

**JUSTICE ADMINISTRATION
AND THE DEFENSOR DEL PUEBLO**

by

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Dr. Jorge Luis Maiorano*

1. INTRODUCTION

The celebration of the Ibero American Ombudsman Federation Conference, which gathers us today in this historical city of Toledo, is the adequate opportunity to deal once again with the relationship between Justice Administration and the Defensor del Pueblo.

The interest in establishing the boundaries and the manner of the relationship of the Judiciary and the Defensor del Pueblo has increased remarkably in the last years. Thus, the First Conference on Ombudsmanship which was held in Puerto Rico, in 1991, dealt with "The Judicial Ombudsman"; the Regional Seminar: "Ombudsman, Democracy and Human Rights" the same year in Bolivia also included a chapter on this issue; the International Conference organized by the Human Rights Commission in Mexico, in 1993, was titled "The Judicial Ombudsman. International Perspectives"; the Ombudsman Conference in Australasia and the Pacific, organised by COMAC in New Zealand (1994) and Hong Kong (1995) included some papers on the "Ombudsman Jurisdiction in Relation with the Courts and Tribunals" and "The Ombudsman and the Judiciary". The same occurred in the International Conference in Taipei in 1994 while one of the Workshops carried out in the VI International Ombudsman Institute Conference held in Buenos Aires, last October analyzed "The Judicial Ombudsman".

Undoubtedly, harmonizing the task carried out by the Judiciary and that of the Defensor del Pueblo is a matter for consideration and growing concern. Therefore, this paper aims at sharing with you some points on this issue, though I suspect I will not be able to exhaust all its diverse aspects, which will certainly be discussed in the corresponding debates.

I believe I can now understand the generalized thought all Ombudsman Office holders share in Ibero America and, specially, in Latin America on this issue which had not been a priority at the time our countries adopted the institution of the Defensor del Pueblo, Human Rights Procurator or Human Rights Commission. Having adapted the classical Scandinavian Ombudsman model created to act against maladministration and administrative mistakes, the Defensor del Pueblo was born with a deep commitment to the protection of those human rights which were openly infringed in the 80's, i.e., life and freedom. Nevertheless, the stronger these offices became in the social framework and the institutional system, the greater the challenges they had to face.

At present the Defensor del Pueblo is not only a main character in all peace processes, in the restricted sense of the absence of armed conflicts, but the institution has also played an

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important role in the supervision of economic, social and cultural rights against social inequality in the framework given by neo-liberal economic policies which have spread in this area. Likewise, the Latin American Ombudsman is also involved in the protection of the so-called “third generation rights” or “solidarity rights”. Every day we are facing the requirements of citizens who are no longer satisfied with only their rights to a life, freedom or dignity. The inhabitants of our countries are now demanding a better life quality which implies much more than respecting their life or freedom.

It would be fair to consider how difficult it was to introduce the figure of the Defensor del Pueblo in Latin American countries; how difficult it was to convince authorities of the benefits these institutions could bring; how long we had to wait to have our countries judicially normalised. These and other obstacles were overcome and, at present, we can proudly show the world all the achievements made in these areas.

Nevertheless, some recent situations call our attention: the threats to the physical integrity of some colleagues; the budgetary restrictions which limit the work of some Offices; the judicial action filed by the Procurator of the Republic of Venezuela to do away with the figure of the Defensor del Pueblo of Merida State; and the repeal of the designations of the Human Rights Procurator and Under Procurator for Nicaragua are signals we should not forget since they could, unfortunately, multiply.

2. JUSTICE ADMINISTRATION—DEFENSOR DEL PUEBLO: A SINGULAR RELATIONSHIP

This introduction over, I will now draw your attention to what I have decided to call a singular relationship: Justice Administration and the Defensor del Pueblo. Firstly, let me point out that the Judiciary has traditionally been one of the powers which voiced the strongest opposition to the Defensor del Pueblo. At least from the theoretical point of view, the resistance to our Institution is stronger from the Judiciary than from the Public Administration itself. From the classical affirmation Drago made when he said, almost soberly, that “the best Ombudsman is the State Council” to the need I had some months ago to resort to an international organ to denounce the justice denial on the part of my country’s Supreme Court, we can often find examples of a relationship which has not always been harmonious and which has sometimes stood out for a lack of understanding of our functions.

