JOURNAL OF INTERDISCIPLINARY HISTORY OF IDEAS

2024

Volume 13 Issue 26
Item 4

– Section 1: Articles –

The *defensor civitatis* for the Protection of Vulnerable People

From Rome to the Present Day

by
M. Lourdes Martínez de Morentin

JIHI 2024

Volume 13 Issue 26

Section 1: Articles

Special Issue: From Defensor civitatis to Ombudsman

General Section

Section 2: Notes

Section 3: Reviews

The defensor civitatis for the Protection of Vulnerable People

From Rome to the Present Day

M. Lourdes Martínez de Morentin *

This article considers the Roman defensor civitatis*, which has been seen as an ancient precedent for the ombudsman for the people. Similar to the current ombudsman, he protected the most vulnerable people. This figure, since the beginning of the Ombudsman in the Swedish Constitution of 1809, has spread in States with a social and democratic conscience and is present in all areas of social life. Its creation has been one of the great advancements of the Rule of Law from the point of view of guaranteeing fundamental rights, since it carries out invaluable work in the protection of citizens, often harmed and powerless in the face of decisions of the public Administration.*

1. Introduction

The figure of the *Defensor*, as a protector of vulnerable people, has spread in states with a social and democratic conscience since the appearance of the Ombudsman in the Swedish Constitution of 1809, and is present in all areas of social life.[1]

* Universidad de Zaragoza (*lmarmor @ unizar.es*).

[1] Carmen Jiménez Salcedo, "Defensa de los derechos de los ciudadanos: el defensor del pueblo, concomitancias con el defensor civitatis romano", in *Contribuciones al estudio de las acciones populares en el marco del derecho administrativo, fiscal, penal y civil romano* (Madrid: Dykinson, 2021), 281. A complete study of the figure of the *defensor civitatis* in Carmen Jiménez Salcedo, "El defensor civitatis desde su primer reconocimiento legal en la Constitución de Valente y Valentiniano del 368 dC hasta la reforma de Maioriano", *Revista General de Derecho Romano* 42 (2024): 1-32.

Journal of Interdisciplinary History of Ideas 13(2024), 26, p. 4:1–4:18. Peer-reviewed.

The institution has achieved great recognition by being considered a persuasive, non-coercive judiciary, and using agile and humanitarian procedures in the face of the excessive depersonalization of the traditional bureaucracy. Currently, this protection extends not only to nationals of a country, but also to foreigners, as it is an instrument for the defence of human rights. The actions of the defenders must be aimed at finding a fair solution for the specific case and, therefore, in some cases it can lead to the non-application of the law.[1]

Under its different names (*Defensor del pueblo*, *Difensore civico*, Portuguese Provider of Justice, Ombudsman, *Prokuratura*, *Défenseur des droits*) it is a very precious institution in democratic societies, which carries out its work silently and efficiently, and is, unfortunately, poorly recognized.[2] Its creation has been one of the great advances of the Rule of Law from the point of view of guaranteeing fundamental rights, since it carries out invaluable work in the protection of citizens, often harmed and powerless in the face of decisions of the Public Administration.

We can consider the figure of the ombudsman as a kind of representative of the citizens, since his or her fundamental function is to control possible arbitrariness committed by public powers; a kind of 'complaints handler' because of inadequate actions by the Administration.

[1] Carlos Constenla, "Constitucionalismo Latinoamericano. Defensa del pueblo y Derechos Humanos. Introducción al tema", in *Tribunado-Poder negativo y defensa de los derechos humanos. Segundas Jornadas Italo-Latinoamericanas de Defensores cívicos y Defensores del pueblo. Homenaje al Prof. Giuseppe Grosso, Torino, 8-9 settembre 2016*, ed. Andrea Trisciuoglio (Milano: Ledizioni, 2018), 169-84.

[2] Antonio Rovira Viñas, "Veinte años del defensor del pueblo", *Revista de Derecho político* 58-59 (2003-2004): 355-368; Francisco Fernández Segado, "El estatuto jurídico-constitucional del Defensor del Pueblo en España", Seminario Internacional "Defensor del ciudadano, defensor cívico o defensor de los derechos humanos: la experiencia comparativa y el Proyecto chileno", Universidad de Talca. Talca (Chile), 4-6 de abril 2001, 223-309. See the overall work edited by Andrea Trisciuoglio, *Tribunado-Poder negativo y defensa de los derechos humanos. Segundas Jornadas Ítalo-Latinioamericanas de Defensores cívicos y Defensores del pueblo. Homenaje al Prof. Giuseppe Grosso, Torino, 8-9 settembre 2016* (Milano: Ledizioni, 2018).

