THE OMBUDSMAN AND THE MYTH OF JUDICIAL INDEPENDENCE

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I. Introduction: The Ombudsman Notion

"Ombudsman", "Citizen's Aide" and "Public Complaints Commissioner" are terms which represent, as we all know, a more or less equivalent concept. There are, of course, other phrases which are also used to express the same idea. But, they all enunciate the existence of a representative, a defender or advocate who lightens the load of bureaucratic government - an essential characteristic of modern public administration - carried on the shoulders of our less fortunate citizens.

This, however, does not mean that the ombudsman has the same powers and functions in all jurisdictions. As stated by Ramón A. Guzmán, Professor of Law of the Catholic University of Puerto Rico, the ombudsman is a juridical institution drafted and limited by the principle of legality:

> The ombudsman institution is not abstract; it cannot be evaluated from the standpoint of anti-juridical perspectives. The ombudsman is what the law says he is; his jurisdictional scope is as prescribed by law, his powers are what the law prescribe."[1]

From this, we can discern that close scrutiny of each country's legislation must be undertaken when we discuss the ombudsman concept. Nonetheless, it must be pointed out that, in all jurisdictions, the qualifications of the person designated to the position must start with his honesty and integrity as essential elements of his effectiveness. Experience shows that proper designation guarantees the success of the institution wherever it has been established.[2]

In the democratic exercise of the right to petition the government for redress of grievances, the ombudsman I know works as a bridge which communicates our most needy citizens[3] with the agencies and employees of the executive branch. In the Commonwealth of Puerto Rico, statistics confirm that the bridge works because redress is obtained in about 72% of all instances.[4]

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Here, as in the rest of the United States, there should be no reason why this instrument of democratic control should not be extended to the judicial branch.[5] After all, not only does today's modern judicature constitute an integral part of bureaucratic government but, as in the case of its executive counterpart, the establishment of an adequate independent mechanism of control is also needed to secure the prompt repair of its administrative wrongs.

2. Concept and Rationale of the Judicial Ombudsman

Justification for the judicial ombudsman, in my opinion, does not require the formulation of complicated syllogisms and esoteric reasonings. I believe it is a question of an undeniable imperative. It is demanded by the very essence of a State whose sovereignty rests with the people. Our Puerto Rican experience, like that of the fifty continental states of the Union, evidences that public employees who are truly dedicated to serving their countrymen, do not try to elude their obligation of accountability to the people. On the contrary, they accept it and perform their work in conformity with its demands.

Professor Shinon Shetreet points out in his treatise on judicial independence that *accountability* is an integral part of the concept.[6] According to his thesis, the judicature is accountable from three distinct vantage points:

1. *Legal*, given that judicial determinations are reviewable before higher courts.
2. *Public*, because it is constituted by the control legally allowed to the so-called political branches and to the organized groups which make up the social power.
3. *Informal*, because lawyers and laymen alike affected by judicial action, will always comment and criticize in their private circles.[7]

It is unquestionable that the interaction between the citizen and the organs of State is found most intensely in the executive branch. Nevertheless, history tells us that insofar as our society has become more and more litigious, so has the interaction between the citizen and the judicial branch become more intense. As a consequence of this increased contact with the courts, the citizen has become more aware of the precedence that the behaviour and attitudes of judges have upon him or her.

For this reason, we do not subscribe to the simplistic idea that "because the courts exist to protect the rights of the citizen, the judges cannot violate them." Professor Demetrio Fernández of the School of Law of the University of Puerto Rico has pointed out, with particular precision, that such an idea is "false and pernicious".[8] False, because there is no relation between the affirmation and the experiences lived daily in the courts. "Pernicious" because it unduly puts a hamper on the future development of our democratic institutions.

