



PROVEDOR DE JUSTIÇA

“The Ombudsman and Civil Society: The Ombudsman defending the citizen”^(*)

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Introduction

In a changing world trying to emerge from a major economic and financial, as well political and social crisis, what role can and should the Ombudsman have?

What are the boundaries of his intervention? Where should they stand back, failing to invade the spheres reserved to private rights and civil society? What struts hold him on in a society dominated by the hegemony of the private. What should be his *iter*?

The answer to these questions must be preceded by an overview of the path so far undertaken by the Portuguese Ombudsman. It is therefore obviously as the Portuguese Ombudsman that I shall speak to you today.

1. *The role of the Ombudsman in normative and social Portuguese dynamics*

Four decades after its establishment, the Portuguese Ombudsman is a stabilized power, which grants support and protection to all. As a State Body, legitimized by the people, it has earned trustworthiness and the respect of the institutions. Its matrix is based on the principle of protection of people that may

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address to the Ombudsman in an expeditious, informal and free of charge way, in order to find a guarantee of justice and legality.

Regarding the monitoring of public administration performance he embodies a power of control and restraint. In addressing proposals of legislative reform to the Parliament, the Government and the Regional Legislative Assemblies, he contributes to an improvement of the legal system. Focused in assuring the compliance Constitution, he may request the judicial review of the constitutionality of laws, when necessary.

After all, as I said once, solving the problems that unsettle the citizens is, from the perspective of the Ombudsman, the assumption of an idea that a more informal and prompter means [than through formal means; the complaint to the Public Administration, the administrative appeal and judicial actions] are capable of arriving at a determination of what ails the citizen; to reach the fair settlement of the case¹.

2. *Evolution of the performance of the Portuguese Ombudsman regarding the protection of fundamental rights*

The mission of the Portuguese Ombudsman is to pursue not only the promotion of justice and legality of the Public Administration but identically to alert to the deficiencies of law that he becomes aware of, as he performs his duties². This task has to be understood taking into account the strong democratic dynamism, both of political and social nature, which followed the 25th April 1974 Revolution. Indeed, the institution of democracy that followed the authoritarian regime that lasted for 48 years of dictatorship demanded the effective promotion and protection of the fundamental rights of the people, in his relations with

¹ Vide “Razões de uma razão (III)”, in *Diário de Notícias*, de 4 de dezembro de 2013.

² See the text of art. 6/1, 1st part from Decree Law 212/75, from 21-4.



public authorities.

In 1975, before Portuguese Constitution approval, the Portuguese Ombudsman was created. Outside his powers of intervention were the strictly private affairs (it was understood that this was not his vocation). Likewise, the Armed Forces issues were left out of the scope of control of the Ombudsman, because it was understood that its structure *«was total independent of Government»*³.

Through the Decree Law 212/75, of 21-4 the Ombudsman was legally consecrated, with the guiding scope aimed to *«... ensure justice and legality of Public Administration activities through informal means»* and allow *«...immediate supervision»* of its actions.

The constitutional dignity of the Portuguese Ombudsman took shape in 1976, in article 24 of the Portuguese Constitution⁴, determining that the holder of office would be appointed by the Parliament defining its activity, characterizing it as a mean of promotion of justice and compliance with the law, different from administrative and judicial means of defence, and establishing a form of access (free and informal) of citizens to his intervention⁵.

The revision of the Constitution in 1989⁶ strengthened its sanctioning powers, powers, as it was settled that the Public Administration has the duty to cooperate with the Ombudsman in the pursuance of its mission. Accordingly, the Statute of the Ombudsman (art. 29/6), ruled that the unjustified breach of the duty of cooperation on the part of all public bodies and their organs or agents

³ Decree Law 212/75, from 21-4, Introduction, paragraph 3, and in fine article 5/2.

⁴ 1976 Portuguese Constitution (approving Decree by April 10, 1976), article 24: *«1- Citizens may present complaints concerning acts or omissions of public authorities to the Ombudsman, which enjoy no power of decision, to the competent bodies and addressing the recommendations necessary to prevent or remedy injustices. 2 – The activity of the Ombudsman is independent of graceful or legal remedies provided for in the Constitution and laws. 3 – The Ombudsman is appointed by the Parliament»*.

