



PROVEDOR DE JUSTIÇA

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### The Ombudsman and the crisis of the Nation-State<sup>(\*)</sup>

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1. *Our time, which is a time of late modernity, has witnessed a visible decline of the Nation-State. This decay, prompted by both globalisation and hyper complexity arising from the superposition of legal orders, materialises in the fragmentation of the State and its specific sovereignty powers as we used to conceive them. This state of affairs, favouring the appearance of faceless powers and the citizens' feeling apart from the State, may be seen critical from the point of view of the respect for the rights of the citizens.*

Arising from the proto-modernity and yet presupposing centuries of collective-building, the State has evolved into the so-called Nation-State in the wake of the revolutionary assertion of the rights and liberties of the individuals as well as of the separation of powers, in struggle with the *ancient régime* and the archaic privileged-based society embedded therein.

Historically preceded by Jean Bodin's theorisation and the Peace of Westphalia landmark, this transformation ought to be seen as part of the state-strengthening process. It carried out a decisive creative significance, as centrality was given to the people, defined as nation, the development of the idea of the Nation-State denoting the conscientiousness of an identity, an ordering catalytic strength within the frame of the territorial sovereign State.

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<sup>(\*)</sup> This text has had the collaboration of Catarina Sampaio Ventura, Legal Adviser to the Portuguese Ombudsman.



Although one can acknowledge the lack of linearity in the path of humankind and the way communities of persons have been organising themselves, through the times, under the umbrella of a unique and differentiated corps – which is the State as a ruling entity –, our time of late modernity has witnessed a visible decline of the State. This decay evidences the contemporaneous crisis of the Nation-State.

In fact, the idea of State, built upon the contour of long and well-established assemblage of powers – legislative, executive and judicial – has fragmented as globalisation and hyper complexity resulting from the superposition of legal orders (national, supranational and international) – *i.e.* the idea of multilevel legal orders – load with dense penumbra the exercise, if not the source itself, of sovereign power.

In a synthetic formula, one can uphold that the Nation-State and its specific sovereignty functions came into crisis not only due to exogenous circumstances but also by reason of endogenous conditions, which, in any case, flow into the disarticulation and the disaggregation of the State, as we used to conceive it.

Externally, the State is increasingly being pulled to supranational political, economic and financial spaces, to which exports parcels of power and from which citizens feel apart. This parting is all the more accentuated since our time is one of nebulosity and uncertainty, intensified by the continuing economic and, all the more, financial crisis.

Internally, one can draw attention to the great changes that the State has undergone – and continues to undergoing –, owing to the privatisation of some of the tasks and functions that have been for decades sacredly attached to the Nation-State, including in social matters – *v.g.* in the education and health realms.

On the other hand, side by side with this fragmentation of the Nation-State, we witness the spread of an invisible, however very palpable, globalisation phenomenon, which turns worldwide economic, cultural, informative and communicational spheres, going far beyond the frontiers of each State, within which beforehand operated.



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Thus, the State is bloodless as sovereignty dilutes and grey zones spread, favouring the appearance of faceless powers or, otherwise, the rise of multiple instances of micro powers.

Hence, considering that the State increasingly appears dissociated from the real and concrete individuals and finds itself in a process of proclaimed search to restrict its sphere of action to a minimum, it is not therefore surprising that citizens are being assaulted by uneasiness. Moreover, citizens feel profoundly insecure with regard to compliance with fundamental principles and rules that compel the organisation of the *res publica*, as well as the discourse of deconstitutionnalisation spreads.

In the just aforementioned context, this time of profound crisis of the Nation-State may easily be perceived by citizens as a moment of critical attack on their rights and, indeed, debate on public measures relating to the organisation of our collective life reveal realms for concern and conflict, as life conditions of each citizen, individually considered – woman or man of flesh and bone – may deteriorate.

2. *In a context of profound crisis of the Nation-State and bearing in mind the specific “DNA” of the Ombudsman institution, it is crucial the stronger affirmation of this State body as a soft law mechanism for the defence of citizens against injustice and illegality by public authorities. The role that the Ombudsman may play in our time of crisis is not unanticipated since the institution was born within the process of state-strengthening itself, as an integral part of it, and has proved to successfully succeed in different legal orders worldwide. As far as Portugal is specifically concerned, the nearly immediate constitutional reception of the Ombudsman as an independent State body that is placed at the heart of the fundamental rights regime should be highlighted in the domestic moulding of the institution.*



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In view of such sombre landscape, the availability of effective mechanisms for the protection and promotion of the rights of the citizens is crucial and, being so, as regards the institution of the Ombudsman, its unique “DNA” paves the way for a major role of this non-judicial mechanism in the defence of citizens against injustice and illegality by public authorities.

