Challenges and prospects of Mexico's non-jurisdictional human rights protection system

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Introduction

June 6 of this year marks the fifth anniversary of the National Human Rights Commission. Despite innumerable obstacles and difficulties, these first years allowed the commission to root itself in society and show the first fruits of its humanitarian efforts.

It has not been a simple matter for the [newly created post of] ombudsman to clear a path within the juridical and socio-political context of our country, where national culture regarding the basic rights of man is still incipient and fragile. The consolidation of this culture should have three effects: a) with regard to public servants, the consciousness that their first professional duty is to respect human rights in all their daily activities; b) with regard to the governed, a knowledge of their basic prerogatives and freedoms as well as the means, resources, agencies and procedures for their defense and protection; and c) with respect to social activists for human rights, a clear understanding that this cause knows no party, ideology or religious creed, and that its defense must be based on humanitarian concerns.

Those of us in the National Human Rights Commission (CNDH, from the initials in Spanish) believe the agency has contributed to the task of strengthening the culture of human rights, along the lines of the three aspects noted above. Almost 40,000 claims have been dealt with in these five years; penal or administrative disciplinary measures have been taken against approximately two thousand public servants; around one thousand recommendations relating to human rights violations have been made available to public opinion; countless training courses have been given to public servants and authorities.

After five years, the debate on human rights is reflected on a daily basis in the mass media. The term "ombudsman" has ceased to be unpronounceable; the practice of public exposure and active participation has become more extensive and vigorous; there is a growing recognition of the important role played by non-government organizations, as agencies of conscience, and progress has been made in their collaboration with public commissions, as agencies of law for the defense of human rights.

I have stated in the past, and repeat today with renewed conviction, that whoever denies the advances that

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Paper presented at the Forum for Grass-Roots Consultation on Human Rights, sponsored by the Interior Ministry (*Gobernación*) on April 20, 1995.

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have been made is suffering from myopia produced by their lack of information or their political or personal interests; at the same time, whoever makes the specious claim that the battle for human rights has been won is engaging in pure and simple demagogy.

With the exception of ill-intentioned and over-politicized voices, the overwhelming majority of opinions publicly expressed about the National Human Rights Commission and its counterparts in the different states call not for the abolition of these bodies but, on the contrary, for strengthening their autonomy, extending the scope of their action and making their work more efficient. These criticisms, motivated by good faith and frequently characterized by good sense and veracity, must be discussed publicly and calmly in order to achieve the objectives sought by those who make them.

I will refer below to three aspects which, in my opinion, have been the most significant as well as those most frequently cited in the media: the procedure for designating heads and members of public agencies for human rights protection; possibilities for broadening these agencies' current scope; and the effectiveness their recommendations should carry.

The issue of ombudsman designation

This is a question of the highest importance. As with any procedure for designating a public agency's chief officer(s), the objective is that the selection mechanism make it possible to choose the best-suited, best-trained and most honorable people to fill a given public office. In the case of ombudsmen, moreover, the selection procedure should guarantee the autonomy, independence and non-partisanship of the agency's chief with regard to actions taken by government powers.

Comparative law records a wide range of procedures which may be followed in designating ombudsmen, which we can classify into three groups: designation by the head of government; designation by parliament; and a mixed procedure involving both the executive and legislative branches. The latter is the one adopted in Article 10 of the Law on the National Human Rights Commission.

There are, of course, no perfect procedures, and each has its pros and cons. As examples, one could cite various cases of exclusively parliamentary designation in which ombudsman selection was the result of political negotiations among parties which included issues having nothing whatsoever to do with the agency itself or the candidates for heading it. It's not unusual for the office of ombudsman to remain vacant for long periods as a result of difficulties caused by negotiations among political parties. In some cases the final choice was a rather unfortunate one.

In the case of the National Human Rights Commission, the nation's president proposes the agency's ombudsman and consultative council, and the Senate approves the choice through simple majority vote. The system has been used on one occasion only for designating a new CNDH president and on two occasions for choosing council members.

