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Historical-Romanistic Study of the Institution of the Ombudsman

An Institution Inherent to Democracy

by
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Historical-Romanistic Study of the Institution of the Ombudsman

An Institution Inherent to Democracy *

Carmen Jiménez Salcedo **

Interest in the Ombudsman has recently increased, prompting the legal debate on the possibility that this institution with a strong democratic profile be granted certain flexible jurisdictional powers, accessible procedures and the creative development of regulatory standards at national and supranational level. In particular, at the level of the European Union (EU), some studies have shown an improvement in the behavior and responsibility of EU institutions and bodies as a result of an intervention that seeks to incorporate good administrative standards and their control. In this sense, and as Romanists, it is our duty to highlight the true origin of the institution in the defensor civitatis *and, through its study, to provide keys to help build a more effective legislative framework that takes into account elements and parameters of utility that Roman Law has provided to the international legal experience throughout history and will continue to provide in the future.*

1. Preamble

* This article is an expanded version of my "El defensor del pueblo: institución imprescindible en el futuro del Estado social y democrático de derecho. Una perspectiva histórico-romanística", *Revista digital de derecho administrativo (RDDA)* 30 (2023): 103-126, https://doi.org/10.18601/21452946.n30.06. The research is part of the R&D&I Project "Acciones e interdictos populares: Delitos públicos, delitos privados, y tutela del uso público de las cosas públicas" (Knowledge Generation 2021, Non-Oriented Research, Type B). España, Ministerio de Ciencia e Innovación, Agencia Estatal de Investigación, Área Derecho, Cod. Administrativo/Ref: PID2021-124608NB-100. Principal investigators: Antonio Fernández de Buján (PI1), Juan Miguel Alburquerque Sacristán (PI2).
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The ombudsman emerged at the beginning of the 19þ century within the framework of the Swedish constitutional text of 1809 and we can say that in the present era and in the international sphere it has reached its maximum level of success and recognition since its establishment. This is due to its institutional nature of persuasion rather than coercive imposition, and to the use of agile procedures to achieve actions with a more human profile, as opposed to the excessive depersonalization of traditional bureaucracy. In this way, it has gained presence at the national, regional and local levels, as well as at the supranational level. In addition, some recent studies have shown an improvement in the conduct and accountability of EU institutions and bodies due to the adoption of good administrative standards as a result of the intervention and control of the European ombudsman. As a result, we are witnessing a resurgence of interest in this figure, despite the fact that, since its creation, it has been overshadowed by the courts of the European Union, which embody the rule of law, as well as by its lack of binding and executive power. In our opinion, however, this last characteristic could become its greatest strength, if it is exercised to the limits of its effectiveness. Indeed, the door is opening to a legal debate on the possibility of granting the ombudsman certain flexible jurisdictional powers, accessible procedures and the creative development of normative standards. For the time being, however, it is certain that the figure of the ombudsman has only the power, with persuasive arguments and light pressure, to induce state and EU bodies and institutions, or governments at the national level, to comply with its recommendations and proposals. Thus, as an incentive to analyze the current institution, we have set out to look at the distant but interesting figure of the Roman *defensor civitatis*, in order to encourge a legislative review of the institution at the national level and, why not, serve as an inspiration to other countries.

As a fundamental premise, we follow the approach of Fernandez De Buján,[1]

[1] A pioneer in directing studies concerning the reconstruction of Roman Administrative and Fiscal Law in Spain, Professor of Roman Law at the Autonomous University of Madrid, Full Member of the Royal Academy of Jurisprudence and Legislation of Spain, Principal Investigator of the aforementioned Research Project, and of many other successive ones in more than 20 years already executed and published on this subject. He is also the director of several monographic contributions under the title of *Hacia un derecho administrativo, fiscal y medioambiental romano* (2005, 2011, 2013, 2016, 2021), and the important *Contribuciones al estudio de derecho administrativo fiscal y medioambien-*

who in several scientific works expresses an idea that deserves attention in these times in which the historical-legal science seems to be relegated to the background: that the Roman legal experience is an obvious classical manifestation of the science of law and that it transcends the historical period of its validity. Most of the concepts, institutions, rules and solutions to legal problems and doubts, as well as the systematics that inform our current legal system, have their origins in Roman law. An influence, moreover, not so recent: in more than a decade of work being done on the reconstruction of Roman administrative law, studies on the influence of Roman public law show a clear presence of the same in our current law and also in the framework of European Union law.[1]

tal romano (Madrid: Dykinson, 2021). He is also the director of the prestigious collection Dykinson "Monografías de Derecho Romano" (sections "Derecho Administrativo y Fiscal Romano" and "Derecho Público y Privado Romano", with more than 150 published monographs) and the editor of the *Revista general de derecho romano* (*RGDR*). Among his numerous works on the subject of our article, we mention here: *Derecho romano* (Madrid: Thomson Reuters-Aranzadi, 2021[4]); *Derecho público romano* (Madrid: Thomson Reuters-Aranzadi, 2016[19]), 200 f.; *Derecho privado romano* (Madrid: Thomson Reuters-Aranzadi, 2016[19]), 150 f.; *De la* actio popularis *romana a la acción popular ex artículo 125 CE. Persecución de delitos públicos, delitos privados, y tutela del uso público de los bienes públicos*", in *Contribuciones al estudio del Derecho Administrativo, Fiscal y Medioambiental romano* (Madrid: Dykinson, 2016), 17 f.; "Acción popular y tutela de intereses generales en el Derecho histórico español y Ordenamiento Jurídico vigente II", *RGDR* (2020): 65; "La *actio popularis* romana como antecedente y fundamento de la acción popular ex artículo 125 CE", RAD 6 (2020): 89; "Las acciones populares romanas: persecución de los delitos públicos y delitos privados y tutela del uso público de los bienes públicos (I)", *RGDR* 34, (2020): 119; "Interdicta publicae utilitatis causa y actiones populares", Academic speech on the occasion of the DHC at the New Bulgarian University, March 16 2018, *RGDR* 32 (2019): 11-15, 177; "La necesaria reconstrucción de los conceptos y dogmas propios de la Administración Pública", *RGDR* 23 (2020): 295-346; "Sistematización y reconstrucción dogmática del Derecho Administrativo romano", in *Contribuciones al estudio*, 222; "Hacia un Tratado de Derecho Administrativo romano", *RGDA* 24 (2010): 347; "Actiones populares romanas: Interés público y tradición democrática", in *Estudios en homenaje al profesor Luis María Cazorla Prieto* (Cizur Menor: Aranzadi, 2021); "*Un apunte sobre legitimación popular*", *RGDR* 29 (2017): 201; "La acción popular", Investiture Speech as Doctor Honoris causa, May 2 2018, Universidad S. Pablo, *CEU*, 13-29; "Actio popularis y defensa del interés general en la experiencia Jurídica romana", paper presented at the Real Academia de Jurisprudencia y Legislación de España, November 22, 2018 during the "X Congreso de las Academias Jurídicas de Iberoamérica", *BOE* 1 (2019): 83-90; "La defensa y protección de los derechos de los ciudadanos desde Roma hasta nuestros días", in *Collection of Reports and Papers Presented at the International Scientific Conference in Honour of acad. Antonio Fernández de Buján y Fernández, Doctor Honoris Causa of New Bulgarian University, held on 6 November* (Sophia: New Bulgarian University, 2019), 19-40.