In every Nation-State based on a pluralistic democracy and the rule of law, guarantee of the rights of the citizens can only be effective when, in case of threat thereto or violation thereof, independent mechanisms are available and accessible to the aggrieved persons.

Notwithstanding the fact that everyone ought to be guaranteed access to the courts in order to defend his or her rights, in a state of affairs stained by intensified dissonance and malaise – as the crisis of the Nation-State affects citizens’ sentiment with regard to the accomplishment by the State of the intentionality to care of their rights and propels social welfare –, it is vital the stronger emergence of a *soft law* mechanism as the Ombudsman with its typical characteristics of *independence, informality, flexibility and celerity*, without prejudice to the availability of judicial protection mechanisms.

Going back the year 1809, in Sweden, it should be previously recalled that among other aspects in the reforms introduced following the deposition of the King, the establishment in the same year of the *Justitieombudsman* (JO) – Parliamentary Ombudsman – is to be understood as an integral part of a system of “*checks and balances*” in the exercise of public power, with the main purpose to safeguarding the rights of citizens.

Subsequently and inspired by the Scandinavian paradigm, the institution of the Ombudsman predominantly spread after Second World War. This generalised acceptance of an institution with the characteristics of the Ombudsman cannot be dissociated from a demand to tackle the issues of the *insufficiencies* or, otherwise, the *incompleteness* of classical control mechanisms (political/parliamentary, administrative



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and judicial) over public administration, or otherwise to *complement* those traditional control instruments.

Insofar the Ombudsman does not assimilate to any of the typical State powers – legislative, executive and judicial –, the crucial distinction which is vested in the institution is revealed by *specific control and recommendation powers* over public authorities, with the main purpose of defending the rights of citizens.

As far as Portugal is concerned, the reception of the Ombudsman institution is meaningfully representative of the significance of endowing the State with a non-judicial mechanism of this kind, and paves the way for a reflection on the role that the Ombudsman can play in our time of crisis of the Nation-State.

Differently from those countries embracing the Ombudsman institution within a landscape where the democratic and the rule of law principles were already deeply engrained in, in Portugal the *Provedor de Justiça* flourished following a moment of rupture revealed by the 1974 Revolution.

By reason of these specific historical and political circumstances under which the institution was shaped, the Portuguese Ombudsman emerged as an integral part of the process aimed at affirming democracy and basing the State on the rule of law and respect for fundamental rights and freedoms.

This very particular context decisively contributed to the modelling of the *Provedor de Justiça*, since its origin, as an independent non-jurisdictional mechanism for the protection and promotion of fundamental rights. The strong evidence for what has just been mentioned lies in the constitutional and statutory framework within which the Portuguese Ombudsman performs his duties.

Having been originally established in 1975 by legislative act (Decree-Law n.º 212/75, of 21 April 1975) the institution of the Ombudsman was soon afterwards enshrined in the 1976 Constitution of the Republic. Moreover this *immediate constitutional incorporation* of the *Provedor de Justiça*, the systematic insertion of the institution into the Fundamental Law is also substantially significant. As a matter of



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fact, the provision of the 1976 Constitution relating to the *Provedor de Justiça* (Article 24 in its earliest version, corresponding to current Article 23) is placed within Part One on “Fundamental rights and duties” and, more concretely, within Title I ascertaining the “General Principles” in this domain.

Accordingly, while founding the institution of the *Provedor de Justiça*, the model of Ombudsman embraced by the constituents was that of an independent State body, elected by the Parliament (thus established within a strengthened process of legitimation) and primarily mandated to guarantee fundamental rights.

As for other legal orders, it is unequivocal that national constitutional and legal circumstances particular to each country may determine different moulding of the institution of the Ombudsman. In any case, we do not hesitate to recognise an Ombudsman whenever certain essential characteristics are met: in any part of the world, the role of intermediary between individuals and the administration is placed at the heart of the institution’s mandate, the *independence* (duly institutionally safeguarded) being “the alpha and the omega” of the Ombudsman.

3. *The searching for the strong reason for the added-value of the work of the Ombudsman as a guardian of the rights of the citizens in a time of crisis of the Nation-State convokes different matrixes embodied in the Ombudsman institution.*

With the powers to investigate, recommend both corrective and preventive action to public authorities, and issue reports, where can the strong reason be found in order to recognise the importance of the work of an Ombudsman as a guardian of citizens’ rights in a time of crisis of the Nation-State? The answer is observably not univocal rather convokes different matrixes embodied in the Ombudsman institution so as to sustain the perspective this reflection is directed at.