Some critics have maintained that the executive branch's intervention in the designation process reduces the institution's working autonomy and independence. Yet this has never been the case. The ombudsman's autonomy and independence are manifested in his daily work, in receiving and investigating complaints, and in his public pronouncements.

There are several advantages to the president making nominations for approval by a legislative body; first and foremost, that this procedure prevents partisan wheeling and dealing. The final power to approve or reject presidential proposals lies with the legislative branch. In the event of rejection, the chief executive would then have to put forward a new nomination.

In order to maintain the advantages of the mixed system, while broadening the legislature's participation and therefore its commitment, several possibilities present themselves for consideration, among them:

1. That the executive present a list of three candidates, as it does presently in order to fill vacancies in the Supreme Court.

2. That the approval process be transferred from the Senate to the House of Representatives, so that a larger number of legislators may participate in the decision.

3. That regulations be drawn up for the procedures according to which candidates testify before the legislative branch, so that the corresponding debate will be genuinely deep-going and well-informed.

Whatever decision is made by Congress, including that of modifying the procedures specified in Article 10, it must always be kept in mind that the National Human Rights Commission is a technical organ of the law and not a public agency of protest and denunciation, and that the ombudsman's work must necessarily be non-partisan and based on profoundly humanitarian considerations.

Any procedure must guarantee aptitude and the requisite knowledge, experience and ability, impartiality and honesty, autonomy and independence, non-partisanship and humanitarian commitment.

In order to make such a candidate profile possible, the prerequisites set forth in Article 9 of the CNDH law must be perfected.

Limited domain

Article 102, Section B of the Mexican Constitution establishes four limitations to the work of public agencies for the protection and defense of human rights: that they may not infringe on electoral, labor or jurisdictional matters, nor on matters pertaining to the nation's judiciary.

For its part, the June 29, 1992 CNDH law establishes another limit, with regard to "consultations undertaken by authorities, individuals or other entities on the interpretation of constitutional and legal provisions."

These are the five limitations to the ombudsman's work of protecting and defending human rights. Each of them should be analyzed separately, keeping in mind that said limits clearly do not negate the fact that such prerogatives and freedoms are themselves in the nature of profoundly important human rights.

Electoral affairs. In this regard, Article 7 of the law amplifies on what should be understood as electoral matters, solely for the purpose of defining the CNDH's scope, indicating that what is involved here are the actions and resolutions of electoral agencies and authorities.

It follows that not all political rights are beyond the competence of the CNDH; only those of a strictly electoral nature.

What the CNDH cannot do in this field is review the functioning and decisions of electoral agencies and authorities; that is, become an appellate body. To broaden the National Commission's scope to cover such matters would mean politicizing an agency whose functions are instead of a technical nature.

It has long been a commonplace to affirm that our electoral system —that is, the system for the organization, development, oversight and evaluation of electoral processes— needs to progress and perfect itself. It is within the context of this effort that we must approach the defense of the politico-electoral rights of the governed, in order to regulate this task in a precise and unambiguous fashion. Sooner or later, the decision will have to be made as to whether the resolution of electoral conflicts should be a political procedure or, on the contrary, a genuinely jurisdictional process directed by professional judges.

If the decision were made to opt for a political format and modality, it would be inconsistent for the CNDH to devote itself to reviewing decisions based on political considerations, given that, once again, the National Commission is a technical agency.

If the decision were to adopt a fully jurisdictional format and modality, would the judges agree that, in contrast to other jurisdictional organs, their decisions would not have full authority and would moreover be open to annulment, revocation or rectification by a non-jurisdictional agency such as the CNDH? The answer would appear self-evident.

In my view, the key to guiding and resolving this debate lies in legislative work aimed at a deep-going reform of the Mexican electoral system. As important as the CNDH is, it is far from being a panacea for resolving any and all national controversies.

Labor issues. The National Human Rights Commission's original Internal Regulations stated that the CNDH is not competent to deal with "labor conflicts involving an individual or collective controversy between workers and employers, in which this is a matter of jurisdictional competence."

The regulations specified that the agency would have competence in labor conflicts where an administrative authority intervened and there are allegations that individual and social rights were violated.