The ombudsman lacks executive power and therefore does not have the power to solve problems, nor can (s)he adopt corrective or disciplinary measures. However, his or her opinions are of a dissuasive nature, publicly denouncing in periodic reports the abuses committed by the Administration, either by its actions or by its passivity with regard to certain events, proposing improvements for the citizens' lives. Since these reports are not binding, governments take them into account depending on their quality and the prestige of the person who holds the position, true *auctoritas*, in a very pure Roman sense.[1]

The figure of the ombudsman appears as a current requirement of the new democracies, and his intervention is increasingly expanded. He cannot be understood without democracy, to which he owes his existence, nor can democracy be understood without said institution, since it defends the legitimate interests of citizens.

Due to the prestige of the institution and its appropriate functioning, in almost all countries with decentralized governments, similar figures have emerged who are able to carry out their work in different areas—national, regional or autonomous—and in different topics, such as the protection of minors (Minor Defender). There is not an ombudsman at a national level in Italy, but positively at a regional level: the Difensore Civico.[2]

In Spain, the figure of the Defensor del pueblo comes up in art. 54 of the Spanish Constitution of 1978. Its social structure, operation and functions are

[1] Jiménez Salcedo, "Defensa de los derechos de los ciudadanos", 283; Rovira Viñas, "Veinte años del defensor del pueblo", 360.

[2] Although it may seem like a paradox, Elisabetta Palici di Suni highlights in her study of Comparative Law ("Il ruolo della difesa civica nei principali ordinamenti europei", in Trisciuoglio, *Tribunado-Poder negativo*, 143): "tale istituto è presente proprio laddove la pubblica amministrazione dà già prova di grande efficienza e funzionalità. Da ciò vi è chi fa discendere il principio secondo cui il difensore civico può essere istituito solo negli ordinamenti nei quali vi è già un sistema amministrativo avanzato e un clima di fiducia dei cittadini nei confronti della pubblica amministrazione".

provided for in Ley Orgánica 3/1981 of April 6 of the Defensor del pueblo. An attempt has been made to see a precedent for this figure in the Justicia de Aragon, of ancient origins, on which a discussion day was held within the framework of the International Grant Project, held in the city of Zaragoza in April 2023. An extensive presentation dealt with this figure; however, in the words of the speaker and specialist (M. A. Álvarez Añaños), it cannot be said that it is a precedent.

The European Ombudsman, called the 'European Mediator', was introduced in 1993 with the Maastricht Treaty of 1991; it is mainly attributed the function of guaranteeing the rights inherent to the very concept of European citizenship within the EU framework. The Ombudsman investigates complaints regarding cases of maladministration on the part of the institutions and other bodies of the European Union, submitted by EU countries' citizens or residents; reports to the interested institutions; tries to find amicable solutions; may make recommendations to such institutions and may send a special report to the European Parliament for appropriate action. (S)he is appointed and renewed by the European Parliament, but can be revoked by the EU Court of Justice.

There is currently a European network of Ombudsmen that functions effectively, together with the Commissioner for Human Rights, created by the Council of Europe in 1999. In Italy, the 'Telematic Portal of Civic Defense' project, developed by Antonio Cammelli and Elio Fameli,[1] shows the importance of a unified, accessible computer system on civic defence, which would make available to the citizens instruments that make more easily understandable the substantive rights of which they are entitled and the various procedures to guarantee their protection.

2. Background: the defensor civitatis of Roman law

The authors have examined this figure considering that its oldest precedent could be found in Roman Law.[2]

[1] Both are researchers at the Istituto di Teoria e Tecniche dell'Informazione Giuridica del Consiglio Nazionale delle Ricerche (Ittig), an institute born under the name of Istituto per la Documentazione giuridica (Idg) in Florence; cf. Sebastiano Faro and Giancarlo Taddei, "Il progetto 'Portale telematico della difesa civica'", in Trisciuoglio, *Tribunado-Poder negativo*, 323-328.

[2] José M. Piquer Marí, "El defensor civitatis en el Código Teodosiano y la Lex romana burgun-

If we look at historical considerations, we will observe that, among the studies on this figure, those related to its possible precedents, which could be traced back to the Roman *defensor civitatis* are missing. Professor Jiménez Salcedo points out that,[1] although the Tribune of the Plebs from the Republican era could have been thought of as a precursor to it, both figures cannot be equated either in terms of functions or powers. The Tribune of the plebs developed great power in political life. He could intervene and paralyze public events, and his person was inviolable (*sacro sanctitas*); he could veto the decisions of his colleague (*intercessio*) and other magistrates, and even the Senate. But its operation was framed in the fight for equality with the patriciate, in the achievement of his privileges and, therefore, in the transformation of ancient Roman society. The *auxilium* to which he resorted and the *coercitio* for penal repression served to control excessive or harmful activity of the public powers.[2] For this reason, the figure that seems most appropriate to be compared to the modern ombudsman is that of the *defensor civitatis*, which emerged afterwards, late in the 4th century AD.[3]