[1] Juan Miguel Alburquerque, "Concentración y ordenación urbanística del territorio romano: colo-

Therefore, looking at Roman legal institutions is not only a necessary step to assess the historicity of the law, but, in the words of the distinguished Romanist, Roman law is configured as a necessary instrument to understand the current law and to help in the construction of the law of the European Union, based on the common elements and parameters that Roman law provides to the European legal experience. In this sense, combining the analysis of the institutions of Roman law with the current legislation constitutes a method of historical-legal research that encourages reflection on possible legislative reforms based on the Roman legal experience, which is a paradigm in many aspects of technical knowledge and justice.

In order to specify the thesis defended in our study of the Roman *defensor*

nias, conventos y municipios de la Bética", *RGDR* 13 (2009): 77-113; "Reconocimiento pretorio y jurisprudencial de la función social de los bienes destinados al uso público – *Res publicae in publico usu*", *RDDA* 17 (2017): 141-161; "Negocio jurídico: introducción, revisión científica y doctrinal", *Ius romanum* 1, *Commercium* (2016): 36-52; "Reflection on the irnitana iurisdictio", *Ius Romanum* 2 (2015): 323-345; "Algunos fundamentos y convergencias de la experiencia administrativa romana sobre el medio ambiente, los recursos naturales y res publicae", *Glossae: European Journal of Legal History* 14 (2017): 27-53; "El principio rector de las obligaciones jurídicas entre parientes: La reciprocidad en tema de alimenta et victus", in *Hacia un derecho administrativo, fiscal y medioambiental romano IV*, ed. by Antonio Fernández de Buján and Gabriel Gerez Kraemer (Madrid: Dykinson, 2021), 1089-11119; "Substantial differences between *De penu legata* and *De alimentis vel cibariis legatis*", *Ius Romanum* 1 (2020): 188-207; *Effects of* ius Latii *on the roman Betic*, *Ius Romanum* 2 (2017): 152-164; "La inmanencia del pensamiento de Séneca en el método educativo de la institución universitaria", *RGDR* 36 (2021): 1 -24; *Acciones e interdictos populares i: legitimación popular y especial referencia al interdicto popular sobre la protección de las vías y caminos públicos* (Madrid: Dykinson, 2022). Salvador Ruiz Pino, "Algunos precedentes históricos de protección o defensa de los recursos naturales y de la salubritas en Roma: hacia un derecho administrativo medioambiental romano", *RDDA* 17 (2017): 91-10; "Nuevas perspectivas en torno a la experiencia administrativa medioambiental romana", in *Hacia un derecho administrativo y fiscal romano IV* (Madrid: Dykinson, 2021), 669-698. Alfredo Obarrio, "La rúbrica de decreto ad alineanda universitatis bona en la tradición jurídica tardomedieval", *RGDR* 24 (2015):1-50. Gabriel Gerez Kraemer, *Usos y derecho de las aguas en la Hispania Romana* (Madrid: Civitas, 2020). Belén Malavé Osuna, "A propósito del poder político y económico de las curias durante el bajo imperio", *RGDR* 31(2020). Esther Pendón Meléndez, "Algunas consideraciones sobre las contratas y subastas en el sector público en derecho romano y en la actualidad", *RGDR* 18 (2012); María Salazar Revuelta and Ramón Herrera Bravo, "Los principia iuris como medio de armonización y unificación del Derecho europeo a través de la metodología histórico-comparativa", *Glossae: European Journal of Legal History* 14 (2017): 818–864. Vanessa Ponte, *Régimen jurídico de las vías públicas en derecho romano* (Madrid: Dykinson, 2007); "La defensa de las vías públicas romanas. Interdictos especiales para la protección del disfrute de las *viae publicae*", *RGDR* 9, (2017).

civitatis, we will state that the *defensor civitatis* of the low Roman Empire is not the current defender of the people. It does not have the same legal nature, the same structure, nor the same attributes, nor does it operate in the same way, but both figures share a common essence, the defense of the most vulnerable, weakest citizens against abuses committed by administrative bodies. In fact, the current Ombudsman in Spain is defined as a high commissioner of the Cortes Generales, in charge of defending the fundamental rights and public freedoms of citizens through the supervision of the activity of the Spanish public administrations. This function can be extrapolated to other states, with subtle differences in terms of elections, procedures and powers, which would be the subject of a comparative law study beyond the scope of this paper, but whose common axis revolves around the investigation, at the request of a party or ex officio, of maladministration practices in the action of public institutions and bodies that are harmful to citizens. The Roman *defensor civitatis*, the first of its kind, was created in the 4th century as an institution independent of the central power of the Empire, to guarantee the defense of the rights of the most disadvantaged social classes, to free from harm those who suffer injustice (*quatenus eripiant malis iniustitiam patientes*).[1] Therefore, starting from a general overview of the evolution of the modern ombudsman, we will focus on a more concrete vision of the Roman *defensor civitatis* with the aim of trying to discover in its legal basis, the keys for the understanding, improvement and legislative projection of the figure of the current ombudsman. This shall be done without going too far, because, as we have said, the *defensor civitatis* is not, and in our opinion cannot be, the ombudsman of today, although it is undoubtedly a source of knowledge and inspiration, as so many institutions of public law and of Roman administrative experience have undoubtedly been.

[1] Just., Nov. 15 Pr.

