

European Ombudsman Institute

Европейский Институт Омбудсмана

• Europäisches Ombudsmann Institut

Institut Européen de l'Ombudsman

Istituto Europeo dell'Ombudsman

Instituto Europeo del Ombudsman

VARIA 54 (E)

Prof Dr Manuele BELLONZI

The Charter of local ombudsperson institution in Tuscany and The French *Charte des médiateurs du service public*: A brief Analysis of the *traits d'union* and of the national peculiarities of the ombudsperson.

The motto of the EOI
to study everything
to compare everything
to choose the better
to stand up for the better

EOI

Prof Dr Manuele BELLONZI - Difensore Civico

Of the associated Communes of Valdinievole

**The Charter of local ombudsperson institution in Tuscany and
The French *Charte des médiateurs du service public*:
A brief analysis of the *traits d'union*
And of the national peculiarities of the ombudsperson**

If it is true that the modern institution of ombudsperson had common *incipit* in the Sweden of XIX century, there are different characteristics which, at a national and/or local level, have allowed the institution to consolidate in different and interesting models in effect today. The Spanish *Defensor del pueblo*, the French *Médiateur de la République*, or the regional, provincial and commune *Difensore Civico* in Italy, and more recent figures such as the *Ombudsman* of Kosovo¹ or the *Mpanelanelana* of the République of Madagascar², have made of the extrajudicial institution of protection of the citizen an interesting subject that, from the original mere parliamentary relevance, is turning into a fully developed and complete guarantor of the human rights.

In absolute national freedom to foresee (or not) the institution and the form of non jurisdictional organizations, it has been tried in various meetings, to define common points which would permit, at the international level, the recognition of a common basis for the institution of ombudsman. We should mention that, since the resolution of 1946, the ONU is in favour of addressing this subject³. Citing some research experience, we can quote, as an example, the work completed during the Council of Europe, in relation to the Stability pact for South-East Europe, in 1999⁴. During this meeting the fundamental requirements of the institution and the prerequisites of a *supra partes* body for the creation of figures *ad hoc* in relation to the countries of South-Eastern Europe have been elaborated⁵.

¹ United Nations Mission in Kosovo Regulation 2000/38, section 17.1, Rule 22.1 of the Rules of Procedure of the Ombudsperson institution.

² Ordonnance n. 92-012 du 29 avril 1992, Journal officile de la République de Madagascar, n. 2155 du 21/12/1992, pages 2843-45

³ On the relevance of the autonomy and independence of ombudsperson the ONU Resolution n.48 in 1993 is to be mentioned.

⁴ European Council, Regional meeting on independent national human rights protection institution (including ombudsperson institutions), Budapest, 1999.

⁵ As an example, among the characteristics of the institution of protection, the necessity of promoting a monocratic figure, autonomic and independent, is highlighted; a figure that acts either on behalf of one side (*istanza di parte*) or *ex officio*, with the opportunity of issuing general recommendations, in order to “insure the responsibility, open-mindedness and transparency of the administration”.

Of equal interest is the research of the Centre of Study of the Friederich Erbert Foundation that has gone deeply into the research on possible European standards in relation to the institution of the ombudsperson⁶, during the convention of 2002 at Sofia. On this line of work we should recognise the tireless development work, over many years, of the European Ombudsman Institute of Innsbruck, referring across all the various geographic diversities of Europe and of the International Ombudsman Institute with its seat in Canada.

Of great importance has been the work of the Congress of local and regional powers during the Council of Europe in 1999 in setting out a resolution ⁷*sul ruolo dei difensori civici/ombudsmen nella difesa dei diritti dei cittadini* (on the role of the *difensori civici/ombudsman* in relation to the protection of the rights of citizens). On that occasion it was attempted to define a common notion of Ombudsman, such as requirements for the choice of ombudsperson, characteristics for the organisation of the office and services, the competencies and its functions, the ways of access the institution and the available means of action of this non jurisdictional body of protection and guarantee. The use of the concept of mediation, autonomy, independence and competence, the adequacy of means, the procedures *ex officio*, the rights of access to the acts of the civic service are only some of the keywords that, while beginning to acknowledge a *fil rouge*, have allowed the definition of common requirements of the institution, at the end of the 1990s.