diorum", *Glossae* 13 (2016): 535-560; Andrea Trisciuoglio, "La tuitio del defensor civitatis nell'Italia ostrogota. Spunti dalla lettura delle Variae di Cassiodoro", in *Ravenna Capitale. Territorialità e personalità. Compresenza di diversi piani normativi* (Maggioli, 2013), 27-45; the same author in "Comparación entre el tribuno de la plebe y el defensor civitatis. A propósito de la prisión preventiva", *Revista Internacional de Derecho Romano (RIDROM)* 29 (2022): 336-366; Alex Corona Encinas, "Sobre la reforma en el cargo de defensor civitatis en época Justinianea. Aproximación exegética a Nov. Iust. 15", *Revista General de Derecho Romano* 34 (2020): 1-17.

[1] Jiménez Salcedo, "Defensa de los derechos de los ciudadanos", 285-86. Likewise, Trisciuoglio, "Comparación entre el tribuno de la plebe y el *defensor civitatis*", 353.

[2] Antonio Viñas, *Instituciones políticas y sociales de la Roma antigua* (Madrid: Iustel, 2013), 163-81; Vincenzo Arangio-Ruiz, *Historia del Derecho romano*, trans. Francisco de Pelsmaeker e Ivañez (Madrid: Reus, 1980), 56 ff.; Giuseppe Grosso, "Il diritto di sciopero e l'intercessio dei tribuni della plebe", in Giuseppe Grosso, *Scritti storico giuridici. Vol. I* (Torino: Giappichelli, 2000), 303 ff., where the author established, with due caution, an analogy between the negative weapon placed at the disposal of the plebs, the *intercessio tribunicia*, and the right to strike, an instrument placed at the disposal of the workers, but also an expression of the union organization. The analogy referred in particular to the common revolutionary origin and successive constitutionalization of both institutions, and the paralyzing effect of their exercise. Cf. commentary and current considerations in Andrea Trisciuoglio, "Potere negativo del tribuno della plebe e diritto di sciopero: i limiti. Rileggendo Giuseppe Grosso dopo 60 anni", in Trisciuoglio, *Tribunado-Poder negativo*, 57-61.

[3] Antonio Palma, "L'ambiguo status del defensor civitatis: soggetto publico o privato difensore?", in Trisciuoglio, *Tribunado-Poder negativo*, 97-118.

The *defensor civitatis* or *plebis* had, as his main mission, to protect the humblest classes against the humiliation of the powerful and against the abusive official exactions. Initially appointed by the government and later elected by suffrage, depending on the time, he was also granted civil jurisdiction over small claim disputes, as well as limited criminal jurisdiction.[1] This institution emerged in times of decadence, anarchy and corruption in the Roman Empire, unable to impose a uniform legal, fiscal and administrative order in its growing process of fragmentation; for this reason, a closed caste system was implemented in which burdens and obligations were transmitted hereditarily. This system was applied with greater rigor in relation to the settlers who worked the lands leased by the State, who could not abandon them. From that time on, the settler found himself linked (*adscrito*) to a certain farm, and with him, perpetually, his descendants.[2]. The emperors Honorius and Theodosius also stipulated that, since they could not be separated from the land they cultivated, in the event of the property being sold, it had to be passed on as "accessories" to the buyer (*ita glebae inhaerere, ut ne puncto quidem temporis debeant amoveri*).

Since the previous measures did not seem sufficient to achieve economic stability, the emperors believed it was necessary to definitively fix the value of goods and services. Thus, the *edictum Diocletiani de pretiis rerum venalium* dealt with the prices of different basic necessities and luxury items; of the wages of the laborers and workers; of the salaries of liberal professions such as lawyers and doctors, and of maritime and land transport. It was the most extensive and thorough tax regime established by any authority. It also contained the death penalty against offenders, which would reveal the extent to which the emperor believed that he could subject everything to his will, including economic laws. On the other hand, it must be highlighted that this system was a clear interventionist action on the part of the State, consistent with its desire for the production and distribution of wealth, in which free commercial initiative, characteristic of the classical era, was stifled.[3]

From that moment and in that context, the *defensor civitatis* emerged.

[1] Vincenzo Arangio-Ruiz, *Storia del Diritto romano* (Napoli: Jovene, 1947), 316.

[2] C.11.48.15; C.11.48.7: He calls them *servus glebae*. Although they were not slaves, they were considered farmers bound to the land by birth, in the words of Theodosius II and Arcadius. (C.11.52: *servi terrae ipsius cui nati sunt*)

[3] Arangio-Ruiz, *Storia del Diritto romano*, 384.

3. Appointment

This was a magistrate with the power to report to the governor of the province the irregularities committed by chancery officials or treasury agents against citizens in various matters.

