

THE OFFICE OF THE PROVEDOR DE JUSTICA IN PORTUGAL
FROM THE POINT OF VIEW OF THE COMMISSION FOR
LOCAL ADMINISTRATION IN SCOTLAND

by

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INTRODUCTION

The first Provisional Government of Portugal approved the Plan for the establishment of the office of the Provedor de Justica in September 1974. Prior to the constitution being in place the first Provedor de Justica was appointed by the President of the Republic. Colonel Manuel Costa Bras held the position from December 9, 1975 until July 23, 1976. Dr. Magalhaes Godinho was the first Provedor elected by Parliament as provided in the Constitution and Law #81/77, *The Provedor de Justica Act*. Dr. Godinho retired in February, 1981 and Parliament elected Eudoro Pamplona Corte-Real as his replacement. Article 5 of Law 81/77 states that the Provedor de Justica is appointed for a four year term with re-appointment possible only once for an additional four year period. The qualifications for the appointment of Ombudsman in Portugal are similar to those in other countries - a person having a reputation of integrity and independence. Although there is no requirement for the Ombudsman to be a member of the legal profession, the proposal for the creation of the Ombudsman in Portugal came from one of the final reports of the Commission for Legal Reform. The proposal was adopted, one of its characteristics being "the choice should fall on a person independent from the Executive Power and preferably a

lawyer."

In many respects the powers given to the Portuguese Ombudsman, and the restrictions placed upon him are in line with those encountered by Ombudsmen in most other countries of the world. He must be eligible to sit in the Assembly of the Republic, the body who appoints him, but is not subordinate to it. Death or serious illness could bring about his demise as could his resignation on personal grounds - and his reasons can be investigated by the Assembly. He can only be removed from office if his position becomes incompatible in the sense that there is a conflict of interest or if he becomes ineligible. The restrictions placed upon him include a ban on holding political office of any kind or being publicly active in political life.

Finally during his term of office he is accorded the rank and privileges of a Minister and is a member of the High Council of the Bench (Conselho Superior da Magistratura), a body appointed to supervise the judiciary.

OFFICE ORGANISATION

The Ombudsman has complete authority over his organisation, both administrative and financial matters being within his jurisdiction. Taking into account not only his professional staff, but also his support staff consisting of public relation, secretarial, clerical and janitorial officers his total complement comes to about 50 members in all. In order to illustrate both how those staff are deployed and also to show their working relationship to each other they are presented in the form of an organisation chart at the end of this paper (Appendix A).

The Deputy Ombudsman, who is an experienced lawyer, is not, rather surprisingly, a permanent member of staff but appointed on a temporary and commission basis. However the importance of his post is reflected in his salary and rank which corresponds to that of an Under-Secretary of State. Provision exists for the appointment of a second Deputy Ombudsman, but at this time no appointment had been made nor was one contemplated. The Co-ordinators are magistrates in their own right, seconded to the Ombudsman on a commission basis. They choose to accept this form of appointment to enable them to return to their legal duties at a future date should they wish to do so.

There are a total of 13 Assessors, 12 of whom are law graduates. Each has developed particular skills in the field of law which can be utilised by the division of their work into four groups as shown in Appendix A. The remaining Assessor is an Economist by profession, his expertise being in nationalized industries and financial matters.

All administrative and support functions are controlled by the Head of Administration.

PROCEDURES OF THE OFFICE

Complaints.

Articles 22 to 24 of the *Provedor de Justica Act* pertain to the types of complaints which may be investigated. The Provedor may initiate an investigation on his own initiative "concerning matters which come to his knowledge by any other means". Complaints may come from citizens individually or collectively, or may be referred by the Assembly of the Republic, the Parliamentary Commissions and the deputies. Petitions and complaints referred, from the Assembly or Parliamentary Commissions may be treated as urgent matters on the request of the Assembly. Article 23 allows for complaints in writing or orally. An ordinary letter is sufficient to qualify as a written complaint but the complainant's name and address are required and their signature should be included "whenever possible". Verbal complaints are reduced to writing and signed by the complainant.