During the International Conference held in Mexico City in 1993 when I could only show a deep interest in this figure, a deep academic interest and a strong personal conviction towards its benefits, I wondered whether the Ombudsman and the Judiciary could be joined not weakening the independence of the first or denaturalising the other. I considered that a negative answer seemed to flow naturally since an extrajudicial organ controlling the Judiciary would be an open negative to one of its inexcusable features: its independence. Nevertheless, in that opportunity I said, and I repeat it from the rich experience gathered from every day life, that two supplementary but diverse aspects should be differentiated: a) the strict function of administering justice, i.e., the juristic function which is mainly characterised by its a) independence and b) the function of courts as a public service.

We are confronted with two distinct situations which are easy to differentiate: on the one hand, the Judiciary, comprised of judges and magistrates who exercise the jurisdictional power through their judgements and the application of their decisions; on the other, justice administration which exceeds the limited framework of the judiciary and includes the correct functioning of the judicial power as the service of justice.

Without a doubt, no one, not even the Ombudsman, can get involved in the exercise of the jurisdictional power which belongs exclusively to the Courts. It is everyone's duty, even ours, to respect and acknowledge the exclusive competence of the Jurisdiction to judge and apply what has been judged as well as the independence of the judgement function. But this independence must be understood as hierarchical and functional, not as the synonym of a lack of responsibility which may allow the judicial organ to leave the Constitution and the law behind. The words expressed by Alvaro Gil Robles may sound classical in this sense:

“Independence has nothing to do with the act of fulfilling the public service of justice with efficiency and promptness, i.e., the duty to go to court, to make decisions, to hear the parties, to guarantee the clerical task, to guarantee that no documents will be lost and that decisions will not take eight years. All this has nothing to do with the independence of justice, it is related to the sphere of the public service, the functioning of the judicial office”.

Then, if the Ombudsman does not invade or interfere with the functions of the judiciary, its independence will not be infringed or harmed. If the jurisdiction of the Defensor del Pueblo includes the non-jurisdictional activities of the Judiciary, the office of the Defensor del Pueblo will not be denaturalised lest in the exercise of his powers he keeps the features of a mediating and conciliatory organ. In my opinion, the value of this question depends on the profile the Defensor del Pueblo adopts in his analysis of the administrative failures of the Judiciary. If he does so from a censor's point of view, he may find some resistance, but if it offers himself as a critical collaborator who is seeking solutions, not guilty persons, his task will be acknowledged and he will be considered as one who tries to cooperate to uphold Constitutional values and principles.

Is the Judiciary weakened or strengthened when the Defensor del Pueblo controls the material and instrumental function of the justice? With no hesitation, I may say that, considering the boundaries already described, the action of the Defensor del Pueblo aids to strengthen the Judiciary before the public opinion. I can remember our dear and respected Eduardo García de Enterría who, in his recent work “Democracy, Judges and Administration Control”, points out the duty to build or restore the “public confidence” in the institutions, which is currently weak and almost lost. He expresses that “the current situation of the democracy calls for an immediate strengthening and, somehow, the relaxation of controls”. The Judiciary can not remain aloof to this affirmation which, on the other hand, brings a cruel reality to light. Before the lack of confidence in Justice, before the constant questioning of its efficiency and the general feeling of impunity which surrounds us, the Defensor del Pueblo can stand out as a means to collaborate with its criticism. He can show an x-ray of the dissatisfactions of the people; he stands as a worthy alternative to defend the right to a jurisdiction. Lastly, he is the qualified mediator from his condition as a non-governmental state institution which acts with full independence and is related to the human being, not to files.

During the International Conference in Mexico, I said that the Defensor del Pueblo must appear before the Judiciary in the following framework: a) he must become an organ which, from its control and supervisory function, shows a collaborating calling; i.e. he offers himself as an aid, not an obstacle; b) he must not invade the jurisdictional function, he can not modify or revise judicial decisions; c) he can not forget that the right to effective judicial supervision is a human right which makes him legitimate, not only to act in the exercise of power but also to fulfil an imperative mandate.

3. THE ARGENTINE SITUATION

Let's consider some examples of the relationship between the Justice Administration and the Judiciary, with special reference to the task carried out by the Defensor del Pueblo of the Argentine Nation.

As it can be seen in most Institutions, the Defensor del Pueblo of my country was designed by the *National Constitution* passed in August, 1994 as an organ with a two-fold mission: to control and to supervise. "Control upon the exercise of public administrative functions" (thus, its function involves individuals and companies which are holders of contracts for the rendering of public services) and control upon "deeds, acts and omissions of the administration" including all the organs which exercise the administrative function (section 86 of the *National Constitution*).