2. An Institution that Emerged in the 19th Century.

The creation of the institution in modern times is located in the 19th century, specifically in the Swedish Constitution of 1809 and under the protection of the dialectical struggle that existed between Parliament and the King, under the name of *justitie ombudsman*. In its art. 96 the constitutional text established that

> the parliament would designate in each legislature an individual distinguished for his knowledge and probity, so that as a representative of this power and according to a series of instructions, he would see to it that judges and officials conformed to the laws and would prosecute before the courts those who in the exercise of their office committed illegalities.

The fundamental law makes him independent of the Crown and the executive, considering him a kind of delegate of the Parliament in charge of the respect of the legality by the powers and the civil servants.

Thus, the figure of the ombudsman, conceptualized since its appearance in the Swedish Constitution, has been extended to practically all countries that follow the model of a state based on the rule of law. After Sweden, it was created in other Nordic countries, such as Finland in 1919, Denmark in 1953 and Norway in 1962, and it has undergone an extraordinary evolution in recent decades, coinciding in time with the different democratic processes and waves that have been generated in different regions of the world, to the point of speaking of a true 'Ombudsmania'.[1]

After its introduction in Europe, it spread to countries as far away as New Zealand, the Philippines, Australia, the United States, Mexico, Canada, Tanza-

[1] In this sense, it is interesting to briefly mention the meaning of the Swedish word *Ombud*, which literally refers to a person legitimized or empowered to act as a representative of another, commissioner, protective agent instituted to control and limit administrative arbitrariness. The term *ombudsman*, which has finally become the term of choice in many parts of the world, is usually translated as representative, mediator, or even mediator, and is also understood as ombudsman. Recently, the use of the word *ombudsperson* has become more generalized, and its use is becoming more and more frequent for reasons related to criteria of non-discrimination on the basis of gender. Cfr. Ana María Moure Pino, *El ombudsman. Un estudio de derecho comparado con especial referencia a Chile* (Madrid: Dykinson, 2015): 22.

nia, South Africa and Israel. In the case of Latin America, and with the institution of the Spanish Ombudsman as its main inspiration, it has been consolidated in more than fourteen countries at the state level and, in some cases, at the sub-state and sectoral levels, thus becoming a true sign and democratic demand of contemporary societies that, due to their excessive bureaucratization, have to face a greater number of threats to the rights and legitimate interests of citizens. However, it is worth recalling the vicissitudes suffered by the holders of this institution and the statements that the Ibero-American Federation of Ombudsmen has had to make in order to stop some malicious attempts to limit the powers of ombudsmen,[1] while their work is observed with interest by international organizations. UNESCO, for example, recognizes ombudsmen as the main multipliers of the culture of peace, making it possible to overcome the current conditions of insecurity and violence that impede the consolidation of lasting peace, and values their role, especially in Latin America, for the respect and development of democracy, civic education and the organized participation of marginalized, excluded and discriminated populations.[2].

Returning to the primordial sense of the institution, we recall that Montesquieu, with his wise political axiom "So that one cannot abuse power, power must check power by the arrangement of things",[3] sets the basis of modern constitutionalism and the philosophical foundation of the figure of the ombudsman. In fact, we can affirm without fear of being mistaken that ombudsmen are established as a parallel power to the executive power, in order to watch over the fulfillment of legality and to exercise a role of control or supervision over the actions of the organs of administrative power; a role that must be essential, consisting in reporting negatively, by way of veto, those acts that, even if legal, violate the fundamental principles of justice and equity that must prevail

[1] Jorge Luis Maiorano, "El defensor del pueblo en América latina. necesidad de fortalecerlo", *Revista de Derecho – Universidad Austral de Chile* 12 (2001): 191-198; Gonzalo Aguilar Cavallo and Rebecca Steward, "El defensor del pueblo latino americano como institución independiente de promoción y protección de los derechos humanos referencia especial a la situación actual de Chile", *Revista de Derecho Universidad Católica del Norte*, Sección: Estudios, 15, no. 2 (2008): 21-66.

[2] Jorge Luis Maiorano, "La UNESCO y el Defensor del Pueblo", *La ley. Revista juridica argentina* no. 500 (1996): 1712-5.

[3] Charles Secondat de Montesquieu, *The Spirit of the Laws*, ed. by Anne M. Cohler, Basia C. Miller, and Harold S. Stone (Cambridge: Cambridge UP, 1989), 155.

in all administrative decisions in a state of law. We are faced with a historical constant that reminds us of a kind of perpetual return to the idea of the need for protection, at all times and in all places, against the abuse of power and the often perverse coldness of the administration.

The basic function of this magistracy could be defined as the control of possible arbitrariness committed by the public authorities, that is, as a kind of "complaint handler" in the face of certain actions of the administration that are considered partially or totally unorthodox. However, the ombudsman does not have executive powers and therefore does not have the authority to resolve the complaint formulated by the citizen, nor to take corrective or disciplinary measures in this regard. Hence the recurring argument of doubt, without any basis, about the real usefulness of his actions.

The ombudsman's office is a one-person institution, with its own office, staffed by assistants and officials, who act on the fundamental principles of independence, impartiality and confidentiality in the matters brought before them, and who apply agile and humane procedures in the face of growing and impersonal bureaucracy.

In most countries, ombudsmen are appointed by parliament to monitor the correct application of the law and to act as guarantors of fundamental rights, particularly in their dealings with the various administrations. Comparative law studies traditionally distinguish three types of ombudsmen: the first, appointed by the executive ombudsman, as in France; the second, appointed by the parliamentary ombudsman, as in Mexico or Spain; and the third, whose main role is the protection of human rights, the human rights ombudsmen. Most of the ombudsmen belonging to the latter category are enshrined in the respective constitutions of their states, as is the case in Spain, Portugal, Romania and Germany..[1] All of them, however, do not represent a derivation of the control exercised over the government by the chambers, but rather an extension of the control activity over the executive power beyond the regime of political accountability of the latter in parliamentary systems.[2]

The opinions of the ombudsman have a dissuasive character, but they are not

[1] Rhita Busta, "Contribution à une définition de l'Ombudsman", *R.F.A.P* 123 (2007): 387-398.

