

The ombudsman and the promotion and protection of  
human rights – The present and the future

O provedor de justiça, a promoção e proteção dos  
direitos humanos – O presente e o futuro

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## **THE OMBUDSMAN AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS – THE PRESENT AND THE FUTURE**

### **O PROVEDOR DE JUSTIÇA E A PROMOÇÃO E PROTEÇÃO DOS DIREITOS HUMANOS – O PRESENTE E O FUTURO**

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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 a 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 from 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 duty of supervising the activity of the executive power, albeit limited to 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 through the legal construction of the state body and is expressed by his actions in defense of the community.

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

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The text has had the collaboration of Ricardo Carvalho, legal adviser in the Cabinet of the Portuguese Ombudsman.

## **2. Achieving The Ethical Commitment In The Development Of The Activity Of The Ombudsman For The Promotion And Protection Of Human Rights.**

The ethical 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 towards the actions or omissions of the public authorities and that is, at the same time, the most formal of the informal means at his 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 these 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. 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*

The community entrusts the Ombudsman with the primary mission of upholding justice and legality. Albeit, we can identify since the institution of this State Body a distinctive constituent of the 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 and 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 communitarian life that previously were in field of the relationship between the state and its citizens - the legal norms provide that the Portuguese Ombudsman can intervene in relations between private entities that imply a special relationship domain, under the protection of fundamental rights.

From this we can conclude that the establishment in the Portuguese legal system 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 Portuguese case, 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 Promotion And Protection Of Human Rights In Under The Perspective Of The Present And The Future**

It is in these institutional and social circumstances that the Ombudsman, constantly aware of an increasingly complex society, has to operate promoting and defending human rights. Rights that are anchored in the historical past but have an intrinsic connection to the future. I.e., all the preventive or corrective actions do not end in a single moment, rather through a temporal continuum where we find the reasons and effects of the act.

And this point is particularly important because it is one of the factors that should guide, without condition, the action of the political and social actors in their primal task of promoting and defending human dignity.

Recognizing that the cultural and democratic pluralism in which we live - that enriches us as a person and has a collective being - corresponds to different values, concepts and visions of the society, we find that there is a trend towards the polarization of thought and action in defense of a time that runs out in a single moment. One of the signs and tensions of the late modernity we live in, full of risks and uncertainties, is the intensification of conflicting currents that find exclusively in the present or in the future the alpha and the omega of the choices of our community.

The continuity of time and the effect our actions in what exists and in what is to come require that we go beyond a binary view of exclusionary ways and seek a path to build a society that does not extinguishes itself in the today or that does not projects in the tomorrow. Certainly the continuous advancement of science and technology showed that future generations are vulnerable to our policies and

actions, but it is no less true that this same scientific, technological and social advancement, which only exists because the community cares for whom in the present makes it possible, enables us not only to understand the meaning and scope of the long-term consequences of these policies, but also the ability to affect their results.

The promotion and protection of human rights starts, necessarily, in the present moment, because it is in the concrete life of each person where we can find their true meaning. The enjoyment of politic, social, economic, cultural rights by citizens may not, under penalty of the disaggregation of our community, be dwarfed in the name of an unforeseen future. On the other hand, a community that closes itself in an autistic way to the frenzy of instant gratification compromises the idea of perpetuation that all communities share.

In a final comment it is important to stress the strong idea that we are all slaves of history.

Each of us, in our uniqueness and in our relationship with others, participates in the construction of the axiological building of our community. This participation demands freedom and responsibility: this is the dialogical axis that legitimates the choices made by the community and that will serve as a reference for future generations.

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