⁵ The Statute of the Ombudsman approved by Law 81/77 of 22-11, established at the outset, the duty of cooperation (Art. 27) that were required all public authorities in respect of the State body.

⁶ Constitutional Law 1/89, from 8-7. See the text of article 23/4 of the Portuguese Constitution, according to the changes introduced by Constitutional Law 1/89, 8-7: *«4. Organs and Public Administration agents cooperate with the Ombudsman in carrying out their mission»*.



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constitutes a crime of disobedience.

The powers of supervision and intervention of the Ombudsman has extended throughout the years. The first step was given when the military agents were allowed to, within certain limits; address a complaint against the military Administration, based upon harmful restraints of their rights and legitimate interests^{7,8}.

a) The intervention of the Ombudsman regarding infringement of Rights, Freedoms and Guarantees in the sphere of legal and private relationships - evolution over four decades

Another important step was given with the achievement of power to act in the private sector, what happened with its formal recognition in 1996⁹, focusing on relations between private parties, if they involve an especially dominant position where fundamental rights, freedoms and guarantees are implied¹⁰. From then on, the Ombudsman holds the power to intervene whenever fundamental or related rights, such as social, cultural and economic ones could be placed in danger, regardless of the sources of the damage.

The inability of the defence of citizens, in general, for the exercise of public authority, not always applied fairly, has been constantly in question. But the hegemony of their practice is not only given to the Public Administration, as there are other entities of private law whose powers are so broad (as they impose

⁷ See the regime complaint to the Ombudsman concerning national defense and armed forces.

⁸ See the text of article 2nd of Law 19/95, from 13-7. The military can only complain to the Ombudsman after they has had exhausting all hierarchical routes previously established by law or the deadline for lodging appeals has expired. See also art. 3/2. Even in these circumstances the complaint shall be submitted for information of the Chief of the General Staff of the Armed Forces or the Chief of the General Staff Branch, for pronouncement, after which they may be sent to the Ombudsman.

⁹ See the text of Law 30/96 of 14-8 – amendment of paragraph 2 of art. 2 of the Statute of the Ombudsman, approved by L 9/91, 9-4.

¹⁰ He can «... still focus on relations between individuals involving a special relationship domain, under rights, freedoms and guarantees».



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themselves as the only supplier or provider of goods and services), that it becomes necessary for individuals to call upon an independent mediator.

b) The intervention of the Portuguese Ombudsman as the guarantor of generic defence of Rights, Freedoms and Guarantees over the performance of private entities exercising public powers or providing general interest (Law 17/2013, from 18-2)

With the widespread privatization and concession of public services and the award of public powers to private entities, it became more urgent to safeguard and protect the individuals against the activity pursued by those. Although, with the amendment of the Statute, dated 1996, the horizontal area of intervention of the Ombudsman has become wider, it is certain that he cannot interfere directly in the activity of private entities during their business trading with citizens.

In a society which has tended to blur the boundary between public and private law, between the exercise of public authority and private trading in areas of public tradition, the Ombudsman expressed and the Parliament accepted the need to broaden his powers in order to protect the citizen when fundamental rights are in danger of being restricted during the relationship with such entities.

Currently, some public powers have been transferred from State to private enterprises. This transfer happened in areas where the management entities and the exercise of public powers have been conceded, sold, assumed as a public-private partnership and transferred from State to private enterprises. This occurred on areas essential to daily life of Portuguese people.

It is the duty of the Ombudsman to monitor their implementation and defend citizens in the protection of their rights and legitimate interests and protect the civil society against behaviours that are understood as limiting the fundamental rights of citizens.



Given the Portuguese social and political evolution, it became imperative to rethink the extension of the limits of intervention of the Ombudsman.

3. *Limits of the intervention of the Portuguese Ombudsman on civil society*

The evolution of citizenship in a democratic society intended to continue as a place of tolerance and respect for human rights obliges to question the limits of the powers of the Ombudsman in his pursuit of the principle of substantive justice and social interaction. So the Ombudsman intervenes, since its establishment, in addition to monitoring the constitutionality and legality of acts of the Public Administration, with the aim of pursuing material justice.

The extraversion of the activity of the Ombudsman manifested itself early on also watching other acts, whether public or private origin, which could jeopardize, or otherwise, restrict the legitimate rights and interests of individuals, since they could respect fundamental rights core. These rights are enumerated in the Constitution in an open catalogue, which allows to have in regard other fundamental and human rights which, although not written in the Constitution, have equal substantive relevance.