We will attempt to, in short, highlight some of the most expressive.



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a) *The accessibility to the Ombudsman and the capacity to listen to the complainants. The right to complaint to the Ombudsman endows each individual with the power to intervene and have a voice whenever confronted with what is perceived as an offence to the rights of the citizens in the realm of action of public powers. Accordingly, contrasting with its fragmentation and a sentiment of predominant “invisible hands” in the conducting of the res publica, the State, through the Ombudsman, regains a body with a specific availability to listen to the fellow citizens, easily recognisable by the latter as an institution that cares for the defence of their rights.*

First of all, the *accessibility* to the Ombudsman. The right to complaint to the Ombudsman is well enshrined in the constitutional tradition of the right to petition, its recognition endowing each individual with a non-insignificant power to – acting singularly or collectively – intervene and *have a voice* whenever confronted with what is perceived as an offence to the rights of the citizens in the realm of action of public powers.

The exercise of an *active citizenship* allied with the single *capacity to listen* of the Ombudsman give room to elevate the level of citizens’ rights protection and promotion. In fact, even in circumstances of fragmentation of the Nation-State and a sentiment of predominant “invisible hands” in the conducting of our collective and, ultimately, each individual life, the Ombudsman remains as a State body with a *visible human face*, feeding its personalising function. By other works, contrasting with the toning down of a people’s genuine identity marks, the State, through the Ombudsman, regains a body with identity, easily recognisable by the citizens as an institution that cares for the defence of their rights.

From the point of view of the citizen who claims the bitterness of an injustice or illegality by a public authority and often collides with the anonymity and dematerialisation in the administration of the *res publica*, this that we label as an *absolute institutional availability of the Ombudsman to “listen” and “feel” the complaints or their*



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*antechambers, the “lamentations”, of their fellow citizens* helps to ensure the respiration of a community organised as a State, above all when the ruling corps declines.

In addition, access to the Ombudsman is typically free of charge and materialises, as we all well know, in a very informal way, as both for the means to addressing the complaint and its content (namely, no sound legal argumentation being required). Thus, the Ombudsman is distant of excess of bureaucracies and formalisms, an easy access to the institution granting citizens – *particularly those who find themselves in a vulnerable situation* (for example, unemployed, children, the elderly, migrants, inmates) – an effective safeguard to their rights.

*b) The power of the Ombudsman to act on his or her own initiative.*

*Due to this empowerment, the Ombudsman is institutionally available to be open to the surrounding environment and to its circumstances, as well as to maintain a very high degree of vigilance. Accordingly, whenever faced by degenerating situations concerning the level of protection of citizens’ rights, the Ombudsman can play a major role by impelling by own motion the alert to the need for change. This stance of systemic analysis places the Ombudsman institution far beyond of a mechanism of individual redress and endorses its leading role, driving forward structural changes, often suggested by the real life shown through the complaints kaleidoscope.*

Further than the complaints, the capacity of the Ombudsman to feel the pulse of citizens’ grievances, as already above suggested, is crucial, as differently from a court – whose intervention only occurs once an action has been introduced –, the Ombudsman is generally empowered to *act on his or her own initiative*. As we absorb it, being an Ombudsman entails the *ethic of commitment*. Accordingly and again, in our time, the Ombudsman ought to be institutionally *open* to the surrounding environment as well as to its circumstances, and maintain a very high *level of vigilance*, since the institution can play a major role by impelling the alert to the need for



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change, whenever faced by degenerating situations as far as respect for citizens' rights is concerned.

Likewise, whether the Ombudsman acts “*motu proprio*” or rather following a single complaint, and acknowledges that a public authority had not comply with the exigencies of legality or justice by which should abide, the Ombudsman's intervention can go beyond the frame of the individual situation and take on a more general impact, in favour of a broadened group of citizens. This stance of systemic analysis, carried out by the Ombudsman, places the institution far beyond of a mechanism of individual redress and endorses its leading role, driving forward structural changes, often suggested by the real life shown through the complaints kaleidoscope.