[2] Antonio La Pergola, "Ombudsman y Defensor del Pueblo, apuntes para una investigación comparada", *Revista de estudios políticos* 7 (1979): 69-92.

coercive, i.e., the ombudsman makes public complaints and periodically prepares reports on abuses committed by the administration or its inactivity, and makes proposals for improving the quality of life of citizens. However, these reports are not binding, and their follow-up by governments depends on the quality of the reports and also on the prestige of the person in office. That is why, traditionally, professionals of recognized professional and human prestige are proposed to carry out this function. The vocation of public service must be essential to whoever holds this competence, and its exercise requires personal virtues such as kindness, empathy, sense of justice, closeness, as well as perseverance and the power of persuasion.

Very precise and vivid, in this sense, is the Roman text collected in the Theodosian Code: "Then, for each of the cities of the foretold diocese, let your sincerity be sure to choose for this ministry those who are of sound habits and whose past life can be praised" (C.Th. 1, 29, 1). And it is truly obvious that behind the institutions are the people who hold them, and that good or bad administrative management is defined according to their human quality, referring above all to their ability to participate in the matters they deal with.

Thus, and with an accelerated pace of diffusion, as if it were a new current trend or perhaps a real requirement of the new democracies, the ombudsmen's offices are increasingly expanding their intervention. It could be said that the institution cannot be understood without democracy and that, conversely, democracy would be seriously affected if it were deprived of this institution, which is the defender of the legitimate interests and rights of citizens.

Of course, it is not our intention here to propose that the ombudsman's offices should replace the functions performed by the traditional control bodies (internal administrative control; external control, mainly by Parliament or its dependent bodies; and, finally, judicial control, both by the ordinary courts and by the contentious-administrative courts). It is only a matter of supplementing or perfecting them through the performance of an independent and impartial body, agile, quick and flexible, close and accessible, free of charge, strongly antiformalist and free of paralyzing and lengthy procedures: a body capable of dealing with any type of complaint (from illegality to negligence, administrative silence or disregard) related to the actions of the administration and the defense of the legitimate rights and interests of citizens; a body that knows how to appreciate discretion and opportunity, that is not limited to the specific case, and

that can therefore offer a greater variety of solutions to the complaints raised, drawing conclusions of general application from the case raised, advising and recommending improvements in the functioning of the administrations and in the relations with the administrations; in short, a body that is unique and different from the others, that has its own scope of action and does not in any way imply an unnecessary duplication of structures. In this way, and thanks to this new institution of guarantee, the figure of the ombudsman appears wherever the contentious-administrative or judicial defenses and protections do not reach or are insufficient, filling the gaps that can inevitably appear in the framework of any advanced system of the rule of law. Moreover, in the exercise of his functions, the ombudsman constitutes a factor of trust and proximity, an accessible and independent body, ready to listen to and help all citizens, especially the weakest and most defenseless, and that contributes to changing the often passive, fearful and distrustful attitude of the citizen towards public actors and public affairs, stimulating and strengthening his responsibility, as well as his dignity and self-respect. As a magistracy of persuasion and influence, it bases its strength and prestige not so much on power as on the Roman *auctoritas*, the prestige accumulated by experience and knowledge exercised from the strictest political and social impartiality.

One of the consequences of the good functioning of the institution and its prestige as a defender of democratic principles has been its multiplication in different spheres of action, creating a typology of homonymous institutions that deploy their work in different territorial and sectoral scenarios, both in the supranational sphere, in the European case, and in the sub-state case, closer to the problems of each citizen. Thus, in almost all countries with a decentralized territorial organization, such as Spain, Mexico, Canada or the United States, among others, national and autonomous or regional ombudsmen coexist with sectoral ombudsmen, such as the Children's Ombudsman. The case of Italy is quite unique, where there is no national ombudsman's office, although there is one at the regional level under the name of *Difensore Civico*.

In the supranational context, we refer in particular to the European Ombudsman, who was created by the Maastricht Treaty in 1991, which assigns him the primary function of guaranteeing the rights inherent in the concept of European citizenship within the Union. To this end, the European Ombudsman is given a wide range of supervisory and investigative powers, which must al-

ways be exercised in cooperation with the Community and national authorities. In this sense, the European Network of Ombudsmen is a step forward in the cooperation between the different ombudsman offices. With more than ninety institutions from thirty-two countries, it operates effectively alongside the Commissioner for Human Rights, created by the Council of Europe in 1999, as a non-judicial body with functions of awareness and respect in matters such as health and education within the framework of the guarantee of fundamental rights.

It is therefore worth pausing to reflect and ask ourselves, for example, whether there is any practical complementarity between the judicial system and the ombudsman's opinions, or whether the ombudsman's analysis could fill the gaps that may exist in the judicial analysis of cases. On the other hand, it is interesting to shed some light on the figure of the ombudsman, and in particular on the value of his periodic report, because let us not forget that through it governments can be urged to review laws, regulations, acts and decision-making processes in any matter. A third issue that draws our attention is the tension that exists between the ombudsman's duty of independence and his political neutrality, with the way in which he is elected. It is only logical to consider a possible revision of the way in which the ombudsman is currently elected. It should be borne in mind that almost all national versions of the ombudsman are proposed by governments and that, even if he is elected by a qualified majority of parliaments (in most cases), his possible inclination to uphold as correct the conduct of the proposing government is at least controversial or objectionable.

In any case, there are different ideas in different countries about the functions and public service of the ombudsman. Their specific functions and jurisdictional powers are different in different countries, where at most we find an ombudsman acting as a mediator. In fact in some countries there is a similar institution called *mediator*, which resolves disputes between the administration and citizens in an impartial but proactive manner in accordance with the legal system. In other states, as in the case of Poland, the ombudsman acts as a spokesman or defender of constitutional rights with powers even to examine the applicable legislation by interacting with the institutions and organs of the administration (*rzecznik*).

In conclusion, we must answer in the affirmative to the question of whether it is advisable to take a look at the figure of the ombudsman and to give ourselves

the opportunity to rethink the scheme of his powers and instruments for the exercise of his function. The Ombudsman should not be reduced to an element with only a persuasive, informative and analytical function on the problems that a society faces in the face of a harmful and sometimes even abominable functioning of the public authorities, but should become an effective element in the struggle against what has come to be called 'maladministration'.

