

**THE OMBUDSMAN IN LATIN AMERICA: THE NEED  
TO SUPPORT AND STRENGTHEN THE INSTITUTION**

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OCCASIONAL PAPER # 73

ISSN 7116349

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# THE OMBUDSMAN IN LATIN AMERICA: THE NEED TO SUPPORT AND STRENGTHEN THE INSTITUTION

Jorge Luis Maiorano\*

## Introduction

My connection with the position of ombudsman, or defender of the people, has taken a circuitous path and passed through several phases: initially, the purely theoretical, academic phase, almost fifteen years of my life, from 1980 to 1994; then the wealth of daily practical experience, acting as the Defender of the People of Argentina from 1994 to 1999; and returning recently to the didactic and theoretical, obviously within the wonderful experience Providence afforded me as the first to hold this position in my country; and as President of the International Ombudsman Institute from 1998 to 1999.

These are, then, the first thoughts that I have written down after having completed my constitutional mandate, and I take this opportunity to formulate—or in any case, reiterate—some ideas about this institution in Latin America. And I say reiterate, since in my last book on this subject, published in April of last year in Buenos Aires, I have already put forward some of the ideas that I am presenting here.<sup>1</sup>

I will present the following basic ideas: 1) How the idea of incorporating this position first emerged; 2) how it has developed over the last fifteen years; 3) in what form it has been incorporated into various Latin American governments, to the point where it has become widely known and accepted.

If one were to stop at these reflections here, the work could be summarized as something like “mission accomplished.” Instead, I would say “far from it.” Several things have happened in recent years which, without minimizing what has been achieved up until now, compel one to at least ring an alarm bell.

## Forms of Incorporation

The institution of “defender of the people”, “counsel of human rights”, “defender of the population” or other similar designations in Latin America, constitutes one of the most unique developments in recent years in the countries of the region.

What fifteen years ago could have been considered a political utopia or a fruitless undertaking by a law scholar, has now grown into one of the essential keys to understanding the degree of reverence and respect now held for human rights by the inhabitants of the region.<sup>2</sup>

Today, the office is already provided for by statute in Argentina, Brazil (at the state and municipal levels), Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti,

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Honduras, Nicaragua, Panama, Paraguay (although the post has never been filled as provided for under the Constitution in 1992), Peru, Puerto Rico and Venezuela. For their parts, Chile and Uruguay have sponsored various initiatives that are leading to its incorporation.

From the beginning, the ombudsman experience in Latin America has been closely linked to a commitment to the protection of fundamental rights. It was precisely the need to create a greater measure of security in response to the growing demand for basic protection of human rights that brought us to this institution, one so prestigious and so esteemed by the rest of the world, and in particular by all of Europe, even though we put our own individual stamp on it.

It was the model of the Spanish Ombudsman—with that promising, committed name of “Defender of the People”—that the Latin American constituency adopted, in general terms. I say deliberately “in general terms” because today the majority of those institutions have surpassed their original objectives and find themselves facing challenges in guaranteeing areas that the international ombudsman community no longer considers outside its mandate.<sup>3</sup>

This new model, originating in the Spanish Constitution of 1978, is the one that predominates in Latin America and it has shaped the institution of the ombudsman, adding unique, clearly defined characteristics. It exceeds, but does not exhaust, the classic definition of an ombudsman as a control mechanism for administrative dysfunction, as a mediator of conflicts and as a promoter of reforms. It has added the defence and protection of human rights.

### **The Current Situation**

In the last few years the evolution of the institution has not escaped the profound changes taking place in our societies. The reality is that the Latin America of today is very different from the one of fifteen years ago when the Constitution of Guatemala was drafted in 1985. Democratic governments have, happily, become more widespread, at the same time that the state has undertaken a messy withdrawal from commercial and industrial activities. As for economic stability, it has seduced the governing and the governed.

In several countries in the region, the institution of ombudsman emerged as the corporate state was dying and the welfare state was disappearing. Thus, it found itself in its first years operating in a society very different from the one that accompanied its evolution in the rest of the world three decades before. It emerged in societies with participatory aspirations, societies that were calling for quality of life, for economic, social and cultural rights, societies with a growing consciousness of their active role in modern democracies. Countries in the region did not escape the causes that were bringing about profound changes all over the world. We have been at the same time both the witnesses and the protagonists.