In this research of a common basis two Charters on the ombudsperson institution have recently been completed in France and Italy: the first one concerns the *Médiateur du service publique*, while the second one is promoted by the local ombudsman institution in Tuscany⁸. It is interesting to make a comparison by analysing the content of both documents, trying to find the common elements and the differences belonging to the two juridical systems. It is important to state first that, the mainly national ombudsman institution in France (with the *Médiateur de la République*), is associated to a huge series of ombudsmen belonging to public services, whereas in Italy the institution, that was born in regional settings, and developed after the ex Law 142/1990 in local bodies, still suffers from the lack of the institution of an ombudsperson at a central level.

⁶ Topics such as practical and legal aspects for the institution of ombudsperson, specific form of the ombudsperson in "transitional countries, functions, powers, prerequisites of the activity, budget autonomy and organisation, relationship between the ombudspersons and other government institution, relationship between ombudspersons and the average citizen., international collaboration between ombudspersons.

⁷ Resolution n°80/1999.

⁸ Approved respectively by the *Club des Médiateurs du Service Public*(CAISSE DE DEPOTS ET CONSIGNATIONS, EDF, EDUCATION NATIONALE, FEDERATION FRANCAISE DES SOCIETES D'ASSURANCES, FRANCE 2;3, GAZ DE FRANCE, LA POSTE, MINISTERE DE L'ECONOMIE, RATP, SERVICE UNIVERSEL POSTAL, SNCF, VILLE DE PARIS MEDIEATEUR DE LA REPUBLIQUE), and by the ombudsman of the Region of Tuscany(dr. Giorgio Morales) and by the President of the Council of Local Autonomies(dr Franco Pesci).

The French Charter, subscribed by the mediators of public services, seems to point at the definition of standards belonging to these same heterogeneous typologies of guarantors. The presence in the working group of the national *Médiateur* (as the mediator of the city of Paris), enriches the document with a general relevance, not merely concerning, then, the issue of the railways authorities, of insurances or of mail offices. In the same way the Tuscan Charter offers an interesting remark, in the section related to the competence of the institution, to the local public services. It is stated, in this instance, despite a continuous privatization of the sector, the undeniable competence and authority of the territorial ombudsperson to intervene against these local bodies⁹.

An issue that may have distinguished the approach of the Italian erudition from the French one concerning the issue of civic defence/mediation over the past, is the attention addressed toward the means of mediation. In Italy, for a certain period, the legislator has given the institution competence mainly of formal control on the administrative conduct¹⁰, thus with the bureaucratization of the operative procedures of civic defence and in the relationship between “controller” and “controllee”. The use of general means of persuasion, conciliation and reconciliation of controversies, has been often used to demonstrate the absence of an authority-authoritativity of the body of protection, devoid of strong power and therefore necessarily ineffective. In the Tuscan charter, right in the premises, it is stated clearly, instead, that the assistance to the citizen is in a mere range of reconciliation. Likewise the nature of the intervention of the local ombudsperson must highlight the quality of collaboration and mediation. This gives relevance to the value of non coercive means that manifest themselves, in the activity of the ombudsperson, in a continuous disposition to communication among parties, in order to find a satisfying resolution in the interest of the public body and the private citizen¹¹. On the contrary, in France, where the appeal to mediation has involved, over the years, various sectors of the society¹², it seems that the term and the figure of the mediator are under the risk of inflation.

⁹ Companies, that are partnershiped or controlled by the local government office and private citizens

¹⁰ As an example, see the “*controllo eventuale*” on the acts of ex. Art. 127 D.Lgs. 267/2000

¹¹ The conciliatory activity in the administrative and procedural field, was denied at first by the concept of the unavailability of the rights of this subject, then has been agreed upon with the normative and doctrinal elaboration of the general institution of self-protection, and the agreements with the subject involved.

¹² According to social and local mediation (limited to the district), it is important to remember the long-term experience of the *Boutique du droit* of Lione.

Indeed it is found in the declaration of the *Charte* edited by the *Médiateur de la République*, the tendency to highlight the distinction between the “institutional” and “conventional”¹³ mediation. If for each figure we speak of an alternative way of sorting out quarrels, it is stated that the institutional mediation, as opposed to the other typology, has a precautionary scope and a role of activator of the changes within the institutions and the companies. Differently from the private conciliator, then, who intervenes once the conflict has started and with a mandate limited by the contract, the mediator of public administration (civic service), has an evolutionary scope of change within its own body. But, both use the same operative and socio-psychological means: listening and explanation, impartiality, discussion between the parties, complete investigation of the quarrel, simplified reconciliation between parties, and so on.