3. The Roman jurists' notion of defending the rights of citizens

The concept of the defender and the idea of defense have been inherent in human beings since the very beginning of their existence. The differences in the distribution of physical and mental capacities among people lead to inequalities, divergences, and consequently to disputes and confrontations in which the weakest or most helpless seek the intervention of a third party with certain skills to act in their defense. In *ab antiquo* Roman law, the pontiffs and later the jurisconsults were consulted on procedural and business formulas and on the scope of legal norms, contributing to the improvement of the law through their interpretative work. The teaching organized and carried out by the jurisconsults at the end of the last pre-Christian century was public and became known for its extraordinary efficiency; some were considered masters in the teaching of law and became so famous that they even deserved the recognition of the Senate, expressed in the form of a material subsidy. In the defense of his fellow men, the jurisconsult was not subject to schedules and, like the tribunes of the plebs, his door was open day and night to his clients. This is how Cicero expresses it, referring to the qualities of a judicial counselor: "You keep watch at night, so that you can answer all those who consult you".[1]

[1] Cic., *Mur.* 22: "Vigilas tu de nocte ut tuis consultoribus respondeas".

Other institutions, such as patronage, also contribute to this idea, which is intrinsic to the human being, of needing and providing support, protection and defense. In fact, the patron, bound to his client by a sacred bond, had the duty imposed by law to protect his client and, above all, to guarantee his defense in the event of a lawsuit. As it is known, the patron in his own name and without express mandate sponsored his client in the trials, fulfilling the law, his sacral-religious obligations, and thus deserving the title of patron, he qualified himself as the defender of his client; he became a kind of *ex officio* lawyer who had his moral basis in the law..[1] Over time, he gradually ceded his right of defense to a lawyer-speaker, limiting himself to a silent and prudent participation through his social influence, in order to confirm his status as defender of his client, to whom he would always give his patronage and favor for the rest of the matters that were not necessarily litigious.

The figure of the orator, which flourished at the end of the Republic as a consequence of the Greek influence, was also dedicated to the care of doubts and public affairs as well as those of private citizens, reaching important positions as a consequence of the prestige and knowledge acquired, studying modules in the most prestigious schools of rhetoricians of Greece. The first orators lacked legal training, they themselves claimed to suffer from *nescientia* (illiteracy) or *ignorantia*; when the ignorance of the laws and civil law was more serious, they had to resort to the jurisconsults to participate in the causes, which does not prevent to understand again, in Cicero's words, that the eloquence of the orators "awakens the admiration of the listeners, the hope of the needy and the gratitude of the favored".[2] Subsequently, even the orators began to participate in the trials in favor of one of the parties, as the *advocatus* would do later, since it was impossible for both the patrons and the orators to speak with full certainty, running the risk of being mistaken due to their lack of knowledge of the law. For this reason, both the one and the other would call (*vocare*) an expert

[1] The employer, due to his social influence and knowledge of the law, used to act as his clients' lawyer in many cases, however, when the complexity of the litigation required it, he shared his functions by consulting with jurists and he allowed himself to be advised with clarifications on purely legal matters that arose. Cfr. Enrique Melchor Gil, *El patronato civico en la Hispania romana*, (Sevilla: Editorial de la universidad de Sevilla, 2018):175 f.

[2] "Quid enim eloquentia praestabilius vel admiratione audientium vel spe indigentium vel eorum, qui defensi sunt, gratia?" (Cic. *Off.* 2, 66).

in litigation—that is, someone who, precisely because of the way he was called (*ad-vocare*), was known as an *ad-vocatus*—so that with his preparation and skill in legal matters he could assist the patron or the orator in their work of defense. In this sense, the first lawyers (*advocati*) did not differ from the jurisconsults: only later the fusion of the orator and the *advocatus* took place, when the orator added to his oratorical skills the required legal knowledge, and in the same way the *advocatus* had to add eloquence to his legal training.[1]

In short, if the defense in litigation was essential to the progress of Roman society from the times of self-help or private revenge to its institutionalization in a more developed context of the administration of justice, it is not surprising that the idea of a general defender of citizens against the abuses of administrative and governmental bodies was present in the minds of jurists and high political officials. Before approaching the evolutionary study of this institution, let us summarize from its legally recognized origin in the constitution of the emperors Valens and Valentinian of 364 A.D. (C.th. 1, 19, 1), first for the province of Illiria and later for the whole Empire, the idea of the *defensor civitatis*, organized around a series of functions. First of all, we find ourselves before an official whose primary mission is to defend, guarantee and protect the rights and/or freedoms of the most helpless citizens, especially against the excesses of tax officials and dishonest judges. He also became in time, a kind of policeman in charge of pursuing theft or tax fraud, punishing without delay criminals caught in *flagrante delicto* or bringing before the governors heretics and pagans. In the era of Justinian he had jurisdiction even in minor cases—trials that did not exceed 50 solids in the time of Constantine I the Great. He would be appointed guardian to the incapable with patrimony not exceeding 500 solids, guarded the municipal archives and ended up being denaturalized, acquiring the competences of the bishops with whom it seemed to merge.

As a motivation for the study of the origin of the *defensor civitatis* and its first manifestations and competences, we are inspired by the idea that our present law cannot be understood without the analysis of its original past in the Roman law. The attention to the Roman legal institutions signifies a valorization of the

[1] Alfonso Agudo Ruiz, "Algunos principios deontológicos de la abogacía romana", *Anuario del centro de la UNED de Calatayud* 18, no. 1 (2010): 31-37; "El abogado romano y la defensa de los intereses del cliente", *Anuario del Centro de la UNED de Calatayud* 14, no. 1 (2006): 37-50.

historicity of the law. However, it is also conceptualized here as a pivotal instrument in comprehending contemporary law and contributing to the formulation of future legislation, drawing upon the rich tradition of Roman legal expertise. This expertise is exemplified by its meticulous approach to the adjudication of specific cases, employing rigorous standards of legal acumen and justice.

4. The First Manifestations of the defensor civitatis

To be honest, we must begin this section by pointing out that we have encountered great difficulties in undertaking a scientific-legal study of the institution of *defensor civitatis*, mainly because of the scarcity of bibliography on the subject. One could think that iusromanistic research has the advantage of having centuries of history full of studies and that our work as romanists leads us to a kind of endless reading of bibliographical sources. It is true that in the legal reconstruction of some institutions, the difficulty of our work lies in compiling all the bibliographical sources on the subject to be treated and in specifying the different interpretations and considerations that all the scholars have revealed over time on the basis of legal, epigraphic and literary sources. This task, already very complex, reaches its maximum level of difficulty and interest when we find a scarce bibliography on the object of our study, as is the case here. In fact, as Émile Chénon notes, the amount of information we have on the *defensor civitatis* grew significantly after the discovery by Baudi Di Vesme in 1836 of the most relevant fragments concerning the institution in the Theodosian Code. This discovery, important above all for the study of the origins of the *defensor civitatis*, took some of the original value away from the works that had previously been written on the subject, such as those of Godefroy.[1] or Roth[2] As for the

[1] *Codex Theodosianus cum perpetuis commentariis Iacobi Gothofredi* (Hildesheim: Olms, 1975), I IX.
[2] Friedrich Roth, *De re municipali Romanorum,* , libro II (Stuttgart: J. Fr. Steinkopf 1801), 105-114.

authors who have written after 1836, in the words of Chénon, "some have not used the constitutions found by the Italian scholar either."[1] Many others have made the mistake of using different documents without taking into account their datation, which has prevented them from seeing the different phases that the institution of the *defensor civitatis* went through.