The mandate to supervise is defined in this section when the Defensor del Pueblo is entrusted with the "defence and protection of human rights, other rights, guarantees and interests protected by this Constitution and the law...". Section 43 of the *Argentine Magna Carta* involves this office in the defence of "the rights which protect the environment, the competence, the user and the consumer as well as those rights of collective incidence... and against any other form of discrimination...".

With respect to the Judiciary, the organic law of this Office, No. 24.284, passed before the constitutional reform, excluded "the Judiciary, the Legislature, the Municipality of Buenos Aires City and the defence and security organs" from its jurisdiction (section 16, *in fine*).

From the comparison made of the mentioned rules, it could be said that the *Argentine Constitution*, which is more recent and superior in rank than the act mentioned, extended the jurisdiction of the Defensor del Pueblo in relation to the classical framework this legislative rule originally established. It is evident that the sections of this law, up to this date, follow neither the text nor the spirit of the Constitution and, therefore, a legislative initiative was introduced in order to adapt the organic law to the constitutional rules.

When it was necessary to design the internal structure of the Institution, we considered the need of creating the Justice Administration Area which, according to the Constitutional dispositions, would intervene in issues such as "prison facilities and the assistance services therein; forgiveness proceedings and pardons; registration of legal background of tried people; extradition proceedings; registration of property and rights of the people; schools and associations of professionals; commercial organizations and non-profit associations; the exercise of administrative functions by judicial organs".

In fulfilling this mandate, the Institution began to receive several complaints on delays in judicial proceedings from different parts of the country; proceedings started as a consequence of problems with inmates in Federal and Provincial penitentiary centres and problems in the registration activities performed by the State. On approaching judicial magistrates denouncing, for instance, the loss or misplacement of a legal file or delay in proceedings, we resorted to the idea of a "request" instead of the classical "recommendation". This term answers the principle before mentioned that the Defensor del Pueblo does not pretend to get involve in the exercise of the jurisdictional function. A "request" is a common term in my country's procedural law and it is used, for example, by magistrates of diverse jurisdictions to communicate among themselves: "I request, exhort and inform"—far from understanding this as an order or imperative synonym. Referring to the Judiciary in a request makes the Ombudsman more prestigious, in my opinion. This "request" or "exhortation" is not made by an attorney or party but by a State Institution, with a Constitutional origin and qualified legislative support. The use of this term, in my opinion, leaves in the magistrate's hands the responsibility to pay attention to the request or to leave it aside. He or she accepts the consequences of the decision.

With the obvious understanding of the profile that the Defensor del Pueblo of the Argentine Nation has imposed in his relation with the Judiciary, most Federal and Provincial Courts and magistrates have answered the communications sent. From the decision to rebuild a judicial file whose loss had been denounced to the instruction made by the National Electoral Board to the Federal judges reminding them of the strict fulfilment of the legislative rule which guarantees the so-called "feminine quota" in election lists, a wide variety of examples evidence the generous collaborating and co-ordinating relationship established with the Judiciary. There was the case where a magistrate, a member of a Social Security Appellate Court, requested the assistance of the Defensor del Pueblo in order to make the pension administrative authority fulfil a judicial decision.

Nevertheless, the following singular case I would like to share with you is, unfortunately, the exception to this rule.

After some days of taking office, in October 1994, I received several complaints lodged by retired persons who reported the delay by the Argentine High Tribunal in resolving their proceedings related to social security rebalancing. The majority of the cases lodged to the Institution reported a delay of more than three years and said situation affected more than 65,000 persons.

Based on the aforementioned Article 86 of the *Argentine Constitution* and considering that the delay showed a virtual injustice, a copy of the presentation made by one of the interested persons was sent to the Supreme Court of Justice so that the Court would make a decision on the problem of the complainant. In the same resolution, the High Tribunal was requested to foresee the mechanisms that would eliminate or diminish the delays on the decisions related to social security claims.

This Tribunal refused the presentation stating that the Defensor del Pueblo lacked competence to make requests of the Tribunal on pending cases. The affected persons continued asking the Institution of the Defensor del Pueblo to help them, so at the end of year 1995, I appealed to our High Tribunal requesting to be considered as party in all proceedings related to the updating of pensions and retirements; consequently, I requested a quick conclusion of this matter stating the reserve of appealing to the Inter American Commission of Human Rights.