On occasion, judicial action may be adverse to the citizen because the judges: (i) may favor "anti-juridical postulates" or (ii) because they lack the "personal sensibility and professional impartiality required to adjudicate certain controversies". [9] The need to weed out noxious traits like these from a judicial service devoid of career training and to endow it

with a mechanism of independent, external control of its administrative processes has led Professor Fernández to state, as follows:

> It is evident that there is a need to convert our courts into really contemporary institutions, conscious of their obligation of accountability. This is so, given that the political and juridical philosophy of our times requires that the powers of the State be legitimized, not through mere fiat ... but through proper explanation to the people (the real sovereign power) by way of their advocate, the ombudsman.[10]

On this subject, Professor Donald Rowat of Carleton University has enumerated several additional reasons to justify the establishment of the judicial ombudsman:

1. The continued growth and greater complexity of the judicial branch.
2. The poor personal and scholastic qualifications of some judges.
3. The arrogance of many judges.
4. The fact that the removal procedure of judges is rarely utilized.
5. The organisms instituted by the judicature itself to hear the grievances of witnesses, parties or their lawyers are ineffective.[11]

But the need for an independent judicial ombudsman does not have to be seen from the exclusive perspective of the idea of overseeing or of having authority to investigate wrongs and demand redress. Both the enabling act of the office of the ombudsman and the conduct it inspires recognize that the ombudsman can only function adequately when an efficient public administration is present. The ombudsman has no place within administrative chaos. The institution is not a super-administrator but, rather, a mechanism of quality control and improvement. This is the reason why the establishment of the judicial ombudsman is, first of all, an acknowledgment of the excellence of the judicial system involved.

The judicial ombudsman is also justified from the point of view of the benefit which the judicature itself, as well as the individual judges, may receive due to his enunciations:

> The existence of a judicial ombudsman, like that of the Citizen's Advocate, is not just to criticize, but, additionally, to provide alternatives for the correction and redress of the wrongs detected. In this manner, the judicial ombudsman should be a most efficient ally of our judicature, he would be a great help in the diligent expedition of judicial functions. The State will have to provide our judicature with the most advanced informative apparatus and a generous portion of economic resources in order that the judicial power may be able to make the best of its human resources.[12]

Another observation which must be made in line with the position that the legislative establishment of the judicial ombudsman is beneficial to the judicial service is that it does not mean, in any way, either mistrust or any kind of underrating of our actual judges. It is a mechanism which, on the one hand, reinforces the idea of having the judicature comply

strictly with the constitutional obligations which bind it to the protection of fundamental rights and, on the other, procures its utmost functioning.

In Spain, where the ombudsman already has constitutional authority to oversee the administrative functioning of the courts, experience shows that it is quite possible to enjoy an effective communication between one and the other. Accordingly, its General Council of the Judicial Power regularly publishes in its *Bulletin* ombudsman recommendations which may affect the interpretation of the judicature's own substantive and procedural rules of administration. Through this working process, the judicial authorities can also keep abreast of the various investigations being carried out by the ombudsman.[13]

In Finland, as in other countries, although the parliamentary ombudsman can only make recommendations - and not give orders to the courts - only in very rare occasions have his recommendations for the correction of administrative wrongs been dismissed.

The examples of Spain and Finland serve to prove that the establishment of the judicial ombudsman is good and possible and that the judicial system is strengthened by its presence. In the end, one must concur with Finnish Ombudsman Söderman in that, "it is not a wise thing to allow the judicial system to be without any kind of control or supervision", given the fact that the history of humanity "evidences many examples of the unsatisfactory results produced by the exercise of limited power."[14]

3. The "Myth" of Judicial Independence

The greatest problem faced by the judicial ombudsman's oversight of the judicature is the thought of the possibility of interference with the concept of judicial independence. The attachment of an ombudsman to the judicial system cannot be permitted to harm, in any manner, either the dignity or the independence which the constitution confers upon all judges. As stated by Castán Tobeñas, the personality of the judges themselves is, more than the legislative organization of the judicial system, the central and determining element of the healthy evolution of the rule of law.