That is why in recent years we have participated in the general spread of government reform through policies that, generally speaking, can be summarized as privatization of public enterprises, economic deregulation and administrative decentralization. On this in particular, I have already remarked on another occasion that the priorities of the current Latin American ombudsmen lie precisely with the special role that they must carry out in the processes of economic change already mentioned.<sup>4</sup>

Through all of this, I firmly believe that Latin America has been an auspicious setting for the development of a very singular evolution of this institution. To support this statement, I use as a basis the following considerations:

- a) There is a clear trend towards constitutionalizing the position of ombudsman. The majority of countries in Latin America that have incorporated it have fashioned it as a state institution, not a government one;
- b) Operational independence granted by these *Magna Cartas* prevents, at least on the regulatory plane, these institutions from turning into appendages of special interest groups or “mufflers” of political disputes;
- c) In contrast to what happened in the rest of the world, the need to control mere administrative dysfunction was not the original reason motivating interest in it;
- d) To this end, and based on the classic model of the parliamentary ombudsman, the experiences of others were adapted and this homegrown ombudsman was imbued with the functions of defending and protecting human rights, and controlling the exercise of power in public and private realms;
- e) In order to assure the free exercise of those functions, some constitutional regulations have accorded them full procedural legitimacy, surpassing even that of Spain’s Defender of the People. This implies the possibility of challenging state actions in the courts and even individuals whose actions violate fundamental rights;
- f) Although individual rights were the rights that initially motivated the spread of the ombudsman, with the trend of progressively recognizing and protecting human rights, its domain has expanded to support growing social needs as well, that is to say, it affects the area of social and economic rights. In the area of these rights, the Defender of the People must act with special care, and act gradually, since in these areas social rights can be better protected when a country has the economic resources to support them. But, while acting prudently, it must react with firmness with regard to abuses or failures of public power;
- g) Recently, some of the Latin American ombudsmen have been taking on a momentous, new role. I am referring to the responsibility for “diffuse” or collective interests, or as they are called in the Argentinean Constitution, “class action rights”.<sup>5</sup> It is not a question of collective legitimacy, but of the institutionalization of a position that, administratively and legally, acts as a defender of the rights of society, thereby extending the protection of the human being on the individual level to the generic or abstract level. It protects the human being specifically and in its different roles in society, as part of society (whether child, user, senior, worker, retiree, aboriginal, patient, etc.);
- h) Consistent with its intrinsic character as a “promoter of change”, the Latin American Defender of the People has assumed a leadership role in the promotion and spread of human rights;

- i) Its growing leadership role as interpreter of the demands of civil society has led the Inter-American system to recognize its right to appeal to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>6</sup>

I agree, therefore, with the Former President of the National Commission on Human Rights of Mexico, Dr. Mireille Roccatti Velásquez, when she comments that:

... These days the involvement of the Ombudsman in the processes of social change in Latin American countries is of vital importance. Its role is no longer restricted solely to recognizing complaints originating from a deficient public administration, the traditional role of the Ombudsman: it is acting to protect basic civil rights. Furthermore, in acting to protect fundamental rights pertaining to the human person, the institution is intervening in other areas of public life in each country, as is the case when it stimulates changes in the State so that it better serves the public. And it contributes to the consolidation of a democracy which fully guarantees fundamental rights, civil and political, as well as social, economic and cultural.<sup>7</sup>

### **International Recognition**

The international ombudsman community has recognized the important role Latin America has had in the evolution of this position. Sometimes, I am obliged to say, it is not without mistrust, as a new kind of ombudsman is emerging, very different from the original northern model. In spite of this, and as proof of the strength of this process, Argentina was the venue, in 1996, of the VIth International Conference of the International Ombudsman Institute (I.O.I.), and the Defender of the People of Argentina hosted 800 participants from eighty countries. This led, almost naturally, to the person writing these lines becoming first the Vice-President of the Institute in 1996, and then, in 1998, the President of the I.O.I., with the massive support of the Latin American region, North America, Asia, Africa and some votes from Europe. As well, international organizations have noted with much interest the work that our institutions have done. Such is the case of the United Nations Educational, Scientific and Cultural Organization (UNESCO) which, already in 1996, included the Inter-American ombudsmen in an action plan to support what this specialized organization of the United Nations has called a "culture of peace".<sup>8</sup>

