



Strasbourg, 21 June 1999
<cdl\doc\1999\cdl-ju\16.e>

Restricted
CDL-JU (99) 16
Or. E

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**WORKSHOP ON THE RELATIONSHIP BETWEEN
THE CONSTITUTIONAL COURT AND THE OMBUDSMAN**

**1-2 July 1999
Kyiv**

**organised in co-operation with the Constitutional Court of Ukraine
and the financial support of Deutsche Stiftung
für internationale rechtliche Zusammenarbeit,
and USAID**

**THE FRAMEWORK OF THE RELATIONS BETWEEN
THE CONSTITUTIONAL COURT AND THE DEFENSOR
DEL PUEBLO (OMBUDSMAN) IN SPAIN**

by Mr Alvaro GIL ROBLES GIL DELGADO

I. - Constitutional treatment of both institutions.

1. – The Constitutional Court is described from the 159th to the 165th article of the Constitution.
 - The Court has had a precedent in the 1931 Second Republic's constitution, but a very short one then because of the civil war and the change towards dictatorship.
 - In its present version the Court holds the mission of solving the recourses against State's and Autonomous Regions' laws and dispositions of law; the individuals' protection recourses; conflicts of responsibilities between the State and the Autonomous Regions, as between those themselves and, in the end, all matters that the Constitution entrust it to.
 - It is not considered within the framework of ordinary jurisdiction and its members are elected by the Parliament, the Juridical Counsel and the Government.
 - In Spanish recent constitutional history, the Constitutional Court has, without any doubt, grown into a key actor in Spain's constitutional and democratic development as well as in the strengthening of the Autonomous Regions' State.
2. – The Defensor del Pueblo (Ombudsman) is also described in the Constitution, 54th article, but with a more modest role:
 - “ An organic law will regulate the institution of the Defensor del Pueblo (Ombudsman), as a high commissioner of the Parliament, named by it in order to defend the rights contained in this Chapter, entrusted to supervise the Administration's activity, accountable towards the Parliament”.
 - The Constitution's Chapter this 54th article refers to is the first one referring to the “fundamental Rights and Duties” of the people.
 - Furthermore the 162nda) article of the Constitution, gives the Defensor del Pueblo the legitimacy to file a recourse of unconstitutionality; and the 162nd1)b) one of protection.
3. – Therefore it can be affirmed that we face two constitutio-nally regulated institutions, one of which, the Defensor del Pueblo, is designed to protect people's rights and liberties, for which, among other means of action and control, it has the capacity to appeal to the Constitutional Court thus enforcing an active legitimacy and not only a private or advisory magistracy.

II. - Short synthesis of the different fields of competency and the way the Defensor del Pueblo operates.

1. – The Defensor del Pueblo is a parliamentary institution – he is elected by the Parliament and acts as its commissioner – but endowed with an absolute independence.
2. – He supervises all public Administrations operations (State, Regions, Provinces, local and institutional), and the Administration of Justice, only as far as the functioning of its public service mission is concerned.
3. – He may act, as a consequence of complaints presented by any physical or juridical person or by proper initiative, “ex officio”, in legal terms.

4. – Complaints and investigations may apply to the irregular ordinary functioning of any public administration or any public service activity (misadministration), and to concrete accusations of any violation of fundamental rights and liberties of the people (human rights).
5. – For its investigation activity he has access to any administrative record, he may question civil servants and authorities and in the case of denial to collaborate or answer, the penal code considers it a disobedience felony. The Defensor del Pueblo may visit and inspect any public building (public offices, jails, hospitals, barracks, etc.), or any other in which a public service or a publicly subsidised activity is provided.
6. – Its resolutions acquire the status of “suggestions” when individual questions or concrete cases are concerned, and the status of “recommendations” if what the Defensor del Pueblo fosters is a resolution of general characteristics or of general effects (modification of rule, etc.).
7. – The Administration or authority appointed by his suggestions or recommendations is not forced to accept them, but must then give a thorough reason why, and if the Defensor del Pueblo disagrees with its arguments, the matter will be included in its yearly report to the Parliament or if necessary in a special report concerning the subject.
8. – The Parliament, through a specific Commission and both Houses, is kept informed of the Defensor del Pueblo’s reports, it debates them and takes the timely steps regarding those persons considered liable according to the report in the summoned Administration.
9. – On a another ground, the Defensor del Pueblo can also appeal to the Constitutional Court, under its own initiative or because he is asked to by any person.