This differentiation and specification of the agency's scope was deleted in 1992 by the Constitutional Review Board, since the passage of Section B of the Constitution's Article 102 set forward a simple generic exception in terms of labor issues, without the agency's regulations specifying anything in this regard. The regulations note the exception by means of the expression "labor-related conflicts."

This has been another, constant source of criticisms of the CNDH and its counterparts in the various states. A number of points should be made in this connection.

The National Commission would be unable to intervene in any conflict between a worker and an employer when the latter is a private individual, given that in any case private individuals commit not violations of human rights, but crimes.

The issue would thereby present itself only in those cases where the employer is a public authority or public servant and thus capable of violating human rights; and an additional distinction is appropriate here: the question of whether or not the conflict can be resolved jurisdictionally through the conciliation and arbitration boards.

Given that in the labor jurisdictional process workers and employers are on an equal footing and due to the characteristic structure and functions of these specialized tribunals and the existence of attorney general's offices for the defense of federal, state and municipal employees, it may be understandable that such acts are not within ombudsmen's area of competence.

Nevertheless, a valid justification would not seem to exist for the fact that in labor conflicts where the employer is a public servant who carries out actions in his capacity as an authority, and where those acts cannot be redressed through specialized tribunals, citizens whose basic rights may have been violated are left without ombudsman protection.

At the appropriate time, legislators may turn their attention to the original CNDH regulations in order to clarify this issue.

Jurisdictional and federal judicial matters. The ombudsman is not a court of appeals or of last resort with the ability to modify judges' decisions. If the National Commission had that ability it would itself be a juridical "demiurge," a political aberration and an infringement of the fundamental political determination that there be a balance of powers. Thus, Article 102, Section B of the Constitution categorically excludes jurisdictional matters, of whatever nature, from the agency's field of competence.

However, Article 8 of the National Human Rights Commission Law passed by Congress, in specifying the scope of pertinent constitutional precepts, stipulates that the CNDH will only be able to deal with complaints and claims made against acts or omissions by judicial authorities, except those of a federal nature, when said acts or omissions are of an administrative character, and concludes by reaffirming that the agency may by no means examine issues of a jurisdictional nature.

Three conclusions flow very clearly from this:

1. The CNDH and its counterparts in the states may under no circumstances deal with issues of a jurisdictional character.

2. These public human rights protection and defense institutions may, however, deal with issues of an administrative nature having to do with the agencies and functionaries of the judicial branch.

3. With regard to the federal judiciary, the National Commission may not deal with jurisdictional affairs, nor with those related to the administration of the federal judicial authority.

In terms of the last item, the states' Superior Judicial Tribunals have stressed the distinction between local and federal judicial authorities, which has led to mistaken interpretations and irritated responses, given that ombudsmen do have competence on questions of form in relation to the local authorities but not in relation to federal judicial institutions.

During the 1992 parliamentary debate leading to the addition of Section B to Article 102 of the Constitution, it was argued that, given that the federal judicial branch is of higher rank since it is charged with interpreting the Constitution, its actions may not be analyzed by the ombudsman, even if these acts are of a purely administrative nature.

This explanation would certainly appear to be a weak one, given that deviations from the prompt and fair administration of justice may occur at both the state and federal levels.

The 1995 judicial reform which created the Council of the Judiciary, an agency whose powers are solely administrative and non-jurisdictional, may serve as a magnificent aid in deciding between the only two possible scenarios: either it is legally established that the Council of the Judiciary will fulfill the functions of a judicial ombudsman, or it is accepted that administrative acts carried out by the federal judicial branch in violation of human rights may be dealt with by the National Ombudsman. Such a decision, which like any other involves both advantages and disadvantages, must be undertaken precisely at this time, when parliamentary work towards the legislative development of the 1995 judicial reform is beginning.

> *"The ombudsman is not a court of appeals or of last resort with the ability to modify judges' decisions"*

Another problem which many believe has not been totally resolved has to do with being able to specify, with complete clarity, what should be understood as a fundamentally jurisdictional matter and what should be considered a matter related to the administration of the judicial branch, in order to easily determine when an issue does or does not fall within ombudsmen's field of competence.