So, for example, it has been remarked that:

UNESCO itself recognized Ombudsmen as the principal agents spreading a culture of peace. Through them current states of insecurity and violence that block the consolidation of a lasting peace are overcome. And UNESCO values their role, especially in Latin America, in promoting respect for and development of democracy, in educating citizens and in organizing the participation of the marginalized, excluded and discriminated against populations.<sup>9</sup>

I do not hesitate to describe this as one of the most important, explicit international

endorsements which the defender of the people, counsel for the defence of human rights or human rights commissioner in Latin American countries has received.<sup>10</sup>

The Declaration on Human Rights and a Culture of Peace, signed jointly by the Defenders of the People of Argentina, Costa Rica, El Salvador, Spain, Guatemala, Mexico and Puerto Rico, and the Director-General of UNESCO, Dr. Federico Mayor Zaragoza, on July 30, 1996 in Antigua, Guatemala is another proof of this.

On that occasion, the following actions, decisions and objectives were agreed upon:

1. The creation and consolidation of a culture of peace involves knowledge of, respect for, protection and development of human rights: civil and political, as well as economic, social and cultural, and those of future generations, without distinction. Also, it is necessary to instill, through human rights education, a permanent, natural attitude of respect for the values and principles of human rights.
2. Creating a culture of peace requires continuous, positive action on the part of states and peoples, focused on the prevention of conflict, the elimination of various threats to peace, and respect for the principles of renunciation of the use of force, conflict resolution, tolerance, disarmament and sustainable economic development.
3. The exercise of freedom of speech and expression and free access to information as integral parts of human rights and fundamental freedoms, are essential elements in the promotion of a culture of peace. In everyday activities, the mass media must endeavour to contribute fully and effectively in reinforcing the idea of peace, the promotion of human rights, the establishment of a just and equitable economic order, respect for cultural diversity, and the prevention of incitement of war.
4. Full participation and empowerment of women is essential to the development of a culture of peace. Social history, exclusion, marginalization and discrimination have imposed on women a number of challenges and disadvantages. Overcoming intellectually and culturally so many obstacles makes women key partners in creating a culture of peace based on respect for and validation of their human rights.
5. We observe with approval UNESCO's efforts in establishing a new intellectual concept of peace, as a culture of peace fosters the fundamental universal values of: respect for life, freedom, social justice, solidarity, tolerance and equity; as well as equality between men and women, and respect for the rights of male and female children, for those belonging to minorities and for those of indigenous populations and displaced populations
6. In order to establish a permanent culture of peace, it is necessary that States and peoples adopt concrete measures to eliminate hunger and malnutrition, and to satisfy all basic human needs. Also, it is necessary to end existing levels of illiteracy as soon as possible.
7. Human Rights and a Culture of Peace will only be possible in a setting based on the application of democratic principles of justice, equity, freedom and solidarity as established

in the Preamble of the Constitution of UNESCO, and not in the application or imposition of models from outside the cultural and historic context of the peoples.

8. The investment of human or material resources to create a culture of peace should at least match that made for war, in order to eliminate the comparative advantage of the latter. To this effect, in order to build a culture of peace, it is necessary to support initiatives designed to achieve arms control and reduce military budgets, and use said resources for education, health and to benefit the development of other economic, social and cultural rights. The need to limit and, in the long run, to end arms production has never been so urgent.
9. Developing values that favour peace, human rights and democracy constitute a critical challenge for education. Education should develop the ability to resolve conflicts by non-violent means. Therefore, it must promote the development of internal peace in the minds of students so that they can affirm with greater resolve the qualities of tolerance, solidarity, sharing and caring for others. Education should teach citizens to respect their cultural heritage, to protect the environment and to adopt methods of production and consumer guidelines that bring about social development. It is also necessary to promote balance and harmony between individual and collective rights.
10. A culture of peace is a human process that develops through the collective practice of and practical experience with Human Rights. The Ombudsmen of Ibero-America value the philosophical concepts that guide UNESCO's Culture of Peace Programme. They consider it advantageous, as part of their double mission to promote and protect human rights, to form an international movement that, by way of exchanges and mutual sharing of experiences, facilitates changing cultural attitudes of using violence and exclusion as solutions to differences, to using dialogue, tolerance, consensus and participation. To this end, we resolve to create the Ibero-American Network of Ombudsmen for a Culture of Peace, whose objectives will be approved at the next meeting of the Ibero-American Ombudsmen Federation (I.O.F.).
11. We, the Ibero-American Ombudsmen, appreciate UNESCO's technical co-operation in helping to integrate the objectives of the Programme's action plan into education, training and promotion of human rights strategies.
12. They consider that, as part of developing a culture of peace, one should always bear in mind that the role of the armed forces should be limited to protecting democracy. Therefore, public security and pursuit of criminals is the field of civil police services. In all cases, armies should be subject to civil authority emanating from the fundamental laws of the nation States in the region.<sup>11</sup>