Created on April 27, 364 in Illyria by a constitution of the emperors Valentinian I and Valens addressed to Probus (CTh.1.29.1),[1] prefect of Illyria, this figure was previously mentioned by the jurists Paulus and Hermogenianus. However, since ancient times there had been the custom of choosing protectors (*patroni*) from among the most illustrious and powerful figures in the city, and occasionally among women. It is not known why the *defensor* was created only for Illyria and not for all the dioceses; maybe it was historical. In the year 385 it spread to every province.[2]

In this constitution its appointment is mentioned in each *civitas* of the diocese of Illyria for the defence of the plebs against the injustices of the *potentiores*. From there it would spread to Africa, Italy and the western part of the Empire.

The vocation for public service had to be essential in whoever held the position; in addition, for his appointment it was necessary to look at certain personal qualities such as kindness, empathy, a sense of justice, closeness, perseverance and the power of persuasion. The list of qualities is included in CTh.1.29.1:

> (…) then for each of the cities of the predicted diocese, let your sincerity seek to choose for this ministry those who have healthy habits and whose past life can be praised.

In the period between 364 and 387 he was appointed directly by the prefect of the *praetorium*, who had the obligation to transmit the list of all the defenders of his diocese to the emperor.

In a second stage that corresponds to years 387 to 409, he was elected by the city itself, by means of a decree (*decreta civitatis*). It seems that at that time he was elected by popular vote.

As this system of election did not give good results, Honorius and Theodosius II adopted another system. They maintained popular suffrage, however, not all citizens without distinction of class took part in the election, but only members

[1] Abbreviations used: C: Justinian Code; CTh: Theodosian Code; Nov.: Justinian Novellae.
[2] Cf. Santi Romano, "Defensor civitatis", *NNDI* 5: 313.

of the clergy, bishops, *honorati*, *possessores* and *curiales*; therefore, commoners were excluded. Furthermore, the defender could only be chosen from among Catholics. The election also had to be confirmed by the prefect.

In 458, Emperor Majorian established the possibility of them being chosen from among the entire people: *municipes*, *honorati*, plebeians. And the right of confirmation passed from the prefect to the emperor. He himself lamented that citizens deprived of his help were forced to take refuge in the countryside fleeing the harassment of the treasury agents (Nov. Maior. 3.1).

In 505, the Eastern emperor Anastasius returned to the restricted suffrage system such as that established by Honorius and Theodosius II (C.1.4.19). As for the people who could be appointed, in addition to possessing the previously mentioned qualities they were required to be imbued with the sacrosanct mysteries of the Orthodox religion, something which they were to demonstrate with facts or statements sworn before the prelate of the Christian faith. Excluded from the possibility of the appointment were the *decuriones* and the *cohortales*, a type of officials of the provincial administration who had extra privileges, but of an inferior position to those of the imperial palace (palatini) (CTh.1.29.2. and 3 = C.1.55.2, year 365 AD).

4. Recipients of protection

A constitution by Valentinian I and Valens (CTh.13.10.7 and 8, year 371 AD), addressed to the Prefect of the Eastern *Praetorium*, stated that the *decuriones* and the landowners (*possessores*) would enjoy the patronage of the *defensor civitatis*. In another, it is said that "the calm peasant" will also enjoy said benefit (368 AD).

Against the rapacity of the treasury agents, who by imposing enormous taxes on the *possessores* committed real crimes, such as the falsification of weights and measures, the constitution of Honorius and Theodosius II (409 AD) referred as follows (C.1.55.8.1):

> We order that through the care and diligence of the defenders the possessors are not burdened in any way with greater measures and weights by the collectors (…).

This new attribution would be enough to show the deplorable state in which the estate property was found.

5. Powers

As it has been said, in the year 385 the constitution of Valentinian, Theodosius and Arcadius created this figure in a general way for all the provinces of the Empire (CTh.1.29.2 and 3 = C.1.55.4), thus clarifying the doubts regarding the functioning, purpose and nature of a figure that, designed for public service, had lost its prestige due to various acts of corruption and lack of impartiality:[1]

With respect to the defenders of all the provinces there will be this rule of administration, and the time will have to be counted in the space of a five-year period: namely that above all you act as father of the plebs, do not allow the inhabitants of the fields and cities to be overwhelmed with distributions of contributions, you oppose, with due reverence, the insolence of the officials and the procacity of the judges, you have the free power to enter whenever you want, to see the judge, prevent the taxes that are exacted from those whom you must protect as children, and do not tolerate that anything more than the customary contribution should be demanded from those from whom it is certain that without such a remedy they could not be compensated.