Moreover the common topic of the Charters, that it is found clearly stated in the international documents mentioned so far, is related to the necessity of the acknowledgement of the independence and autonomy of the ombudsperson. The Tuscan document, with particular clarity, reminds how the objective and subjective independence, is a peculiar characteristic of the ombudsperson, independence which represents an essential issue for a protection which is effective only if guaranteed by subjects that act in “a third party” condition in relation to the addressees of his intervention and to the petitioners. The *Charte*, correspondently, impose to the singular statutes that the impartiality of the institution is guaranteed in the conduct of the quarrels, and underlines the fact that this institution need to be functionally independent from the authorities or the corporations. According to the topics of independence and autonomy, both documents highlight the necessity, related to the ombudsperson, that appropriate resources of operation¹⁴ are guaranteed to this figure, as to avoid the risk, quoting the forceful words of M.Hayes, of “*mettere la museruola al cane da guardia o di immergerlo in un torpore privandolo del cibo*”¹⁵ (muzzling a watch dog or plunging it into a numbness by depriving it of food). Of equal relevance, in the Tuscan Charter, is the reference to the conditions of appointment, that provide for a quorum, requirements and procedures of consultation of social forces, so as to insure to the ombudsperson the acknowledged and authoritative figure of being a subject authentically *supra partes*. In relation to the *Médiateurs*, the appointment, generally, is under the care of the person in charge of the organisation that guarantees their independence from any internal organisation of the institution or of the company. In this instance the irrevocability, for the full term of the mandate, should insure the efficacy of the action (*efficacia dell'azione*).

¹³ *Le Médiateur de la République approuve les principes de la présente Charte visant à préciser les bonnes pratiques de la médiation institutionnelle afin d'éviter la banalisation de ce terme.*

¹⁴ Charter: “... guaranteed by the attribution of appropriate resources (even with budget autonomy)...”; *Charte* “ils ont les moyens nécessaires pour exercer leur action (budget, pouvoirs notamment de proposer des solutions... ”).

¹⁵ See report of the ombudsman of Valle d'Aosta, B.U.S.O. n° 33/4.81998 p.5.

Another peculiar aspect of the French document, is the tendency to decline a code of conduct (deontology) belonging to the ombudsman, as well as other liberal professions. *Les valeurs et la deontologie* are related, in facts, to the general characteristics of the mediation. The careful, balanced and easy-going attention to the parties, the careful respect of people, of their opinions and attitudes, and the attitude to simplify the search for friendly solutions of quarrels are elements that belong to the technique of mediation. Other more “technical” aspects are added, to the ones just mentioned, such as, the continuous respect of the debate, the transparency of the activity¹⁶, the confidentiality and the appeal to the equality of recommendations.

Another characteristic, that is referred to in the Tuscan Charter of the ombudsperson institution, is the will to establish, on the territory of the region, a net of protection, information, advice and collaboration to the users and the same local civic services. The same net, already foretold by the best doctrine of the past¹⁷, here becomes a programmatic target of the territorial ombudsmen that operate with the regional ombudsman coordination in Tuscany.

The topics discussed in both charters, briefly exposed here, are successfully included in the targets sought by international and European documents. The several common elements show the nowadays completed realization of an *iter* of international harmonization. Still interesting are the peculiarities and unexplored spaces that are the product of a geographic and cultural conceptual evolution, and that are still waiting for confrontation and beneficial mutual contaminations. The creation of a mixed work group, a kind of “twinning between charters”, may be aspired to, in order to optimise the operation and the harmonious philosophical/dogmatic definition of the ombudsman, so as it has been foretold by the doctrine and by the most recent European institutions.

Dott. Manuele Bellonzi

¹⁶ Obligation to inform the party in relation to the figure and powers of the institution, as in the obligation to advertise the activity of the office and the general recommendation, through periodical reports.

¹⁷ G.Arena, lecture at the Seminar CSR-ISR, *La difesa civica in Italia, quali prospettive?*, Roma, 28 Febbraio 1995, a cura di M. C Sacchetti, pag.103.