From the start, it must be established that judicial independence "does not mean - as Alvaro Gil-Robles has said - that there are areas exempt from control."[15] Neither should we think, as Professor Guzmán has indicated, that our branches of government are "parallel tunnels, totally incommunicated." As he states:

> Delegations of legislative power are a frequent thing. 'Executive legislation' through rules, regulations and executive orders constitute a considerable portion of our juridical system. Judges know, maybe better than anyone else, that their 'legislative' function is not that of a mere *negative legislator* - as conceived by Kelsen - limited to striking down whatever norms may be incompatible with the fundamental law. The Constitution confers upon the Supreme Court the power to *legislate* rules of procedure and for the administration of its functioning.

> We must also point out that modern constitutional systems do not have to box themselves into the traditional scheme of three branches of government. Today, we have the so-called **constitutional entities** which, albeit organized and governed by the constitution, are not attached to any of the traditional branches. In this manner, for example, the Spanish Constitutional Court is a constitutional entity independent of the judicial branch, parliament and the government.[16]

As can be surmised from this, it can be stated with doctrinal purity that the juridical systems of the U.S.A., more than one of "separation of powers" is of "checks and balances" - a system which takes for granted the nonexistence of *absolute* judicial independence.[17]

Likewise, we can now also confirm that judicial independence is a thing which cannot be defined. That is the reason why I refer to it as one of the many "myths" which surround us.

Castán Tobeñas has enumerated, quite satisfactorily, the essential components of the concept of judicial independence, as follows:

1. A technical system of enrolment to a judicial career that guarantees the intellectual capacity, competence and moral formation of all candidates.[18]
2. A technical system of uniform promotion.[19]
3. Guarantees of tenure on good behaviour.[20]
4. Self-government of the judicature.[21]
5. A salary which ensures financial independence.[22]
6. The establishment of a judicial association whose members may freely work toward their own betterment.[23]

As Professor Castán puts it, these guarantees strengthen the vigorous enforcement of the following duties:

1. To grant justice in accordance with the rule of law.[24]
2. To avoid all contact with politicians.[25]

I can personally attest to the fact that the administration of justice in Puerto Rico is not plagued by party politics. Our judges faithfully fulfil their obligations, even at the risk of having to abandon their positions involuntarily. However, *vis à vis* the concept of judicial independence, the fact of the matter is that neither our constitutional precepts nor our judicial code satisfy adequately the criteria propounded by Professor Castán Tobeñas. To prove this, it is sufficient to contrast the requisites enumerated by him with the juridical realities which make up our judicial practice.

In Puerto Rico, as in the U.S.A., judicial appointments are dominated by the political

process.[26] There is neither a judicial career nor any judicial school where those aspiring to judgeships may be specially trained; moreover, there is no kind of commitment by the Governor and the Senate to appoint and confirm those who have proven to be apt for the positions. Judicial appointments, except for the nominal requisites established by the *Judicial Code*, constitutionally depend only on the personal criteria of the Governor and on the political advice and consent of the Senate. Promotion is likewise subject to this same process. All judges, except those who make up the Supreme Court (whose appointments extend until they reach seventy years of age), are generally appointed for short terms of around eight and twelve years. Their salaries, although constitutionally protected against reduction, are established by the mere will of the legislature. There is no program of periodic revision for promotion, not even, in the case of salaries, for adjustments for the normal increases in the cost of living. There is quite a difference between the salaries of federal judges and those of the various states. And, of course, the courts' administrations have no authority for self-government.

Just one phrase is appropriate: the elements necessary for judicial independence are nonexistent. That is why we have stated that it can be affirmed with doctrinal purity that the judicial ombudsman, rather than being an element of interference with the judicial independence of the courts, is probably the most practical mechanism which can be established to guarantee it. If each institution performs its functions in accordance with its particular juridical obligations, there should be no jurisdictional conflict between them.