*c) Proactivity and equidistance.*

*Differently from a typical repressive control mechanism, the Ombudsman engages in a proactive, cooperative and persuasive kind of control of public powers. The institution acts in view of facilitating dialogue between the citizen and the public authorities, getting positions nearer whenever possible. Moreover, the Ombudsman's capacity to persuade to change is potentiated by the equidistance with which the institution investigate the situations complained off.*

Moreover, the Ombudsman is not by nature a repressive control mechanism of public powers. Differently, the institution engages in a proactive, cooperative and persuasive control. Being equidistant – the Ombudsman is not a lawyer defending a constituent – he or she can try to mediate a conflict, facilitating dialogue between the citizen and the public powers, getting positions nearer, always in search for a just solution. And this, with enormous benefits for the transparency in the exercise of public powers and, consequently, for the citizens comprehension of the regulation of collective life.



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*d) The impact that the work of the Ombudsman can have on the conformation of the legal order.*

*Notwithstanding the fact that the intervention of the Ombudsman is merely recommendatory or persuasive, the work carried by the institution can also have a significant impact on the conformation of the legal order, beyond the resolution of singles cases of misadministration, by way of addressing legislative recommendations, pointing out shortcomings in the law, where the Ombudsman's national enabling legal framework so authorises. In addition, as occurs in the case of the Portuguese Ombudsman, impact on the conformation of the legal order may arise following an initiative by the Ombudsman before the Constitutional Court in the realm of constitutional abstract review.*

Notwithstanding the fact that the intervention of the Ombudsman is merely recommendatory or persuasive, the work carried by the institution can also have a significant impact on the conformation of the legal order, by way of addressing legislative recommendations, where the Ombudsman's national enabling legal framework so authorises.

Indeed, the Portuguese Ombudsman, as many other Ombudsmen empowered to make legislative recommendations, does not only seeks redress whenever a public authority fails to act in accordance with the principles and rules which are binding upon it. Each and every time that the *Provedor de Justiça* finds inadequacies, it is within his competence to point out shortcomings in the law and to make recommendations concerning the interpretation, the amendment or the revocation of the relevant provisions, as well as to make proposals for the drafting of new legislation. As for the latter, by doing so the Ombudsman may again impact the legal order when, for example, suggests the adoption of new legislation where the lack of the law seriously reflects in the safeguard of the rights of the citizens.



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Moreover, we would like to specifically mention the *locus standi* of the Portuguese Ombudsman with regard to constitutional review. Indeed, by means of the successive abstract control, the *Provedor de Justiça* may request the Constitutional Court to declare, with generally binding force, the unconstitutionality of any legal rule or specific instances of illegality, a positive ruling implying the elimination of the rule in the legal system. As for the control of the unconstitutionality by omission, the *Provedor de Justiça* may request the Constitutional Court to verify any failure of the legislator to comply with the Constitution by means of the absence of legislative measures required to make constitutional rules executable. Once the Court confirms such a failure to comply with the Constitution, the legislative body is notified thereof and, as a result, is expected to enact the missing legislation.

The access of the Portuguese Ombudsman to the Constitutional Court is not confined to the purpose of guaranteeing fundamental rights, but encompasses more generally the guarantee of the Constitution as a whole. Nevertheless, one should highlight that the initiatives of the Portuguese Ombudsman before the Constitutional Court focusing on fundamental rights issues represent a significant mean of “indirect guarantee” of those rights, as citizens do not have direct access to the Constitutional Court as far as abstract control of constitutionality and legality is concerned.

### 4. *Concluding remarks*

We have attempted to underline some of the matrixes embodied in the Ombudsman institution, sustaining the capacity of the Ombudsman to arise, with even more strength, in times of decline of the Nation-State. Last but not least, we should bear in mind that the narrative territory of an Ombudsman is the *search for justice*, in the limits of the search of the just solution for the case, and, within this “genetic code”, that the mission of an Ombudsman is to *go further beyond and deeper*.



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In sum, due to strong institutional features of the Ombudsman, we can conclude that, in a time where we face multilevel instances of power, whose decisions have significant impact in the lives of the citizens, the Ombudsman assumes, within the Nation-State, a singular link of *proximity to the citizen*, in contrast with the growing complexity and anonymity in the exercise of public powers.

The Nation-State, though threatened, has not disappeared. Though with metamorphoses, the Nation-State resists. Therein, we saw the institution of the Ombudsman born within the state-strengthening process. Thus, also an integral part of the Nation-State, surviving for more than two centuries. Alive as maybe never before, the Ombudsman – a non-evanescent institution (symbol of a “*universal Esperanto*”?) – has proved to affirm its own identity within the specific complexities of our time and its institutional capacity to defend and elevate in this this time of profound crisis the fundamental rights and freedoms of fellow citizens.