### **The Latin American Defender of the People and a Culture of Peace**

Is the Latin American ombudsman prepared to contribute to forging a culture of peace? Is this not a pretentious goal for a young institution working in societies where there are profound and growing problems of marginalization, the vestiges of authoritarianism and where social policies are deferred by economic policies?



These questions constitute, in my opinion, an increasingly disturbing prospect, but we must not fall into the facile trap of claiming that the ombudsman is not prepared to meet the challenge. With complete conviction, I maintain that the Latin American defenders of the people, human rights counsels or commissioners find themselves absolutely necessary for forging this culture.

How can the Latin American ombudsman forge a culture of peace? In my opinion, the defender of the people in our countries finds itself in the privileged position of assuming, from the state, the role of mediator between the needs of the people and the authorities that determine their destinies. From this position, it can see how deep the division is between the daily dissatisfactions of the population and the concerns of the ruling class. And what legitimizes it even more is that, acting with full independence, this merciless examination can be done within the state itself, allowing the latter to recreate its relationship with society.

Peace is not only the absence of conflict, but also the overcoming of conflicts. And it is, above all, these conflicts (public/private, authority/freedom, capital/work, public interest/private interest, macroeconomy/microeconomy, tolerance/discrimination, etc.) with which the institution of the ombudsman works. So, for example, it works against discrimination based on sex, religion, language, racial origin, financial situation, etc., and also against injustices aggravated by the situation between money lenders and consumers of monopolistic services.

Is it true that the ombudsman or defender of the people can do little against traditional armed conflict? In such a situation, the hoped-for objective of peace may be remote. However, where it can make an active contribution, it is responding to the growing cries of Latin Americans who are now no longer happy with just the right to live. They want more and this implies a better quality of life, better education, better health, greater protection of common values, etc.

We must now forget that one of the fundamental issues in the countries of Latin America has been the steady movement towards institutionalism, that is, elections by the rule of law. Although it has been difficult, we have persisted in this pursuit. However, Latin American constitutionalism, precursor of social rights, today aspires to more than just the protection of the old rights to which our constitutions were dedicated during the nineteenth century. Today, together with individual rights—that are still only wished for in some regions—our societies yearn, first, for the full application of social rights and, second, for collective rights and the rights of future generations.

The Latin American defender of the people or ombudsman faces difficult challenges. Among them, that of gaining the prestige that the position has in other countries around the world, that of opposing classic abuses of public power and confronting violations of basic human rights that come, in many cases, from its own bosom, and that of creating solutions that avoid social belligerency and encourage, at the same time, new forms of reconciliation and mediation of interests.

## Unfinished Work

In the fifteen years that have passed since its first incorporation in a Latin American Constitution the institution of the defender of the people has certainly spread, and it has achieved international recognition as I have just pointed out. Nevertheless, new dangers are threatening the future of this institution: proposals to eliminate the position, cutbacks in facilities, budgetary cuts, various harassments and, in conclusion, a serious risk that the position is being diluted in Latin American countries.

There is a revealing fact that has, up until now, never been published. In Latin America, no defender of the people, human rights commissioner or other equivalent on the national level (and also on many local levels) has been re-elected, despite the fact that the relevant regulations permit this.