As a practical matter, it should be acknowledged that judicial independence is not the least affected by the legislative establishment of an independent judicial ombudsman. Söderman candidly comments on this as follows:

> It being that, in the long run, any controversy between a judge and the ombudsman would have to be the subject of a judicial decision, in my opinion, the concept of judicial independence would never be at risk.[27]

In summary, I believe that the so-called "judicial independence" of the Puerto Rican and American judicatures, lacking so many elements to make it so, would not be affected in any way by the judicial ombudsman. Instead, experience shows that the institution would become a promoter and guarantor of the *real* judicial independence as conceived by Castán Tobeñas and as proposed and supported by those who believe that *all* public employees must be held accountable to the people.

It has been said that democracy is the best conceivable form of government and that the essence of democratic government is its dedication to the protection of the rights and individual liberties of the governed. But, likewise, it has been cautioned that the consecration of this obligation in laws and constitutions is not sufficient by itself to guarantee its survival. No matter how many speeches and declarations may be expounded to proclaim the merits of the social contract between the people and their government, in the end, as Winston Churchill stated, the existence of democracy will depend on the continuous, vigorous control provided to safeguard it.[28] In other words, to guarantee it, one must have at hand the remedies which prevent its usurpation. The institution of the judicial ombudsman

is probably one of the most efficient tools the citizen has at hand to safeguard his control over the government.

ENDNOTES

1. "Commentaries to the Enabling Act of the Office of the Ombudsman" (1989) 1 Journal of the Puerto Rican Academy of Jurisprudence and Legislation 1.

2. W. Gellhorn, *Ombudsman and Others: Citizens' Protectors in Nine Countries* (Cambridge, MA: Harvard University Press, 1967).

3. "The Ombudsman, and the Administration of Justice" (1991) 51 Law Review of the Puerto Rican Bar Association 95 at 97.

4. Office of the Ombudsman of Puerto Rico, *Fifteenth Annual Report.*

5. The Ombudsman of the State of Alaska has jurisdiction over certain administrative procedures of the local judicial system.

6. S. Shetreet "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in *Judicial Independence: The Contemporary Debate*, S. Shetreet and J. Deschenes, eds. (Boston, MA: Martinus Nijhoff Publishers, 1985) at 654.

7. *Ibid.*

8. D. Fernández, "The Judicial Ombudsman in Puerto Rico: Some Reflections on its Need and Characteristics" (1991) 52 Law Review of the Puerto Rican Bar Association 125.

9. *Ibid.* at 128.

10. *Ibid.*

11. D. C. Rowat, "Why an Ombudsman to Supervise the Courts?" (1991) 52 Law Review of the Puerto Rican Bar Association 87-88.

12. *Supra* note 8 at 128.

13. A. Gil Robles, *infra* note 15 at 99.

14. J. Söderman, "The Ombudsman and the Judicial System" (1991) 52 Law Review of the Puerto Rican Bar Association 103 at 106.

15. Quoted in R. A. Guzmán, "The Puerto Rican Ombudsman, the Judicial Ombudsman and the Rule of Law in Puerto Rico" (1991) 52 Law Review of the Puerto Rican Bar Association 67 at 75.

16. Guzmán, *supra* note 15 at 69 (emphasis in the original). Examine also the figure of the Venezuelan *Fiscal General.*

17. *Ibid.*

18. J. Castán Tobeñas, *Judicial Power and Judicial Independence* (Madrid, Spain: Reus, 1951) at 51.

19. *Ibid.* at 53.

20. *Ibid.* at 54.

21. *Ibid.*, at 55.

22. *Ibid.*

23. *Ibid.* at 56.

24. *Ibid.* at 47.

25. *Ibid.* at 49.

26. *Supra* note 8 at 128.

27. *Supra* note 14 at 105.

28. Quoted by Dr. Kreisky in the *Third Ombudsman Conference* held in Stockholm, Sweden, 1984.