Regarding the personal qualities of the defender—honesty and severity—two constitutions of the same emperors are referred as follows (392 AD):

In all regions where the cruel madness of thieves, unaware of their own danger, is agitated, very honest and very severe defenders are in charge of discipline, and they preside over all acts daily, and do not allow the crimes to multiply with their impunity, and fight the sponsors, who, by giving favour to the prisoners and their aid to the criminals, made their crimes ripen.

The *defensor civitatis* had among his duties the defence and protection of the weak from any kind of oppression. Chronologically, he assumed powers in tax

[1] Cf. Romano, "Defensor civitatis", 313.

matters; vigilance to the judges so that they would not be corrupted by the more powerful adversary; power to denounce the guilty judge to the provincial governor; small jurisdiction over minor causes, whose purpose was to give prompt justice to the poor and save them from the annoyances of lawyers and chancery officials.

Thus, the defender could not deny his assistance to the inhabitants of the provinces, in the face of injuries or damage received by anyone (C.1.55.9.1), nor could he be exempt from his office if he had not presented the emperor an authorization from the prefect (C.1.55.10 Theodosius and Valentinian, year 441).

Regarding the jurisdictional function, the constitution contained in C.1.55.1 (year 365) indicates the power that defenders have to act in minor affairs (under 50 *solidi*), debt claims, escaped slaves, and similar things, informing the governor of the most important ones.

In matters of taxes, they could lead a real trial if the subscriptions in the census list had not been made according to law. Subsequently, the defender had to be present when the lists were drawn up (CTh.11.1.19).

Among its faculties, whenever it could be appropriate, he also had the possibility to have meetings with the *praefectus praetorio*, the *magistri militum*, the *magistri officiorum* and other magistrates, which recalls the *ius agendi cum patribus* of the ancient tribunes of the plebs.

Little by little, these functions declined, and he became a kind of police commissioner, so his appointment was no longer justified. We have already seen that he was charged with repressing the bandits and placing those caught in flagrant offense at the disposal of the governor; likewise, he had to persecute, denounce and bring in the presence of the governor pagans and heretics.

Acquiring the character of municipal magistrate with Majorian in a constitution of year 458, it is probable that the old powers of protection and defence were returned to the defender, but that in practice no improvement was observed towards the plebs.

With Justinian the return to the old functions seems to be noticeable: the defender still protected the plebeians against the agents of the treasury and watched the composition of the census lists (C.1.55.4). He exercised the old jurisdiction of minor causes (not exceeding fifty *solidi*: C.1.55.1); he continued to persecute banditry (C.1.55.6), and now also heretics; inserted *apud acta* the claims which were addressed to him, etc. A special power was attributed to him:

the appointment of guardian or curator to minors whose fortune did not exceed 500 aurei (C.1.4.30). In this period, and even before, together with the defender and with his same function, the figure of the bishop began to appear, who, little by little, would completely replace him.[1]

6. The Justinian reform

After the publication of the Code (year 534), Justinian completely reformed the institution of the *defensor civitatis*, who gradually became a kind of a lieutenant of the governor.

The reform is located at a time of local administrative structure reorganization, for the sake of greater efficiency and closer links with the central power, which will place the defender as one of the fundamental elements of municipal administration, reaching its peak at that time,[2] highlighting the historical institution continuity throughout the History of Rome.[3]

Justinian orders the position of defensor civitatis to be held among the most notable inhabitants of the cities in turn, perhaps to prevent the people appointed, with little qualification, from being under the de facto control of those who promoted their appointment, who could usurp their rights, fact that was assumed

[1] Romano, "Defensor civitatis", 314.

[2] Corona, "Sobre la reforma en el cargo de defensor civitatis", 2, 17.

[3] Antonio Fernández de Buján, "Sistematización y reconstrucción dogmática del Derecho administrativo romano", *Revista General de Derecho Romano* 30 (2018): 10. About the historical evolution of the institution, Emile Chénon, "Étude Historique sur le Defensor Civitatis", *Nouvelle Revue Historique de Droit Français et Étranger* 13 (1889): 321-362; Vicenzo Mannino, *Ricerche sul "Defensor civitatis"* (Giuffrè, 1984); Robert M. Frakes, *Contra Potentium Iniurias: The Defensor Civitatis and Late Roman Justice* (Beck, 2001); Piquer Marí, "El defensor civitatis en el Código Teodosiano", 536-560.

to be frequent by that time. Perhaps it was one of the reasons why the institution had lost its original prestige among local officials and city residents, and why the emperor urged its strengthening and recovery.[1]