There are two reasons that, in my opinion, explain this situation: 1) the partisan inclination to convert the institution into a political trophy, and 2) the situation that all defenders that do a perfectly good job in the position start out being viewed sympathetically by the authorities and end up becoming a nightmare for governments that opt to reduce their profile by replacing the incumbent. In order to fully understand the statements I have just made, it should be remembered that in the beginning the position encountered an obstacle that almost prevented its acceptance—an uninformed political leadership thought that the ombudsman was being grafted from other cultures, motivated by outside interests. Today, in contrast, the principal obstacle is precisely the reverse. Politicians are very familiar with the position and they know how much trouble an institution that acts outside of party interests, independent of their ignoble intentions, can be in resolving citizens' dissatisfactions. It should also be remembered that the institution's first actions were a strong defence of human rights against violations perpetrated by acts of the state itself. Today, in contrast, under the regulatory presence of the state and increasingly strong corporate concentration, the main offences result from state inaction, from its failure to fulfil its role as the guarantor of rights and, in a parallel way, from abuses committed by private monopolies.

Of course, I would also like to point out a factor that may contribute to the growth of the position. In the 1980s, the ombudsman was instituted—to state it graphically—from “top to bottom”; that is to say, it was the authorities that established a position that society was not familiar with, and in some cases precisely in order to show the world an appearance of democracy. Today, in contrast, in the reformulation of state goals that have evolved without the state, society has ended up without a natural protector. So, conditions are present for the position to grow, or to erupt, from “bottom to top”. Today, it is the people, those “on the bottom”, who are the ones that are asking, sometimes shouting, for someone to protect them from private sector abuses or state failures.

Today, Latin America is populated with defenders of the people. This is evidence of a notable advance from the situation that existed in the decade of the eighties. Some of those institutions now have had several “generations” of defenders. But, the vicissitudes that the holders of these positions have suffered and the statements that the Ibero-American Ombudsmen Federation has found it necessary to make in order to curb sinister attempts to reduce facilities

and pressure defenders, must be remembered.

Thus, I maintain that the defender of the people in Latin America is not, by a long shot, a finished work. Today, the pressing needs are different: to urge the buttressing of these institutions, to demonstrate to governments that the defenders or commissioners are not their enemies, that they do not intend by their criticisms to undermine power but, rather, to clarify and sensitize it so that governments can recognize the daily dissatisfactions of the people that are undermining confidence in their institutions, and to make clear that budgetary adjustments can never justify the elimination or weakening of an institution beneficial to the people, and which can only bother the arrogant and the authoritarian.

### Endnotes

1. J.L. Maiorano, *El Ombudsman: Defensor del Pueblo y de las Instituciones Republicanas*, 2d ed., vols. 1-4 (Buenos Aires: Ediciones Macchi, 1999).
2. See J.L. Maiorano, "El Ombudsman: Defensor del Pueblo y de las Instituciones Republicanas", in the collective work *El Defensor del Pueblo en la República Argentina* (Buenos Aires, 1991) at 31ff.
3. J.L. Maiorano, I.O.I. International Conference presentation (1996).
4. J.L. Maiorano, "Servicios Públicos y el Ombudsman", *Memoria del III Congreso Anual de la Federación Iberoamericana de Ombudsman (FIO)* (Lima, 1999) at 183 ff.
5. Constitution of Argentina (1994), Articles 43 and 86.
6. Expanded in J.L. Maiorano, "El Defensor del Pueblo en América Latina: su compromiso con la protección de los derechos humanos" (1996) No. 1 *Revista de Derecho Público* (Universidad Autónoma de Centro América, San José, Costa Rica).
7. M. Roccatti, *La Función del Ombudsman y el fortalecimiento de los derechos humanos en Latinoamérica* (Mexico, 1998) at 12.
8. *Declaration of Antigua Guatemala on Human Rights and a Culture of Peace*, Ibero-American Forum of Ombudsmen, Antigua, Guatemala, July 30, 1996; J.L. Maiorano, *La UNESCO y el Defensor del Pueblo, La Ley*, 1996, vol. D at 1,712ff (Buenos Aires, 1996).
9. *Ibid.*
10. *Ibid.*
11. Declaration, *supra* note 8.

