



PROVEDOR DE JUSTIÇA

“The Specific Role of the Ombudsman in Promoting Human Rights under International Law” (*)

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1. Ethical commitment of the Ombudsman

The Ombudsman is an independent state body with its institutional framework upheld by the Constitution and whose mission is the protection of the intangible heritage of the community, anchoring its democratic legitimacy in the election by the Parliament.

The strong bond that connects him to the Parliamentary Institution and to the citizen which avows itself as the primeval foundation of the Ombudsman's nature, is embodied in the first instance by the requirement of a qualified majority for his election - that ensures greater array of social representation - and is strengthened everyday by his informal and close action, in the relentless pursuit of a fair settlement through the reestablishment of legality.

The Ombudsman emerges as the genuine sense of the community for the protection of fundamental rights, supported in the bulwark of human dignity concerning the exercise of public powers, and shares with the Parliament the

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duty of supervising the activity of the executive power, albeit limited to materially administrative issues.

It is from this axiological dimension that the ethical commitment of the Ombudsman to Parliament and with his co-citizens emanates. Strong commitment that permeates the legal construction of the state body and which is expressed in his actions in defense of the community.

The hyper-complex social relations increasingly porous and dynamical require that all - and primarily from those who are invested in a public function - guide their actions by the horizon for having an ethical of responsibility. Responsibility primarily before the legitimizing referent - the Constitution and parliamentary election - but also towards the citizens who expect the Ombudsman's uncompromising defense of their rights, freedoms and guarantees.

2. Achieving the ethical commitment in the development of the activity of the Ombudsman for the promotion and protection of human rights

The ethical of commitment and responsibility signifies a new approach towards the actions of those who, like the Ombudsman, must provide for the realization of the human rights. Though, no longer is sufficient to foresee to provide, i.e. it is not enough to have the ability to anticipate possible sources of conflict and tension between citizens and public authorities. Today, unlike the past, it is essential that, at first, we must reflect on the reality of the people. And this implies to comprehend. Comprehend the everyday life, the stage where the rights or their offenses vivify. Comprehend the "I" of the citizen but also the "we" molded by the community and organized as a state.

This demanding reflective act, stripped and immune to preconceptions and prejudices, establishes a new paradigm of practice: comprehending to provide.



For this reason the Ombudsman - assumed as an organ of the State but also as a person – can not be alienated from the concreteness of life for the reason that only immersed in it he will be able to hear the expressions of discontent and to understand their reasons.

The discontent, dissatisfaction or even sadness are revealed in many ways and by various means. The primal source of that revelation is the complaint to the Ombudsman. Complaint where the citizen expresses his dissatisfaction with the inaction or omission of the public authorities and that is both the most formal of informal means at its disposal - because it is not needed particular procedural solemnity, but in the other hand it is crystallized in the legal texts and is intrinsically linked to the genesis of the Ombudsman.

Despite the importance of the complaint, the Ombudsman can not limit his actions to the impulse of the citizen. The mission of the Ombudsman also requires that he is especially alert to their feelings, even when those feelings, because diffuse and fluid, are not materialized in a complaint.

Not infrequently, the citizen, because he will not, or does not know how or can not, materializes his disappointment or his grievance against the actions of public authorities in a formal complaint. This feature does not fall out of the spectrum of the Ombudsman's actions or concerns. To the expressions of genuine feelings from the citizens as authentic and relevant as they are, we call lamentation, the Ombudsman must correspond with the proper attention.

But this time characterized by risks, paradoxes and ambiguities, the Ombudsman can not fail to act when, despite the silence, injustice is revealed before him. In this circumstance, the action of the Ombudsman, tempered by consideration of the reasons and the adequacy of the means, is a factor of assurance of citizen's rights. We want to say that the Ombudsman has to apprehend the reality by his own initiative and can not be immobile or unmoved by the events.



2.1 The uniqueness of the power of the Ombudsman

The power of the Ombudsman arises in the framework of a democratic state ruled by the law as a singular power different from the classic trilogy separation of state powers - legislative, executive and judicial - for which the Ombudsman is not entitled to govern legislate or judge.

His powers anchored in the community are accomplished through formal and informal channels, particularly the recommendation, suggestion, call to attention or composition of interests in the search for alternative solutions which encourage conflict resolution. That being said the power of the Ombudsman is a strong power - as paradoxical as it may seem – as it is inscribed in the historical matrix of the Ombudsman, who maintains the dialectical relationship with the public administration and protrudes in an exercise of a magisterium of influence, enabler of greater latitude of action, allowing the consensus.

It is in this greater latitude for action, freed from the corset of form or sanction, where we can find the strength of the Ombudsman's power. Subtracted from the traditional logic of state powers, the power of the Ombudsman is developed in another horizon. Spreads out precisely where the concrete justice could not be achieved within the formal system, and where the stiffness of the normative and institutional frameworks does not correspond with the appropriate solutions.