The wording of the preface to Nov. 15 shows the emperor's displeasure at the laziness and inefficiency of the defenders when it came to fulfilling their duties, since, as stated, they would limit their work to what was ordered by the provincial governors. Likewise, reference is made to bad practices in the exercise of their function, such as the sale of public documents and negligent actions in the conservation of documents already issued, which as Professor Agudo emphasizes, would generate notorious legal uncertainty.[2] To avoid such practices and reduce interference in the exercise of office, the imperial chancellery resolved to strengthen the functions of the defender in the cities, especially with regard to judicial powers. Thus, the prohibition of declining the appointment was established, even by those who had the dignity of '*illustris*', just as the refusal to perform municipal positions and offices had been prohibited in previous centuries, as it is recalled by the CTh, in order to prevent desertion from burdensome municipal positions, in a kind of relationship of necessity between the imperial power and the local elites. In this way, the imperial chancellery would ensure that these elites maintained their predominant situation in the local context and, in return, would obtain municipal management that ensured the maintenance of law and order, while promoting the proper functioning of the tax system.[3] On the other hand, the appointment by a municipal commission and the restrictions on access to the position, which from this moment could only be held by the municipality's *possessores fundi*, altered the characteristics of the institution and were a demonstration of the progress of the new regime of local notables, who had ended up replacing the curial establishment in urban life.[4]

Some of the competencies specified in Nov. 15 attempted to bring the pro-

[1] Corona, "Sobre la reforma en el cargo de defensor civitatis", 8.

[2] Alfonso Agudo, "La competencia de apelación de los gobernadores de las provincias orientales en la legislación de Justiniano", *Revista General de Derecho Romano* 29 (2017): 7.

[3] Corona, "Sobre la reforma en el cargo de defensor civitatis", 11; Mark Whittow, "Ruling the Late Roman and Early Byzantine City: A Continuous History", in *Late Antiquity on the Eve of Islam* (New York: Routledge, 2016), 143-69.

[4] Corona, "Sobre la reforma en el cargo de defensor civitatis", 17.

fession closer to its original purposes of protecting disadvantaged sectors, for example, the insistent need to keep records, since there was a duty to draw up a record of the complaints of the municipalities about the injuries received, possibly for evidentiary purposes; but the attribution to the defender of preparing said acts and documents was not a Justinian innovation, but already appeared in a constitution of Valentinian I and Valens (C.1.55.1). Yet, there was an obligation to establish public headquarters in which the original public documents would be preserved and guarded.

Likewise, the auxiliary powers in tax matters that were attributed to him were notable, and they would serve, according to the authors, a double purpose.[1] On the one hand, the actions of the *defensor* in this area can be interpreted as work aimed at the police and the maintenance of public order, replacing, if necessary, the provincial governor, especially in the event of his absence. In this sense, it was established that the *defensor* would have to verify such situations and prepare the public document that reflected the default of the taxpayers. On the other hand, this function of public notary can be understood, also in the opposite sense, as a certain guarantee of the rights of taxable subjects, fundamentally for evidentiary purposes, due to the validity of public records in judicial procedures.

Along with those in the fiscal field, Justinian's main innovation with respect to the *defensor civitatis* lies in the expansion of his jurisdictional functions. This extension had the purpose of providing greater efficiency to the administration of justice.

The jurisdictional powers are opposed to the original configuration of the position, considered by some authors as a kind of city representative, although without the aforementioned powers.[2] We have already seen that this circumstance had been alleviated by Constantine by reinforcing the power of the *defensor* by giving him jurisdiction in small criminal proceedings (less than 300 *aurei*), thus alleviating the workload of judges and provincial governors. They also had the power to arrest individuals who had committed more serious crimes and place them at the disposal of the governor of the province, which is maintained in the Justinian legislation. On the other hand, the performance of the position

[1] Corona, "Sobre la reforma en el cargo de defensor civitatis", 13.
[2] Leonard A. Curchin, "The End of Local Magistrates in the Roman Empire", *Gerion* 32 (2014): 282.

was reduced to two years, compared to the five provided for in the previous legislation (C.1.55.4, year 384). The appeal of the sentences pronounced by the defender fell to the provincial governor.[1]

7. The figure of the bishop as defender of citizens in the late Empire

In some cities, the *defensor civitatis* was replaced by the bishop in the protection and defence of the disadvantaged.[2]

The phenomenon of intercession by bishops before civil authorities in trials under the jurisdiction of the latter must have been very common in the post-classical era, once Christianity became the official religion of the Empire.[3] The examples of intercessory bishops are varied: Ambrose of Milan, Augustine of Hippo, etc. The latter, as one of the most prominent and well-known members of the Catholic Church in the province of Africa, at no time evaded his intervention as an intercessor or mediator in various cases, although in the majority of occasions he did so in support of the interests of his own religious community when they were affected, as shown by the set of letters referring to his intercession on behalf of a certain Favencio when he was arrested as soon as he was receiving asylum granted by the Church of Hippo.