The Portuguese Ombudsman acts, first of all, follow complaints from individuals. These may be submitted by all residents in Portugal, regardless of nationality or even stateless people, without restriction of age.

His special mission is to solve small and large problems of citizens that took place in their day-to-day life that embitter them and weaken them. He represents the last resource to render effective the principle of substantive justice. But he can also act on his own, has primacy by a very dynamic interpretation of the implementation of their duties. Especially because the Statute¹¹ never led to an exhaustive list of activities that were allowed to engage in defence of

¹¹ As amended by Law 9/91, from 9-4.



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Fundamental rights.

Whether the Ombudsman should extend his intervention to resolve conflicts between individuals and with respect to disputes arising at the heart of civil society?

Let us distinguish, here, these types of actions.

Prima facie, the Ombudsman intervenes in civil society, immediately, in his capacity as “*a mediator*” regarding the effectiveness of the rights and freedoms in private law¹². First, through his standing to raise the assessment of the constitutionality of laws before the Constitutional Court, both in cases of successive abstract review of the constitutionality or legality of regulations as well the verification of unconstitutionality by omission¹³. His speech is more obvious because, as a rule, private interests cannot apply directly to the Constitutional Court and gain increased by the action of the Ombudsman protection. Here are concerned, among others, situations of racial segregation, by gender, religion, in hiring among private, relating to freedom of the press.

Moreover, in cases of violation of fundamental rights, occurred in relations between privates and when concerning the application of rules that hurt the contents of Basic Law, it is also possible for the Ombudsman to raise its assessment. What he does, immediately, advising the legislator to adjust the rules to the constitutional precepts (legislative recommendation), and to revoke it if it is deemed necessary.

The Ombudsman can still raise with the Public Defence Attorney Office the need to intervene in cases of contracts between privates which include clauses that hurt the Fundamental rights. This is a situation that is in accordance

¹² Cf. Gomes Canotilho, J.J., *Provedor de Justiça – 20.º Aniversário 1975-1995, Sessão Comemorativa na Assembleia da República, 30 de Novembro 1995*, Lisboa: Provedoria de Justiça, 1996, pp. 59 e ss.

¹³ Art.s 281/1 and 283 of the Constitution.



with the verbalization of “*extraversion*” of the powers of the Ombudsman^{14,15}. It is in this measure that the Ombudsman ensures «... *the unity of the legal order in the sensitive area of rights and freedoms*»¹⁶. This is and should remain a delicate balance between private and public, between freedom and social intervention to correct injustices that hurt the individual as a citizen of the *Polis*.

4. *The Ombudsman as National Human Rights Institution*

The vocation of the Ombudsman as tutelary of the fundamental rights of the Portuguese inhabitants has been achieved since its inception and manifested itself almost immediately by the insertion on the Fundamental Law of the figure (itself inserted in Part I of the Constitution concerning the fundamental rights and duties).

Innovatively, the Portuguese Ombudsman was instituted in order to defend human rights by checking the acts or omissions of Public Administration (this one as a more typical or classical function)¹⁷. But this is not the only role of the Ombudsman. His mission was primarily aimed to the protection of human rights, insofar as the Public Administration can adopt measures which are offensive of those rights, not only as it exercises its power, as well as when it performs the tasks expected of a Welfare State Administration.

So, I can say the constitutional and legal host (the Statute) as the jurisdiction of the State Body is a structuring element in the promotion and defence of human rights as comprehensive fundamental rights.

Human Rights, as expression of the Universal Law, promote and protect

¹⁴ I. e., the extent of its «... *action mediating the repair of illegalities and injustices committed by private versus public, in roundabout collision with rights and freedoms constitutionally enshrined*».

¹⁵ Cf. Gomes Canotilho, J.J., *idem*.

¹⁶ Cf. Gomes Canotilho, J.J., *idem*.

¹⁷ Cf. Ventura, Catarina Sampaio, *Direitos Humanos e Ombudsman. Paradigma para uma instituição secular*, Lisboa: Provedoria de Justiça, 2007, pp. 83 e ss.



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the integrity and respect of the dignity of the Human being. They are supranational with a ratio of natural law underlying the evolution of societies that right it down as formal law.

