

Ankara, 24th May 2019

## The Portuguese *Ombudsman*

(Introduction)

For the Portuguese *Ombudsman* it is a great honour to be hosted here in Ankara, at the siege of the Chief-*Ombudsman* of the Republic of Turkey.

I am very thankful to Mr. Sheref Malkoch and to all his team for the way we have been received for the last couple of months.

The Twinning -light Project, that allowed and organized the cooperation between our two institutions – between the Portuguese *Ombudsman* and the Turkish *Ombudsman* –, is now coming to an end. And at this moment I would like to thank you for having made possible the execution of this project.

It was due to your thoughtful and warm welcome that the we were able to discover the differences and the similarities that unite and differentiate Turkish and Portuguese Law.

It was due to your thoughtful and warm welcome that we were able to conclude that, in spite of all the geographical distance that separates Ankara from Lisbon, we can understand each other and speak a common language, comparing procedures, exchanging good practices, sharing problems and looking for the best way to solve them.

(1. The role of the *Ombudsman* in the Portuguese Political and Constitutional system)

Today, my topic is about the Portuguese System, viewed as a whole. I am supposed to answer the following question: which role plays, exactly, the institution of the Portuguese Ombudsman, in the general context of the Portuguese Constitutional system?

I will try to answer this question in three main parts.

First, I will try to describe the main features that characterize the Portuguese constitutional system.

Secondly, I will try to emphasize the role that the *Ombudsman* plays in this system, stressing its importance.

Finally, I will try to find the reasons which can explain this importance, tracing their origin in the recent Portuguese History.

## (2. Main Features of the Portuguese Constitutional System).

The Constitution of the Portuguese Republic was approved by a Constituent Assembly in April of 1976. In this Constitution, which has ruled the country for more than forty years now, the institution of the *Ombudsman* has a very special reference.

This special reference is made in article 23, aside with the general principles concerning fundamental rights and freedoms.

Here the Constitution states that is there will be in Portugal an *Ombudsman*, elected by the national Parliament for a four years term, that will receive complaints presented by the citizens concerning unjust and unlawful actions, taken [carried out] by public agents.

Since 1976 this Constitution has been subject to six amendments.

However, all the constitutional provisions [norms] that concern the *Ombudsman* were kept unchanged.

Besides article 23, already mentioned, which frames the generic status of the institution, it is also to be mentioned other two basic norms (article 142 and article 281)

By mentioning these articles, I am not expecting that you will memorize their numbers: I still believe that our Twinning-Project can be a success and I do not want to spoil it, at its very last moment.

I have mentioned these articles only because they frame the place that the Portuguese *Ombudsman* plays in the general political and constitutional Portuguese system.

According to article 142, the *Ombudsman* is, by its own right [or inherently] a member of the Council of State.

The name or designation «Council of State» has, I suspect, a very different meaning in Turkey and in Portugal. In Turkey, I believe, the so-called Council of State is, like the French «Conseil d'État», part of the judicial power, with the power to annul unlawful administrative acts and provisions.

In Portugal, on the contrary, the so-called «Council of State» is not a part of the judicial power. It is a strictly political and constitutional body, with the competence to advise the Head of State in the most important national issues, or whenever he decides. Since Portugal is a Republic since 1910, the Council of State I am speaking about is, in practice, the advisory council of the President of the Republic.

The fact that, according to the Constitution, the *Ombudsman* is, inherently, a member of this advisory Council of the President of the Republic, shows

the importance that was given to this institution (to the *Ombudsman*) by the Constitution itself.

The other members of this Council are the President of the National Parliament, the Prime-Minister, the President of the Constitutional Court, the former Presidents of the Republic and the Presidents of the two Regional Governments existing in the entire national territory, along with five personalities chosen by the President of the Republic himself and other five personalities chosen by the National Parliament.

The importance of this body is also measured by the importance of the Presidential powers.

Differently from what happens in many other western European countries, like Germany or Italy, Portugal has not a strictly parliamentary system of government. Our system belongs to the so-called «semi-presidential» form of Government, according to the French example of the Fifth Republic.

There is a President of the Republic elected directly by popular vote with significant political powers – for example, the power to decide the dissolution of the Parliament. But there is also a Government, that is the head of the executive power, depending on the Parliament.

The advisory council of the President must be heard before the President takes the most important decisions – for instance, before he decides to dissolve the national Parliament. And the *Ombudsman* is a member of this

Council. The fact shows the importance recognized by the Constitutional text to this institution.