The facility is available for a complainant to visit the office of the Ombudsman in Lisbon where an interview will take place with an experienced officer. This officer will, on the basis of the interview, advise the complainant

whether the complaint is one which falls within the jurisdiction of the Ombudsman. If this is the case he will write out the complaint on a specially prepared form, and then read it back to the complainant who will signify his agreement by signing it, or making an appropriate mark on the document. Before leaving the office, the complainant is given a receipt indicating that he has lodged a complaint with the Ombudsman.

The reason for adopting this procedure lies in the rate of illiteracy in Portugal which is estimated to exceed 30% of the population. It affords those who are handicapped in this manner to have a complaint considered by the Ombudsman.

It may be argued that the system benefits only those who live in, and around Lisbon and therefore have easy access to the Ombudsman's office, but it is possible for complainants who live some distance from Lisbon, and who find difficulty in putting their complaints in writing, to seek out the services of a District Attorney to write down and present their cases on their behalf. Having said this, it is interesting to note that although no charge is levied by the District Attorney for performing this duty very little use is made of this service. As well, article 23 provides that a complaint may be presented to any agent of the Ministerio Publico (State Counsel Division) who must

then forward it without delay to the Ombudsman.

As is the case with most Ombudsmen the bulk of the complaints received are in writing. The procedures for dealing with written complaints are similar to those for dealing with a verbal complaint which has been put into written form - a file is opened for the correspondence and a card index records the name of each complainant and the number of his file. Records are also maintained of each letter received and also every letter sent in reply. Such records are usually limited to the date of the letter and a very brief description of its contents.

The Processos 1P allows the Ombudsman himself to initiate a complaint on any matter which he considers warrants investigation. The most likely source of such issues is the media - the Ombudsman reads or hears of some action which he considers worthy of investigation and therefore opens a file on it in the same manner that a file would be opened for a verbal or written complaint. It should however be made clear that the Ombudsman exercises this power with extreme caution - statistics for the four years 1976-1979 show that only 1% of the total complaints made against all forms of authorities, central and local were raised in this manner.

The Handling of the complaint.

When a file has been opened to accommodate the complaint it is forwarded to the Deputy Ombudsman who, after considering the contents, writes an opinion on it and then passes it to the Ombudsman for his approval. The opinion will usually suggest either a rejection or a further consideration of the complaint. Should the decision be to reject the complaint there are available "standard letters" setting out the reasons for rejection and one will be sent to the complainant. If on the other hand it is decided to look into the complaint the file is passed to the Co-ordinator, who in turn will allocate it to an Assessor for detailed consideration.

Before passing the file to the appropriate Assessor (see below) the Co-ordinator will study its contents and the opinion(s) given by the Deputy Ombudsman and Ombudsman. In most cases he will agree with the views that are expressed but occasions do arise when the Co-ordinator may hold a contrary view which can result in another opinion being placed on the record. The Co-ordinator may also find it advisable to write notes of guidance for the Assessor responsible for handling the case.

A criticism which has been levelled at this system is that due to the large number of files which pass through his

hands, too much time is being spent by the Co-ordinator on administrative duties, that is controlling the files rather than studying their contents.

As already mentioned the Assessors are divided into four groups: each group specializes in an area of work. One group deals with Local Authority work and is the subject of more detailed study later in this paper, in addition, it concerns itself with Educational complaints. A second group is responsible for questions on Social Security and also the Administration of Justice but under this latter heading they are unable to examine decisions taken by Judges but rather concern themselves with complaints of delay in the legal processes. The third group of assessors are responsible for problems stemming from Labour Law and also Colonial matters raised by the return of people to Portugal from her former colonies. In this group there is also found the sole non-legal Assessor, an Economist who deals with matters concerning the Nationalized Industries and also handles Financial issues. The final group deal almost exclusively with problems concerning the Civil Service, leaving one Assessor to handle Taxation complaints.

The Investigation

Once complaints have been assessed as being admissible, an investigation is undertaken by the Provedor and his staff. Article 26 of Law 81/77 requires that the investigation take the form of "requests for information, inspections, scrutinies, inquiries or any other reasonable proceedings". The legal rules of evidence do not apply to the Provedor's investigations. The procedure is intended to be rapid and on an informal basis.