Among Italian Romanists, another reference that we have taken into account for the breadth and completeness of his work in which he develops the history of the institution in the framework of its evolution before and after the Theodosian Code is Mannino, who states that the study of the *defensor civitatis* must be approached in relation to the Roman 'state' organization, the administrative structures of the cities and provinces, the origin of the imperial bureaucracy and the taxation involved, and the identification and application of the objective law in the Empire.[2]

In the framework of research projects directed by Fernández De Buján, some Spanish Romanists have contributed to the reconstruction of this figure, as is the case of Piquer[3], Corona Encinas[4], Rodriguez Lopez[5], and Trisciuoglio in Italy.[6] In the same vein and in accordance with its comparative historical trajectory, we continue to follow the trail of our prior publications with the objective of achieving the most objective reconstruction possible of this intriguing figure. In addition, and as a result of the exegesis of the sources, we have had to recognize the purely conjunctural character of certain systems. However, it is our intention to demonstrate that there is a common structural and functional

[1] Émile Chénon, *Étude historique sus le defensor civitatis* (París: Larose et Forcel, 1889): 1

[2] Vincenzo Mannino, *Ricerche sul defensor civitatis* (Milano: Giuffrè, 1984), p.12; Mario Talamanca, "Esperienza scientifica e diritto romano", in *Atti del Congresso nazionale "Cinquanta anni di esperienza giuridica in Italia"* (Milano: Giuffrè, 1981), 770.

[3] José Miguel Piquer Marí, "El defensor civitatis en el Codigo teodosiano y la Lex romana burgundionum", *Glossae: European Journal of Legal History* 13 (2016): 535-560.

[4] Álex Corona Encinas, "Sobre la reforma en el cargo de defensor civitatis en época Justinianea. Aproximación exegética a Nov. Iust. 15", *RGDR* 34 (2020).

[5] Rosalía Rodríguez López, "Defensor Civitatis", in Andrés Pociña Pérez and Jesús María García González (eds.), *Grecia y Roma IV. Más gentes y más cosas* (Granada: Editorial Universidad de Granada, 2017), 279-295.

[6] Andrea Trisciuoglio, "La *tuitio* del *defensor civitatis* nell'Italia ostrogota. Spunti dalla lettura delle *Variae* di Cassiodoro", in Gisella Bassanelli Sommariva and Simona Tarozzi (eds.), *Ravenna Capitale. Territorialità e personalità. Compresenza di diversi piani normativi* (Santarcangelo di Romagna: Maggioli, 2013), 27-45.

thread throughout its history, and that the notion of an occasional nature of the *defensor civitatis*, that appears to emerge from a first analytical approach to the texts, is unfounded. Consequently, our investigation encompasses not only the origins of the institution, traced to Constantine I the Great, and its subsequent appearance in the constitution of the emperors Valens and Valentinian in 364, but also its initial manifestations, shedding light on its functions at each stage. In doing so, we stick to a fundamental point: within the imperial norm that ultimately secured its legal recognition, the defender appears as a public official who defends the cities that he sponsors in the event of any disputes with the emperor's power—although it seems highly likely that Valentinian I transformed this figure into an authentic lawyer for the entire *plebs*, with functions that remained nevertheless theoretica in nature, rather than having practical application. Let us see then, *ad initio* how the institution is articulated.

We should begin by dismembering the original meaning of the term: the denomination of *defensor civitatis*, when translated textually, means 'Defender of the City'.[1] The verb *defendo* is composed of *de* ('from', 'apart from') and *fendo*, the latter being in its turn a verb that survived only in compounds and means 'to attack', 'to hit'. Thus *defensor* refers to one who wards off (or fends off) a blow or an injury—in general, who takes a stand against any kind of aggression. The term *civitas* ('city') has its origin in *civis*, 'citizen'; *civitas* denotes a collective of citizens, free men who, by birth or by choice, inhabit a specific locale and who form the nucleus of society and culture, characterized by their customs and intersubjective relationships in a distinct manner. It conveys civilization versus savagery, inhumanity, or barbarism: the customs of the citizens, or *mores maiorum*, serve to construct the *civitas*, and the city is defined by its community, which is the object of defense.

From the plain meaning of *defensor civitatis*, we could infer that the institution's initial task is to defend the citizens. In this sense, it can be considered a type of defender of the people, aligning with the contemporary designation: a defender of the *plebs*, possibly the heir of the republican tribune of the *plebs*. This could also be understood as a municipal official similar to a justice of the peace, entrusted with the settlement of minor legal disputes, or a type of pub-

[1] Cfr. Silvio Romano, "Defensor Civitatis", in *Novissimo Digesto Italiano*, vol. 5 (Torino: UTET 1960), 313.

lic prosecutor, akin to a patron who provides free legal services to individuals lacking resources.[1]. However, the literal meaning of the name is not indicative of the actual role of the defensor civitatis, especially in its latter stages. While it is true that, in its origins, the institution's primary objective was to protect various sectors of the population experiencing unfavorable economic and social conditions, that is to say, those under the power of officials or of the privileged. During the final phase of the Republic, the organization of the Roman provinces imposed a substantial degree of autonomy on those cities that had previously possessed sovereign status, in contrast to the recently incorporated territories that constituted part of the provincial territory. The inhabitants of these cities, who constituted authentic communities and significant urban centers, endured severe abuses at the hands of the administrative offices located there. Again it is Cicero who, in the orations delivered in defense of the interests of Sicily against the criminal actions of Verres,[2] depicts how the proconsuls and praetors exploited the provinces with fierce tyranny and arbitrariness.