By the same token, the *ombudsman* has the power to start a procedure before the Constitutional Court, in the context of the so-called abstract norm control.

In the Austrian tradition of the constitutional justice, the abstract norm control has two main characteristics.

First, only certain political bodies, identified by the Constitution, have the power to start such a procedure before the Court. Second, in this procedure, the Court has the power to take decisions that have abstract and general binding effects.

According to article 281 of the Portuguese Constitution, the political bodies that have legitimacy to start the abstract norm control before the Constitutional Court are: the President of the Republic, the President of the National Parliament, the Prime-Minister, the General Attorney and a group of 23 members of Parliament.

The *Ombudsman* has also this power, and he (in my case, she) is mentioned in article 281 immediately after the Prime-Minister.

This fact also shows the importance that the Constitution has recognized to the *Ombudsman*.

Finally, the Portuguese Ombudsman can open procedures by its own initiative and order a certain control or inspection concerning administrative agencies by its own authority, and without the previous consent (or knowledge) of the controlled or inspected agency.

These powers are not predicted in the Constitution. They are given to the *Ombudsman* by ordinary law. (By statute law).

Nevertheless, the statute that confers these powers was first written as early as 1976, and has never been changed, since then.

The legitimacy of the *Ombudsman*, as the Constitution predicts it, supports the entire system

As I have already said, he (in my case, she) is elected by the National Parliament for a four years term.

However, there are about this topic other points which should also be stressed, and that I have not mentioned. In the first place, it should also be stressed that our Parliament is, in line with a long constitutional tradition, composed by a single chamber. It is an «unicameral» Parliament.

In the second place, it should also be stressed that the Portuguese *Ombudsman*, like the Turkish *Ombudsman*, in order to be elected by this «unicameral Parliament», needs the approval of at least two thirds of its members. In Portugal, it is this very same qualified majority that is required to amend (to change) the Constitution.

Finally, it is important to note that. Like in the Turkish system, this four years term can be renewed just once: the same person can therefore remain as *Ombudsman* for a maximum of eight years, if the Parliament decides to elect this person for a second mandate.

However, it has seldom occurred in the past. Normally, each *Ombudsman* makes only one mandate (I am the tenth *Ombudsperson*, in forty two/ forty three years)

### (3. The History)

Now, the main question is the following: why is that so? Why does the Portuguese Constitution give such a legitimacy, and such an importance, to a Constitutional body that has *no authority* whatsoever?

We can make recommendations to the legislative power and present them; we can start a procedure before the Constitutional Court; we sit at the State Council and, therefore, we can act as a personal advisor of the President of the Republic; we can order inspections to administrative agencies without their knowledge or agreement. It is true that we can do all that.



But what happens if the Legislative Power does not accept our recommendations? What happens if the Constitutional Court does not recognize any reason to our claim, concerning the unconstitutionality of a certain norm? What happens if the President of the Republic does not take in account our opinion? What happens if an administrative agency does not follow the line of action that we consider to be the correct one, at the end of an inspection that we have ordered?

The proper answer is: nothing happens, because we do not possess any kind of state authority. We are respected if people feel we deserve to be respected. Nothing more.

Why, then, gives the Portuguese Constitution such a legitimacy, and such an importance, to a Constitutional body that has *no authority* whatsoever?

The answer lies in History. History justifies nothing, but explains almost everything.

Even before the approval of the Constitution, the institution of the *Ombudsman* was known and admired in Portugal. During the last years of the sixties and the first years of the seventies (of the 20th Century) several opinions appeared, stating the need of bringing back to Portugal the institution that was created in Northern Europe.

The fact that administrative courts had, at the time, a very narrow field of jurisdiction, and the fact that the citizens had, for that reason, very narrow ways of defending themselves against the actions of a highly authoritarian administration, counted a lot for this general admiration towards the Scandinavian Institution of the *Ombudsman*.

No wonder that the first provisional Government (established immediately after the Revolution of 1974) had already inscribed in its program the future creation of an *Ombudsman*, inspired in the northern and Scandinavian tradition.

When the Constituent Assembly wrote the text of the Constitution, this idea – the idea of repeating in Portugal the Scandinavian experience – was supported by every single parties presented at the Parliament. The consensus about the importance of the institution was complete.

This can be an explanation for the importance that the Portuguese Constitutional System has recognised to the – and I will say it in Portuguese language, now - « *Provedor de Justiça* ».

Thank you very much for your attention

Maria Lúcia Amaral