The latter activity, directly deriving from the mandate given by the 54th article of the Constitution, may not be understood as a daily control of public administrations but as the defense of constitutional order and citizens’ fundamental rights and liberties.

III. – The realisation by the Defensor del Pueblo of its legitimacy to have recourse to the Constitutional Court and the problems it stirs up

A) Regarding the recourse in unconstitutionality.

- The Constitution does not establish limits: He may appeal any law, whatever its content might be.
- Nonetheless the first two Defensor del Pueblo established the criteria that only those laws afflicting the First Chapter of the Constitution would be appealed, that is to say afflicting citizens’ fundamental rights and liberties.
- Therefore were to be refused requests expounding other matters and specially those regarding problems of competence between the State and the Autonomous Regions as between themselves. The Defensor admits that for such matters already exist other legitimate persons and institutions to file recourses, and that on the contrary it would link him to political and partisan fights in which he should not take part.

- However political tensions cannot be avoided. First of all because requests concerning laws afflicting fundamental rights are always politically delicate for the governing majority, the opposition and public opinion.
- In many situations the Defensor del Pueblo is the ultimate recourse for minorities, specific social groups or trends of opinions to oppose a precise law.
- Therefore the Defensor del Pueblo must pay a special attention to the thorough construction of its resolutions, in whichever way, because he is aware of the political tensions they can create. He must only back up his resolutions on a legal ground and the violation of the Constitution but never based on personal, political beliefs or criteria of opportunity.
- Several laws have been appealed in the last years, some with a positive result and others no, but always in a lesser number, for the Defensor del Pueblo refuses to become a systematic tool to appeal laws.
- Because he is a commissioner elected by the Parliament the most delicate problem arises when he appeals a law ratified by both Houses. It is a proof of maximum independence, but surely not exempt of political tensions.
- The Parliament has never appeared in front of the Constitutional Court to defend a law that was appealed by the Defensor del Pueblo, nor has it ever asked him during his appearances to the Parliament, about the criteria motivating his appeal.

B) Regarding the appeal of protection.

- The appeal of protection is an individual appeal that anybody may file to the Constitutional Court, once exhausted ordinary jurisdictional means, when some of his fundamental rights or liberties have been violated.
- The field of his legitimacy being so wide, the Defensor del Pueblo has admitted he would only appeal under such procedure in very exceptional cases, those of real misprotection of the people or the ones of general interest.
- Through such a choice he avoids turning into the free and universal lawyer in front of the Constitutional Court, situation that would pervert his function.
- Therefore very few appeal of protection have been filed (eleven), but they all have been won.
- The Constitutional Court requires that the Defensor del Pueblo as anybody respect all the terms of the procedure, even though he obviously does not need to appear with attorneys or proxies as for private individuals.

IV. - Final considerations.

1. – The legitimacy to appeal under unconstitutionality and protection, is complex and creates tensions but it is extremely important to enable the Defensor del Pueblo to fulfil with his task.

2. – In certain situations it represents the only way to directly refute a law, when interested majorities block the Parliament and therefore it is not possible to gather the minimum of 50 representatives required to appeal.
3. – The fact that anybody or any entity may request to appeal through the Defensor and that he has to answer thoroughly if he accepts the suggestion or not, forces him to a major task of jurisdictional appraisal of the law because it means, in the case of a negative answer, the formulation of a sentence close to a constitutional one, resulting in an extremely complex and involving situation for the future.
4. – Filing an appeal creates immediately political tensions with governments and a public debate, which brings strength and notoriety to the Defensor del Pueblo, but also means an obvious institutional damage. It would be a serious mistake on behalf of the Defensor to fall into the temptation to become the spokesman of minorities in the Constitutional Court.