During the imperial period, a new, more centralized vision of political-administrative organization emerged. The Antoninian constitution of Caracalla of the year 212, with the concession of the citizenship to all the inhabitants of the empire, eliminated the distinction between this one and the provinces with what all the cities could enjoy a certain political autonomy exercised by own organs of government, local magistrates like the *duumviri* or the *curiae*, organs of government, later also magistrates in charge of judicial processes or own bureaucracy of the local administration to which they belong. However, these changes, which had a marked fiscal purpose, meant on the contrary a strong interventionism and control of the central government over all Italic and provincial municipalities. In this sense, it is not so risky to affirm that already in the time of Alexander Severus, that is, more than a century before the creation of the *defensor civitatis* an official was appointed to protect the interests of the most disadvantaged, the dispossessed, as well as the guilds of merchants and artisans, who would be advised in the filing of lawsuits.[3]

[1] Norberto Rinaldi and Marisa L. Taddia, "El defensor civitatis", *Verba iustitiae: Revista de la Facultad de Derecho y Ciencias Sociales de la Universidad de Morón* 4, no. 7 (1998): 81.

[2] The praetor Gaius Verres, whose administration Cicero described as "istam communem Siculorum tempestatem calamitatemque" (Cic. *Ver.* 2, 2, 91)

[3] Mehesz Kornel Zoltan, *Advocatus romanus* (Buenos Aires: Zabalia, 1971), 30 f.; N.-D. Foustel De

In this context, the organization and political structure described will lead to the emergence of defenders of the cities in the fourth century. It is important to note that when the emperor became 'dominus', with absolute power, the administrative organization began to be structured in prefectures. They would be guided by the prefects of the praetorium, a kind of vice emperors with broad powers who held the highest rank in the administration of justice in their respective territories. Each prefecture was further subdivided into dioceses, overseen by *vicarii*, who also exercised significant authority. The dioceses were then subdivided into provinces, governed by *praesides*, and finally into municipalities, led by *duumviri*, who served as heads of independent or autonomous municipalities. This structural arrangement created the ideal environment for the accumulation of power by the wealthiest classes, leading to significant social unrest and tensions between the upper classes and the lower social classes. This crisis ultimately prompted the conscientious actions of the emperors Valentinian and Valens. Both known for their piety, they were attentive to the plight of the most impoverished inhabitants of the provinces. Consequently, they officially established the role of the *defensor civitatis* in the Constitution of April 27, 364, as recorded in Theodosian Code (1, 29, 1), addressed to Probo, prefect of the *praetorium* of Illyria. This provision was subsequently expanded to encompass the operation of the defender in all cities of the empire.[1] Finally, in the Byzantine Empire, Emperor Justinian's Novel 15 formally acknowledges the Defensor Civitatis, a significant role in an effort to bolster an institution with such a long-standing history. This suggests that the institution played a key role in the life of the cities in which it was established, despite the rise in prominence and relevance of estates such as the bishopric.[2]

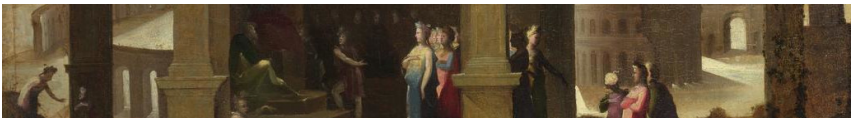
In sum, while the formal establishment of this institution is traditionally attributed to the late Empire era, specifically the constitution of Valens and Valentinian in 364, a thorough examination reveals that its origins can be traced back to the earliest phases of the republic, manifesting in diverse forms and exhibit-

Coulanges, *La ciudad antigua* (Buenos Aires: Ed. El Foro, 2000), 513; Alfonso Agudo Ruiz, "El abogado romano y la defensa de los intereses del cliente, *" Anuario del Centro de la UNED de Calatayud* 14, no. 1 (2006): 37-50.

[1] Vid. P, Bonfante, *Storia del Diritto Romano* (Italia: Giuliano Crifò, Giuffrè, 1959): 486 f. Foustel De Coulanges, *La Ciudad Antigua* (Buenos Aires: El Foro, 2000): 513.

[2] Cfr. Corona Encinas, "Sobre la reforma", 2.

ing distinct legal characteristics. But this constitution offers a comprehensive delineation of the *defender civitatis*, underscoring its distinctive essence and profound significance. The constitutional text would later extend the institution from Illyricum to Africa, Italy, and the rest of the Western Empire. As Piquer asserts, this legal text encapsulates the essence of the defender as an institution independent of the central power of the Empire, with the objective of safeguarding the rights of the most disadvantaged social classes for reasons of utility (*admodum utiliter*).[1]



Seven years later, in 371, the 'defender' is referred to in a constitution also by Valens and Valentinian, signed in Constantinople and addressed to the Prefect of the Praetorium of the East.[2] On this occasion, the discourse pertains to the *defensor urbium*, who not only defends the *plebs* but also the decurions and even the *possessores*. Finally, in the year 385, a new legislative measure of Valentinian, Theodosius, and Arcadius generalizes the creation of this figure for all the provinces of the Empire. Title 55 of Book I of the Code of Justinian is dedicated to this institution, aiming to consolidate its legal framework and to reorganize its regime under the rubric *De Defensoribus civitatum*. The same happens in the Theodosian Code (C.Th. 1, 29). In fact, the imperial legislation constantly insists on references to the *defensor civitatis* and although we could think that its raison d'être responds to the need to specify the configuration of a new institution that spread in a strikingly rapid manner throughout the Empire, it seems

[1] Piquer, *El defensor civitatis*, 539.

[2] "Defensores nihil sibi insolenter, nihil indebitur vindicantes, nominis sui tantum fungantur officio: nullas infligant mulctas, nullas exerceant quaestiones. Plebem tantum, vel decuriones ab omni improborum insolentia et temeritate tueantur, ut id tantum, quod esse dicuntur, esse non desinant. Per omnes regiones, in quibus fera et periculi sui nescia latronum fervet insania, probatissimi quique atque districtissimi defensores adsint disciplinae, et quotidianis actibus praesint, qui non sinant crimina impunitate coalescere. Removeantur patrocinia, quae favorem reis et auxilium scelerosis impartiendo, maturari scelera fecerunt" (C.Th., 1, 29, 7-8).

more logical to conceive the reason for this insistence in the reiteration of the problems related to its operation and that the emperors were determined to correct. Thus, for example, the numerous changes and oscillations in the manner of its appointment, which can be observed in the successive imperial laws, clearly reveal the lack of a clear concept of the purpose and nature of this figure, which undoubtedly negatively affected its prestige as an institution of public service and, therefore, its credibility and effectiveness.