Since 1999, the Portuguese Ombudsman is accredited with “A” status, in full compliance with the Paris Principles, as a National Human Rights Institution (NHRI).

The Ombudsman, directly and immediately, protects and promotes the realization of human rights. What he does, immediately, by assigning a «... *dissemination function of the content of human rights* (pedagogical function); *award (...) the legitimacy to propose court affairs (...); power of legislative recommendations (...) on matters falling within the protection of human rights; power to recommend to the competent bodies to be bound by international conventions of human rights; preparation and dissemination of reports on the situation of human rights; jurisdiction “ratione personae” under statutorily define in relation to individuals*»¹⁸.

Where there is ground, the Ombudsman has the duty to frame the subject of complaints or the initiatives taken by him (in a transition from the particular to the general) from the perspective of human rights. To achieve this purpose, the Ombudsman has a range of formal and substantive law measures that go beyond national law, and include measures of international and European Union law, of which Portugal is a Member State, that can be used in relation to all residents.

The implicit diversity of human rights and the variety of forms of damage and offence to individuals or communities targeted by the entities concerned, impose the use of standards and measures that go beyond the strict formal criteria of legality. This includes national law, international law, Community law and moreover, international common-law in a dynamic interpretation to the ultimate goal of achieving human rights.

¹⁸ Cf. Ventura, Catarina Sampaio, *idem*, p. 85.



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The Ombudsman can promote the divulgation of cases argued in multiple parameters (for instance through the presentation of his annual reports to the Parliament or reports or sectorial studies, the recommendations made, and the pointed legislative omissions). He also fulfils a pedagogical role in publicity and education for human rights, promoting the means of defence which are legitimate to use at all times, particularly by submitting a complaint to the Ombudsman.

And we should stress the importance of this organ of State as a protector of the rights of minorities and the most vulnerable or fragile groups¹⁹. The Ombudsman promotes and also protects these groups, including their right to difference and cultural, social, economic integration from the perspective of legality and, above all, justice.

5. *Conclusive Synthesis*

We can ask to what extent the protection given to citizens should extend, without turning on interference in private affairs of civil society. It remains as an open subject, although influenced by the social reality and the experience of the State concerned.

Otherwise, as I once said, where, in the classical view of separation of powers, is a declared well-defined field (...) today this no longer happens because the bridges, links, synapses between the three "realms" are many more which adds. (...) Those "kingdoms" became little, what it does, of course, increase the territory of "nobody" ("nobody" in the sense, is good to see, traditional absolute separation). And it is precisely here that the Ombudsman enters the picture. The redesign of the strong and the soft powers, powers that the democracies of the

¹⁹ Among these we hold the prisoners, the elderly, children, women (especially in labour area), persons with disabilities, asylum seekers, among others.



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XXI century will involve manufacturing, of course, that one has to have a particular attention to the legal and political territory of the Ombudsman²⁰.

In a new age, a new millennium, where fundamental rights are consolidated what is required from the government is not so much the recognition of the intrinsic value of the fundamental rights of citizens but first and definitely the core problem of actual and real achievement²¹.

The problem of existing communities is not acceptance of "recognition" of rights, but that would almost entirely in - issue of "actual distribution" rights. That "all" recognize "the right" of all health, education, justice, security, safety, housing (...). The big problem, I shall repeat, is how to distribute the means to achieve that or those purposes. The Ombudsman of the XXI century must be aware of the illegalities and injustices and fight them. Must realize the hyper complexity the world today and to do everything that this not become an insatiable monster devouring sense and simplicity of human relationships. Has, more than ever, to mediate but with a mediation model that assumes that he, Ombudsman, is not an external element to the conflict but hopelessly a part of the relationship that has to be multifaceted solution²².

A fair balance between the actual and real achievement of fundamental rights of our fellow citizens and the protection of the area of freedom and happiness of which we shall continue to be mentors is the core of the XXI century Ombudsman.

It is this reflection that I bring today.

²⁰ Vide "Razões de uma razão (IV)", in *Diário de Notícias*, de 31 de janeiro de 2014.

²¹ Vide "Razões de uma razão (III)", in *Diário de Notícias*, de 4 de dezembro de 2013.

²² Vide "Razões de uma razão (III)", in *Diário de Notícias*, de 4 de dezembro de 2013.