The presentation was based on the Institution's right to sue and be sued (section 86 of the *National Constitution*) and against the violation of the right to jurisdiction. At the moment of appealing to the international commission, it was taken into account that the *Inter American Pact of Human Rights* is incorporated into the Argentine legal order, with preference to the legal act and section 25.1 of that legal body that foresees that "everybody enjoys the right of a quick and simple legal proceeding or of other effective recourse before the competent courts protecting him/her against the acts that violate their fundamental rights".

The Argentine Supreme Court insisted on its position of refusing the petition stating that the Judiciary was excluded from the competence of the Institution by the aforementioned act 24.284; that the Defensor del Pueblo was not authorised to investigate the Judiciary's concrete activity and that, consequently, he was not legally authorised to start an action or submit petitions before a judicial organism in respect of conduct of any kind carried out in the scope of the Judiciary's mandate.

The specialized doctrine criticized this statement and argued the non-compliance of section 86 of the *National Constitution* and the circumstance that, when the head of the Institution asked to be considered party to the conduct, his intention was not to investigate the legal activity; but to request the resolution of the legal cases that affected "a beehive of harmed people", i.e. a social dimension that with solidarity shares other similar interests.

In virtue of the reservation made, the presentation to the Inter American Commission of Human Rights was carried out at the beginning of October 1996. The grounds of the aforementioned writing reminded that "the time of the proceeding must be considered and valued as the time of the interested person's life that takes part in the proceeding... it must not be measured as a chronological time, but as a biographic time, because it regards a human being's life ...nobody wishes deaths during life ...it would be convenient that judges were extremely sensitive to the procedural time problem, apart from clocks and calendars, living it as the life time of a person claiming for the administration of justice... but the time of existence of each living being is his/her time, the sole time existing and lasting for him/her, and upon its consumption, everything occurring to him is lost, terminated to its unique I and not to another..."

The Argentine public opinion was touched by this presentation. The doctrine defended this presentation with firm grounds but it was questioned for considering that a government body might not sue its own State. Obviously, those who had considered this had not understood that the Defensor del Pueblo is a government institution, independent of the governing political party; that his capacity to sue and be sued enables him to sue the State and in this case the respect to human rights to jurisdiction was in danger.

After two months and eighteen days of presentations to the Inter American Commission of Human Rights, the Supreme Court of Justice of my country decided upon one of the pending complaints; thus stating a valid criterion for the remaining 65,000 cases. The Supreme Court took into account the complainants' claims and made the appropriate readjustments. As mentioned in my 1996 Annual Report on the Institution, today we can be proud of our contribution to the problem set forth four years ago.

What has happened makes me consider the importance of our Institution's ability to appeal to

international organisms when national instances are exhausted. In this concrete case I have just mentioned, the international proceeding was undoubtedly showed as a valid mean to finish with injustice. I cannot hide that such a procedure surely implies a high political cost for the person who set it forth. Without prejudice of the aforementioned, I wanted to tell this case with details for future cases. I am really convinced that the Institution has been strengthened because it has showed society that it is not linked to political parties; that the Defensor del Pueblo exercises its competence with full functional independence and that the phrase "it does not receive orders of any authority" has legal and sociologic validity (section 86).

4. CONCLUSION

I conclude this paper stating that the theme "Administration of Justice and Defensor del Pueblo" is not exhausted; but instead due to the values it includes, this subject can never be considered finished. The right declaration is not enough without institutions and techniques that enable its effective implementation. The guarantees are here. The Defensor del Pueblo is a guarantee that enables the full exercise of rights. The Defensor del Pueblo functions as a collaborator, co-ordinator of the Judiciary, never as a competitor. He respects its independence but claims his own.

In 1993 when I did not know that the Providence was going to grant me the privilege of assuming the responsibility of creating the Constitutional Institution of the Argentine National Ombudsman, I said that "justice is one of the most required values by human beings. This value, an essential part of the Ombudsman's task, must always guide our acts. We, all together with our efforts and wills must make the justice, beginning and end of human jobs, shine and strengthen in our respective countries. Justice must improve legal regulations and really protect Human Rights".

Today, knocked by the reality in which we live, I consider that all Defenders, Procurators, Human Rights Commissions are united by the emotional psalm of the book of Deuteronomy of the Old Testament that reads: "You shall pursue justice, justice" and I state that our Institutions are a song to rebelliousness and a bet to solidarity.