Most of the cases are handled by correspondence with very occasional visits made to the complainants and not too frequent inspections of government departments by the assessors to verify facts. Article 27 requires co-operation by all public authorities in furnishing information and providing access to documents and files. Any document relating to the secrecy of criminal proceedings and matters of security, defence and international relations is restricted from the purview of the Provedor. The Provedor may request any citizen give oral evidence and a summons may be sent by registered mail to anyone refusing to give "important evidence". The crime of disobedience is committed by not appearing or refusing to give such evidence.

Reports and Concluding Actions of the Provedor

When maladministration is found, the Provedor de Justica normally sends a letter to the authority (central or local) giving his opinion and seeking the authority's co-operation in rectifying the complaint. Experience has shown that departments of central government usually accept the Provedor's findings. Local authorities however, often refuse to acknowledge or act upon findings of maladministration. Article 34 of Law 81/77 provides for the Provedor reporting to the "competent higher instance" any non-compliance with his recommendations. An annual report is presented each year to the Assembly of the Republic. As with all other annual reports a discussion of complaint statistics is included. In 1979 nearly 3,000 complaints were received by the office with over 2,200 in writing and about 600 oral. Only 46 investigations were initiated by the Provedor. The main body of the report contains a sampling of representative cases handled during the year.

A COMPARISON BETWEEN THE PROVEDOR DE JUSTICA AND THE COMMISSIONER FOR LOCAL ADMINISTRATION IN SCOTLAND

LOCAL AUTHORITIES

In Portugal, there exists a three tier structure of local authorities, the top tier being the Distrito, the second the Municipio, and the third the Freguesia. On the face of it there appears to be the basis for comparison between the structure of Local Authorities in Scotland with the Distritos corresponding to the Regions, the Municipios to the District Councils and the Freguesias to the Community Councils. It is not surprising that such comparisons appear more relevant when it is learnt that some stream-lining of local authorities in Portugal is now being carried out, the main exercise being to eliminate the Distritos and replace them with a smaller number of "Regions". It is equally not surprising to learn that most of the Provedor's work is involved at Municipio level in the same way that the District Councils are the main areas of complaint in Scotland. However there the similarity ends, with Portuguese local authorities there does not appear to be a clear cut division of responsibilities which exists in

Scotland.

In Portugal the rule appears to be that each tier will involve itself in anything which is considered to be of local interest and there seems to be five areas under which involvement may take place at any level. These are:

1. The Administration of Public Property.
2. Development.
3. Culture and Social Security.
4. Public Safety.
5. Allocation of Resources.

Before studying the allocation of responsibilities in more detail it is necessary to show the composition of each tier.

THE DISTRITOS.

There are 18 Distritos in Portugal and another 4 situated in Madeira and the Azores making a total of 22. The Head of each Distrito is the Civil Governor who is appointed by the Government. The main organ of government in each Distritos is the Assemblia which is not elected by the inhabitants but made up of 'ex officio' members and representatives appointed by a limited election. The composition of the Assemblia is as follows:

1. Civil Governor

2. Heads of Assembleias Municipio
3. Heads of Camaras Municipio
4. Representatives of each Assembleia Municipio elected by the heads of the Juntas de Freguesia of each Municipio.

In addition to the Assembleias there also exists another non-elected body in the Distritos - the Conselho. This body which is much smaller than the Assembleia is a mixture of political and professional expertise comprising of 5 heads of Camaras Municipal elected by the Assembleia and 3 experts in economic, social and cultural matters appointed by the government on the recommendation of the Civil Governor who himself sits on the Conselho. This gives a total of 9 members but the control of this body, is held by the political representatives.

Although it was stated earlier that each tier of local authority would involve itself in any aspect of work, certain areas of responsibility appear to be regarded as being within the authority of the Distritos. They take responsibility for the care and maintenance of major roads which run through their area; they are also responsible for cultural matters and promote the economic and social development of the Distrito. They are also responsible for co-ordinating educational activities within the district. Because their responsibilities cannot be regarded as being of

a nature which are close to the general public it is not surprising that very few complaints against Distritos are received by the Ombudsman. Out of a total of 300 complaints made against local authorities in 1979, only seven were made against the Distritos and almost without exception all of these concerned disputes over wages and appointments in the Distritos.

THE MUNICIPIOS.