The National Human Rights Commission's November 12, 1992 Internal Regulations state that the criterion for determining whether an act is jurisdictional or administrative

is based on the specific nature of the given act. If a judicial public servant carried out a juridical evaluation in order to state his decision, then we are dealing with a jurisdictional matter; if he did not do so, the matter is considered to have an administrative character.

Needless to say, this criterion can and must be reviewed and enriched. The specific listing of administrative acts by judicial agencies which may involve the violation of recognized human rights could be a good basis for resolving a controversy which we ombudsmen face daily.

The nature and efficacy of recommendations

Despite the fact that all the ombudsmen existing in the world emit pronouncements which are actually recommendations, and which go by that name, in Mexico, paradoxically, this feature has been the object of the most criticism, with the expressed objective of making these recommendations binding. In order to resolve this paradox we must lay out a series of points.

In the first place one should consider that if a recommendation is binding, that is, if it may be imposed on the authorities in obligatory fashion, it will be anything but a recommendation. In reality, imperative and obligatory measures are the domain of judicial decisions, and it is therefore a question of actions of a jurisdictional nature which, at a given point, become definitive and assume the status of judicial writ. In other words, it would be a question of rulings.

If the National Human Rights Commission were to pronounce obligatory decisions, that is, rulings, it would serve as anything but an ombudsman; in reality it would be a court; and if it were to be a court such an act of insanity would completely wreck the Mexican Constitution.

It is unquestionable that in order for ombudsmen's recommendations to be fulfilled, what is necessarily required is that the authority receiving these recommendations have the will to fulfill them; that in light of evidence that a human rights violation has been perpetrated, said authority be convinced that this is the case and order an end to the violation, the reparation of damages and punishment of the public servants responsible.

The force of ombudsman recommendations must therefore be sought in factors other than such an impossible coercive power. It lies in the moral authority of the agency making the recommendations; in publicizing their contents; in the agency's ability to create significant currents of public opinion to back them up and move the given authority towards fulfilling them completely; and in the effects that periodic official reports, presented essentially to the chief of state and parliament, should have.

sufficient to note that 52.3% of its recommendations are now considered to have been completely fulfilled.

However, neither does it mean that the CNDH's recommendations are invariably fulfilled rapidly and sufficiently. 43.5% of the recommendations are currently considered partially fulfilled. 21 recommendations out of more than 900 have not been accepted by the authorities to which they were sent. In any case, the National Commission is not satisfied with the results obtained and has made this public on many occasions.

These points of clarification are made here not only in order to clear up the aforementioned paradox but, at the same time, to seek procedures and methods for making the recommendations more effective, without depriving them of their real spirit and juridical nature.

The first thing which must be insisted on in order to achieve such an objective is that the authorities to which the recommendations are sent