3. New Horizons mission of the Ombudsman

3.1 The Ombudsman as a National Human Rights Institution



PROVEDOR DE JUSTIÇA

The community entrusts the Ombudsman with the primary of upholding justice and legality of the actions of the public administration. Albeit, we can identify since the institution of this State Body a distinctive constituent classic figure of the Ombudsman. And that distinctive component adds a new dimension to the responsibilities of the Ombudsman directed to the primary purpose of ensuring fundamental freedoms rights.

The Ombudsman's field of intervention, revealed by the constitutional background that consecrates his institutional figure and developed by his legal statute, extends beyond the verification of the acts or omissions of public administration and the eventual mending of injustice or illegality. It extends from the outset of a functional point of view, to the entire material administrative activity, i.e. all entities, regardless of their nature, exercising public powers.

However, precisely because the evolution of the state organization in relation to the provision of services to citizens and to the community has changed completely over the past decades – moving to the sphere of private interactions areas of the community life that previously were in field of the relationship the state and its citizens - the legal provides that the Portuguese Ombudsman can intervene in relations between private entities that imply a special relationship domain, under the protection of rights.

From this we can conclude that the establishment in the Portuguese legal system of figure of the Ombudsman was innovative because it is distinct from the traditional archetype, as he is considered a Human Rights Ombudsman. Therefore, the Portuguese Ombudsman is a National Human Rights Institution accredited within the United Nations, with the "A" status (fully compliant), according to the Resolution of the General Assembly of the Organization-chela, of December 20, 1993, which was known for shaping the Paris Principles.



In the particular case Portuguese, the Ombudsman, with democratic legitimacy resulting from the parliamentary election, is only bound to the Constitution and to the protection of fundamental rights. This intimate connection to the fundamental axiological building of the Portuguese society mirrors as well, and unequivocally, that it is an organ that represents a guarantee of fundamental rights.

The Portuguese Ombudsman is presented to the community as a server for Justice and Law, carrying with him the defense of human rights as referential matrix, solidifying, through its action, a democratic culture based on the stronghold of human dignity.

3.2 What meaning can we find in the Ombudsman in times of crisis

In a Democratic State the bond that unites the citizens to the state - based on a sense of belonging and trust - form the solid foundation upon which a community can be built. To cherish this tie, especially in times of crisis, is particularly relevant in the action of the Ombudsman, because the institutional nature of this figure, but also the human dimension that it involves constitute a trust factor. Trust that is fundamental in any democratic society and that trust is severed is a source of vulnerability and defenselessness, reaching more acutely those who by the lack of resources and social support are exposed to increased risks of exclusion.

4. The role of the Ombudsman in promoting and protecting human rights under international law

As I already said, the scope of the Ombudsman intervention extends far beyond the domestic ground. In the specific case of the Portuguese Ombudsman he is accredited as a national human rights institution, fully



PROVEDOR DE JUSTIÇA

compliant with the *Paris principles* (A-status), from which derives numerous responsibilities under national and international law.

The independence of the Ombudsman - a requirement for his recognition as national human rights institution - is particularly important as he is entrusted by the international community with the most relevant responsibility of overseeing the fulfillment by the State of its international obligations assumed under international law. This new undertaking that amplifies in a very intense way the activity of the Ombudsman is expressed in two main axis.

One is the effective role as a promoter of the awareness, recognition and solidification of human rights in the relationship that is established between citizens and the State.

The other materializes in the preparation and presentation of reports addressed to international organizations, under the various mechanisms that verify the compliance by the State with internationally assumed obligations. This involves the effective responsibility and duty of exercising the right to be heard - e.g. the United Nations Human Rights Council - expressing in a free and independent manner his assessment on the effectiveness of human rights in the actual and concrete lives of his co-citizens.

Both constitute a powerful and influential instrument of political and social development as it encourages a true culture of accountability in the exercise of public powers, and contributes to improve wellbeing.

This important role, in the national and international stage, has been progressively gaining recognition by the international institutions that make up universal human rights system. At the present time those organizations regard the Ombudsman - in his role as a national human rights institution – as an essential partner not only in his significant activity of reporting regularly the countries compliance with their international obligations, but also as an important contributor in global and regional organizations responsible for the



PROVEDOR DE JUSTIÇA

creation of new legal norms and for the conception of innovative standards and practice guidelines.

This new horizon is simultaneously encouraging and challenging. Encouraging since it represents the acknowledgment by the community, nationally and internationally, of the importance of the Ombudsman. Challenging as it incorporates in itself a new approach on the role of the Ombudsman in the twenty first century, demanding a pioneering view not only of the new issues that afflict our community but also the new inventive ways to accomplish a fair and equal society.