At the end of this study, we emphasize the importance of this administrative body, which enjoys important advisory powers, but lacks the privileges of authority. We propose its reinstatement as an independent administrative authority so that it can contribute to the process of regulating public order in matters affecting the fundamental rights and freedoms of citizens and their relationship with the public administration in the state.

¹ Shorfi Safia, the previous reference, page 138-139.

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