The same thing happens in the letters addressed to Marcellinus requesting that capital punishment not be applied to the stubborn Donatists, after the edict

[1] Cf. Agudo, "La competencia de apelación de los gobernadores de las provincias orientales", 7.

[2] Romano, "Defensor civitatis", 315.

[3] Cf. the works of José Antonio Martínez Vela, "El obispo como defensor y protector de los ciudadanos en el bajo imperio romano. El testimonio de las cartas de san Agustín", *Revista General de Derecho Romano* 32 (2019): 1-29; Gabriel del Estal, *Los tres vuelos del águila de Hipona* (Ediciones Escurialenses, 2001), 80-83.

of suppression of Donatism in the year 411.[1] Among the arguments used by Augustine, reference is made to the Christian *pietas* of his interlocutor, to his authority as a bishop before the Christian magistrate, and also to legal arguments in a sample of his detailed knowledge of the current order.

As we see, there was not always a *defensor civitatis* in the imperial cities.[2] In the absence of said protector, the bishop, or the imperial chancery, could perform this protective function, always ready to receive direct complaints from the provincials about the abuses of the local authorities.[3] However, it is not possible to speak in regard to Rome of a right to representation of a person, as it is understood today.[4]

8. Conclusive considerations

The *defensor civitatis* never achieved the purposes for which it was created. This is demonstrated by the continuous reforms in the way of electing him, which were expected to ensure the election of suitable people; by the substantial changes that were gradually produced in his powers, distorting them, making this figure just another simple magistrate; as well as by the continuous recommendations that appear in the imperial constitutions addressed to defenders who are not zealous in the fulfilment of their duties. However, the institution, perhaps due to the spirit of conservation that always animated Roman Law, was not directly abolished, but rather gradually disappeared. The unstoppable decline of the municipal administration, on the one hand, and the continuous development of the powers of the bishop, on the other, meant that it no longer had a reason to exist. Nevertheless, in the absence of documents confirming

[1] Christian schismatic movement initiated by Bishop Donato in the 4th century in Numidia (present-day Algeria), which was born as a reaction to the relaxation of the customs of the faithful. Cf. Madeleine Moreau, "Le dossier Marcellinus dans la correspondance de Saint Agustin", *Recherches Augustiniennes* IX (1973): 5-181.

[2] Martínez Vela, "El obispo como defensor y protector de los ciudadanos", 21.

[3] Trisciuoglio, "Comparación entre el tribuno de la plebe y el defensor civitatis", 353.

[4] Pietro Paolo Onida, *Agire per altri o agire per mezzo di altri. Appunti romanistici sulla rappresentanza* (Napoli: Jovene, 2018); Andrea Trisciuoglio, "Reflexiones sobre el mandato imperativo: experiencia romana y constitucionalismo moderno", in *Temas de Derecho administrativo* (Madrid: Dykinson, 2021), 33-42.

it, in relation to the Eastern Empire, it seems that the institution was maintained, even if only nominally, and lasted as long as the city enjoyed autonomy, disappearing completely when Emperor Leo "the philosopher" abolished the municipal regime, towards the end of the 9th century. As for the west, the defender survived the fall of the Empire, subsisted under Ostrogothic rule and was suppressed in the Lombard order but maintained in the part of Italy subject to the Eastern emperor. The moment in which it definitively disappeared is not known, but according to the writings of Gregory the Great, around the year 600 it continued to exist.

References

Agudo, Alfonso. "La competencia de apelación de los gobernadores de las provincias orientales en la legislación de Justiniano". *Revista General de Derecho Romano* 29 (2017): 1-12.

Arangio-Ruiz, Vincenzo. *Historia del derecho romano*. Translated by Francisco de Pelsmaeker e Ivañez. Madrid: Reus, 1980.

—. *Storia del Diritto romano*. Napoli: Jovene, 1947.

Bonfante, Pietro. *Historia del Derecho romano*. Translated by J. Santa Cruz Teijeiro. Madrid: Ed. Revista de Derecho Privado, 1944.

Chénon, Émile. "Étude Historique sur le Defensor Civitatis". *Nouvelle Revue Historique de Droit Français et Étranger* 13 (1889): 321-362.

Constenla, Carlos. "Constitucionalismo Latinoamericano. Defensa del pueblo y Derechos Humanos. Introducción al tema". In *Tribunado-Poder negativo y defensa de los derechos humanos. Segundas Jornadas Ítalo-Latinoamericanas de Defensores cívicos y Defensores del pueblo. Homenaje al Prof. Giuseppe Grosso, Torino, 8-9 settembre 2016*, edited by Andrea Trisciuoglio. Milano: Ledizioni, 2018.

Corona Encinas, Alex. "Sobre la reforma en el cargo de defensor civitatis en época Justinianea. Aproximación exegética a Nov. Iust. 15". *Revista General de Derecho Romano* 34 (2020): 1-17.