Perhaps the most important tier of local authorities in Portugal is the Municipios, which number about 500. A Municipio is made up of three bodies: the Assembleia; the Camara; and the Concelho.

The Assembleia is composed of a part elected by the inhabitants of the area, whilst the remainder is composed of ex officia members viz the heads of the Juntas de Freguesia. The Camara, on the other hand, is a totally elected body and since it is the executive arm of the Municipio it attracts the greatest number of complaints to the Provedor. The Conselho is the third body: it is not elected and like its counterpart in the Distritos appears to concern itself with economic, social and cultural matters at the Municipio level. The area of responsibility of a

Municipio is both wide and varied. They accept authority for the provision of water within their area; they take upon themselves responsibility for the repair and maintenance of roads and bridges and also the cleaning of roads and public buildings. The provision of public transport comes within their jurisdiction and also development in the area. They also concern themselves with the maintenance of parks and gardens, and research into agriculture. They have some authority in police matters being responsible for safety and fire prevention. By the nature, both of their composition and the extent of their responsibilities, it is not really difficult to understand why they are subject to many more complaints than the other tiers of local authorities; out of the total of 300 complaints received by the Provedor de Justica in 1979 against local authorities, 258 of these were made against Municipios. These complaints range over such a wide area that comment on individual cases is not possible within this paper. It is, sufficient to set out below the variety of subjects upon which complaints were made.

1. Planning and development.
2. Division of land.
3. Change in the use of land.
4. Compulsory purchase orders.
5. Jobs and wages.

6. Damage to property.
7. Disputes within the committees of a Municipio.
8. Pollution.

THE FREGUESIA.

This is the smallest unit of local government and there are almost 5,000 throughout Portugal. Each Freguesia is made up of 2 bodies. The Assembleia de Freguesia which is an elective body, is the body which attracts complaints to the Provedor.

It can be assumed from the number (5,000) that a Freguesia is a very small unit indeed, in some cases representing very rural and isolated areas comprising only a handful of inhabitants. Consequently their responsibilities are of a minor nature involving, for example, small building and repair work which includes the maintenance of cemeteries and fountains. On the social side of life, they are responsible for the planning and execution of local activities, they raise money for charity and also have a very limited power to raise finance by renting facilities such as stalls and markets.

For the number of Freguesias that exist, the Provedor only received 35 complaints about them in 1979. Such complaints concerned themselves with damage caused to private property, disputes over planning permission and the manner in which the Freguesia conducted their business.

CONCLUSIONS

Although the composition of local authorities in Portugal and Scotland bear certain similarities, the procedure adopted by each country for the investigation of complaints vary considerably. Whilst in Portugal the complainant has direct access to the Provedor de Justica, it is necessary for Scottish complainants to seek referral of complaints through a local councillor. In recent Annual Reports the Scottish Local Ombudsman has taken the view that a system of direct access is desirable and worthy of Parliamentary consideration. Furthermore no provision exists in Scotland for the Ombudsman to initiate his own complaint investigations as is permitted for the Provedor under Processos 1P.

While in Portugal the investigation itself is conducted almost entirely by correspondence, this is rare in Scotland where the procedure is much more complex. In almost every case an investigating officer visits the complainant,

inspects and discusses the subject of the complaint and then interviews the local authority officers involved in the matter as well as studying their files. As some visits involve considerable travelling this lengthens the time taken to investigate a complaint.

It is understandable that each Ombudsman has an office in the capital city of their respective countries but recent research carried out in Scotland has shown that a number of complainants would welcome the existence of a sub-office in one or more of the other main cities. If this was considered useful in Portugal, Oporto would possibly be the choice for a second office.

When examining the number of complaints made on local authority matters to the respective Ombudsmen it is interesting to note how close the figures are. Taking 1979 statistics the Provedor de Justica received 300 complaints of which approximately 80% were against the Municipios. In the same period the Scottish Ombudsman received a total of 395 complaints (238 were referred) and over 70% were made against District Councils. In Scotland, housing was the main subject of complaint followed by planning and land and property. In Portugal complaints concerning Municipios covered similar matters, for example planning and development and division of land. At the top level,

(Distritos and Regional Councils respectively) in local authority work similar areas of work, such as roads, education and social work matters, and accordingly similar complaints are also encountered.

APPENDIX A