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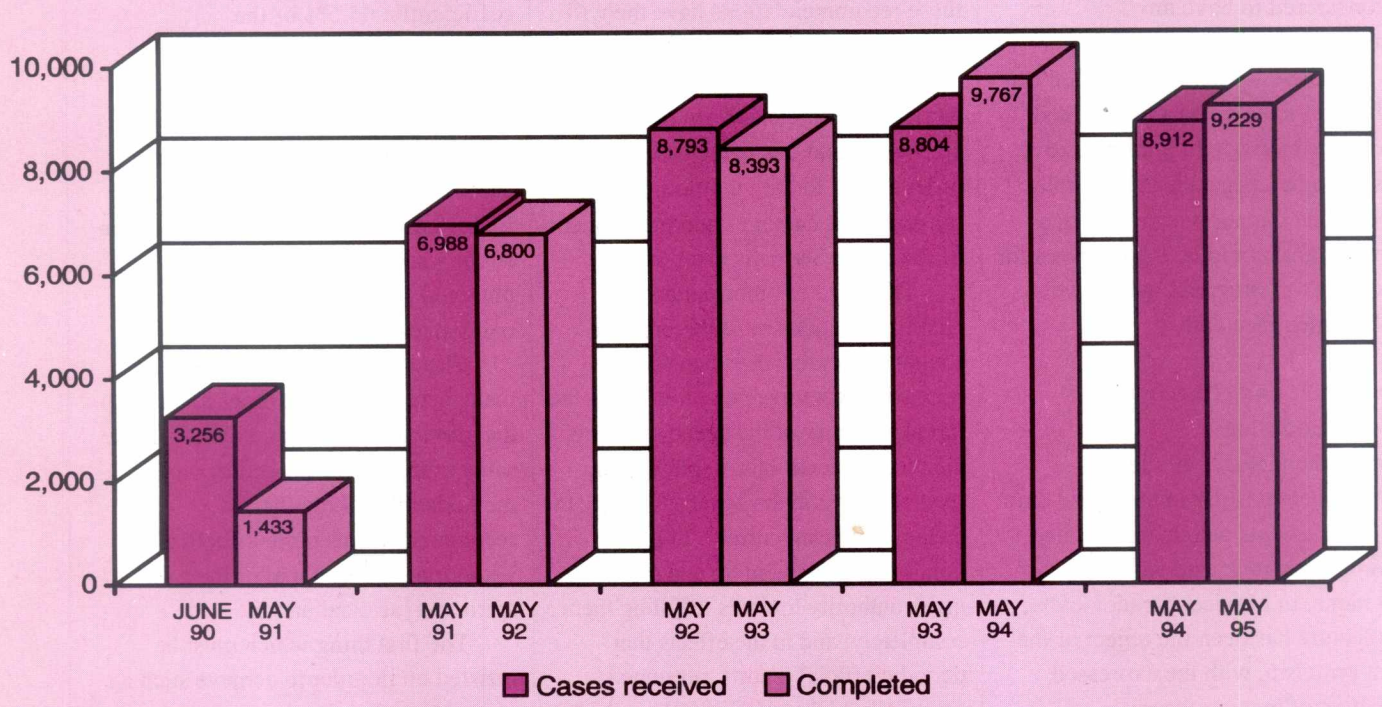
In Mexico, unfortunately, the indispensable will of the authorities which receive the recommendations has not been extensive enough as to lead to the full and rapid fulfillment of said recommendations. This does not mean that the National Human Rights Commission's recommendations are *never* fulfilled. In this regard it is

see them not as public acts of censure, but rather as civic exercises in collaboration which help to correct errors, to perfect norms, behavior and attitudes, which seek to prevent impunity and thereby strengthen our state of law. No bureau secretary, no attorney general, no governor should feel personally offended by a



Since the National Human Rights Commission (CNDH) was founded five years ago, it has recived 36,753 complaints. The Comission has completed 35,622; still in process are 1,131 cases. This means that 97% of the cases presented to the Comission have been attended.

recommendation. It is not their agencies' or offices' behavior which is being reproached, but rather that of public servants within those bodies who have disobeyed normative mandates and higher orders. The Human Rights Commissions are not seeking to wound our institutions; on the contrary, we seek to strengthen them so they may efficiently fulfill the functions assigned to them by law.

If this approach to what the recommendations mean remains unchanged in a number of public servants, progress will be much slower and more difficult; but finally, sooner or later, the cause will win out and it is they who will be changed. Full recognition of the dignity of human beings can be halted or interrupted, but it can never be obliterated.

In order for the fulfillment of recommendations to be less cumbersome, quicker and more effective, and while skeptics are being converted to the cause, it is indispensable that legislative bodies, at both the federal and state levels, take on a more active role of supporting the public agencies for the protection and defense of human rights.

It is therefore that I respectfully propose a reform of the basic laws of our country's congresses and legislatures so that, after the respective ombudsmen present their annual reports, the corresponding parliamentary commissions may require the testimony of the recipients of those recommendations which remained unaccepted or were negligently unfulfilled, so they may explain to the people's representatives the reasons for such omissions. On the basis of this testimony, the legislative bodies would take such measures as their sovereignty would determine. VM