Curchin, Leonard A. "The End of Local Magistrates in the Roman Empire". *Gerion* 32 (2014): 271-286.

Del Estal, Gabriel. *Los tres vuelos del águila de Hipona*. Madrid: Ediciones Escurialenses, 2001.

Faro, Sebastiano, and Giancarlo Taddei. "Il progetto 'Portale telematico della difesa civica'". In *Tribunado-Poder negativo y defensa de los derechos humanos. Segundas Jornadas*

Ítalo-Latinoamericanas de Defensores cívicos y Defensores del pueblo. Homenaje al Prof. Giuseppe Grosso, Torino, 8-9 settembre 2016, edited by Andrea Trisciuoglio. Milano: Ledizioni, 2018.

Fernández de Buján, Antonio. "Sistematización y reconstrucción dogmática del Derecho administrativo romano". *Revista General de Derecho Romano* 30 (2018): 1-13.

Fernández Segado, Francisco. "El estatuto jurídico-constitucional del Defensor del Pueblo en España". *Seminario Internacional «Defensor del ciudadano, defensor cívico o defensor de los derechos humanos: la experiencia comparativa y el Proyecto chileno», Universidad de Talca. Talca (Chile), 4 a 6 de abril 2001*: 223-309.

Frakes, Robert M. *Contra Potentium Iniurias: The Defensor Civitatis and Late Roman Justice*. München: Beck, 2001.

Grosso, Giuseppe. "Il diritto di sciopero e l'*intercessio* dei tribuni della plebe". In ——. *Scritti storico giuridici. Vol. I.* Torino: Giappichelli, 2000.

Jiménez Salcedo, Carmen. "Defensa de los derechos de los ciudadanos: el defensor del pueblo, concomitancias con el defensor civitatis romano". In *Contribuciones al estudio de las acciones populares en el marco del derecho administrativo, fiscal, penal y civil romano*. Madrid: Dykinson, 2021.

——. "El defensor civitatis desde su primer reconocimiento legal en la Constitución de Valente y Valentiniano del 368 dC hasta la reforma de Maioriano". *Revista General de Derecho Romano* 42 (2024): 1-32.

Mannino, Vicenzo. *Ricerche sul "Defensor civitatis"*. Milano: Giuffrè, 1984.

Martínez Vela, José Antonio. "El obispo como defensor y protector de los ciudadanos en el bajo imperio romano. El testimonio de las cartas de san Agustín". *Revista General de Derecho Romano* 32 (2019): 1-21.

Moreau, Madeleine. "Le dossier Marcellinus dans la correspondance de Saint Agustin". *Recherches Augustiniennes* IX (1973): 5-181.

Onida, Pietro Paolo. *Agire per altri o agire per mezzo di altri. Appunti romanistici sulla rappresentanza*. Jovene, 2018.

Palici di Suni, Elisabetta. "Il ruolo della difesa civica nei principali ordinamenti europei". In *Tribunado-Poder negativo y defensa de los derechos humanos. Segundas Jornadas Ítalo-Latinoamericanas de Defensores cívicos y Defensores del pueblo. Homenaje al Prof. Giuseppe Grosso, Torino, 8-9 settembre 2016*, edited by Andrea Trisciuoglio. Milano: Ledizioni, 2018.

Piquer Marí, José M. "El defensor civitatis en el Código Teodosiano y la Lex romana burgundiorum". *Glossae* 13 (2016): 535-560.

Romano, Santi. "Defensor civitatis". *NNDI* 5: 313-316.

Rovira Viñas, Antonio. "Veinte años del defensor del pueblo". *Revista de Derecho político* 58-59 (2003-2004): 355-368.

Trisciuoglio, Andrea. “Comparación entre el tribuno de la plebe y el defensor civitatis. A propósito de la prisión preventiva”. Revista Internacional de Derecho Romano (RIDROM) 29 (2022): 336-366.
—. “La tuitio del defensor civitatis nell’Italia ostrogota. Spunti dalla lettura delle Variae di Cassiodoro”. In *Ravenna Capitale. Territorialità e personalità. Compresenza di diversi piani normativi*. Maggioli, 2013.
—. “Reflexiones sobre el mandato imperativo: experiencia romana y constitucionalismo moderno”. In *Temas de Derecho administrativo*. Dykinson, 2021.
Viñas, Antonio. *Instituciones políticas y sociales de la antigua Roma*. Madrid: Iustel, 2013.
Whittow, Mark. “Ruling the late Roman and early Byzantine city: A continuous history”. In *Late Antiquity on the Eve of Islam*. New York: Routledge, 2016.

Orientalizing, Spirit protector shown in relief inside the chamber of the Zaachila tomb, *2019; CC BY-NC-ND* `https://flic.kr/p/2iPUkTn` .