As Romano asserts, the *defensor* manifested as a peripheral organ of the central administration, entrusted with the oversight of the powerful and the municipal organs. Additionally, it functioned as a hybrid 'state-municipal' organ, integrated within the same administration that it was designed to supervise.[1] Yet the prevailing corruption among the defenders, coupled with their flagrant partiality to the will of the *potentates*, must be acknowledged. Conversely, the defenders' lack of vigor and ineffectiveness have been attributed to their insufficient rank and power, hindering their capacity to effectively counteract the transgressions perpetrated by public authorities, particularly in fiscal matters, where a persistent and evident discord with the administrators prevailed.[2]

Therefore, it is important to clarify some aspects of the way in which the defenders have been elected throughout this historical evolution, as well as the periods foreseen for the duration of the position and, finally, some of their most representative functions. With regard to their election and appointment, there have been many changes throughout its history, although it seems that originally the Prefect Pretorio was responsible for choosing them from among persons of good character with administrative or civil service experience, such as having held the office of governor or having worked as lawyers, *agentes in rebus or palatini*. In the Code of Justinian we can read that the decurions and officers employed in the service of the prefect or in the service of the *praesides* placed under their orders (*cohortales*), are expressly excluded, perhaps in an attempt to preserve the independence and impartiality of the institution.[3]

[1] Romano, *Defensor Civitatis*; Mannino, *Ricerche*, 24 f.

[2] Francisco Cuena Boy, "El defensor Civitatis y el protector de los indios: breve ilustración en paralelo", *Ius fugit: Revista interdisciplinar de estudios histórico-jurídicos* 7 (1998):184-185.

[3] "Defensores civitatum non ex decurionum seu cohortalium corpore, sed ex alii idoneis personis huic officio deputentur" (C.J. 1, 55, 2). The text adds that the appointment should always be reported to the emperor, indicating the importance of this function.

The prefect of the praetorium was therefore in charge of the election, but the emperors would soon limit it in a sensible way. As early as 368, in fact, in a third letter to Probus, who had become prefect of the praetorium of Illyria, they expressed very clearly their preference for a limited category of officials, namely the agents *in rebus* they sent from time to time to the prefects of the praetorium to direct their office as princes, and to whom they thus granted a kind of retired position. These princes, say the emperors, will be established by our order as patrons of the plebs in the various cities, in preference to all other honorati. The prefect of the praetorium had no choice but to choose among them.[1]

This system lasted until 387. For 23 consecutive years, from 364 to 387, the defenders were appointed directly by the Prefect of the Praetorium, under the control of the Emperor. These years represent a first period in their history, during which the institution became generalized, spreading from the diocese of Illyria, where it had begun, to all the provinces. In this regard, in the Theodosian Code there is also a list of qualities that those who are to carry out such a noble function must have, such as the knowledge and practice of good manners and legal knowledge and experience, since "the emperors would think that they had done nothing for the plebeians if they did not give them suitable defenders".[2] Finally, it is interesting that the legislative provision of the emperors Honorius and Theodosius in 409 (C.J. 1, 55, 8) states that although the appoint-

[1] "In defensoribus universarum provinciarum erit administrationis haec forma net tempus quinquennii spatii metiendum: scilicet ut imprimis parentis vicem plebi exhibeas, descriptionibus rusticos urbanosque non patiaris adfligi, officialium insolentiae, iudicum procacitati salva reverentia pudoris occurras, ingrediendi, cum voles, ad iudicem liberam habeas facultatem, superexigendi damna vel spolia plus petentium ab his, quos liberorum loco tueri debes, excludas, nec patiaris quicquam ultra delegationem solitam ab his exigi, quos certum est nisi tali remedio non posse reparari" (C.J. 1, 55, 4).

[2] "Si qui de tenioribus ad minuscularis interpellandum te ese crediderit in minoribus causis acta conficias: scilicet ut, si quando quis vel debitum iustum vel servum qui per fugam fuerit elapsus vel quod ultra delegationem dederit postulaverit, vel quodlibet horum tua disceptatione restituas; ceteras vero, quae dignae forensi magnitudine videbuntur, ordinario insinuato rectori et cetera. Cum multa pro plebe a nobis studiose statuta sint; nihil providisse nos credididmus, nisi defensores idoneos dederimus. Igitur non ex decurionum corpore, sed ex alio, videlicet ex administratoribus, qui vel consulares fuerint administratione vel praesides, aut ex palatinis vel agentibus in rebus vel his, qui principatus culminis vestri vicariorumque gesserunt, vel scholasticis hui officio deputentur" (C.Th. 1, 29, 2-3).

ment must be ratified by the prefect, the defenders will be constituted from among those initiated in the orthodox religion, by decree of the bishops, the clergy, the honorable, possessors and curiales. In our opinion, it is not that the rest of the citizenship is completely excluded from the electoral process, but it seems that the intention is to specify the composition of the electoral body in a more precise way, also in accordance with the consideration of the Christian religion as official in the empire.[1] It will be Justinian himself, finally, perhaps due to the consideration of the discredit that the institution suffered at the time, who modifies the elective system, indicating in his Novel 15 that the office of *defensor civitatis* should be carried out in turn by the noblest inhabitants of the cities ("universi nobiliores civitatum habitatores").

As for the duration of the office, it seems that in the first years of its existence it would be for life.[2] In 385, with the Constitution of Valentinian, Theodosius and Arcadius,[3] the duration was reduced to five years; in 535, to two years, according to the already mentioned Novel 15 of Justinian. In this text, the defenders are also required to take an oath upon taking office; it is impossibie that they be removed from office by the governor of the province, their function corresponding to the prefect.[4]

Then again, the sources seem to determine the same and the opposite within a short period of time. Thus, in 387 a sanction was foreseen for anyone who "ad locum defensionis ambitione pervenerit" (C.Th. 1, 29, 6), whereas in 441 the opposite would be imposed, in order to prevent the defenders from abandoning

[1] Cuena Boy, "El defensor", 187. But Romano, "Defensor", 314, upholds the suppression of the possibility of popular elections.

[2] Cfr. Romano, *Defensor civitatis*, 316.

[3] "In defensoribus universarum provinciarum erit administrationis haec forma, et tempus quinquennii spatii metiendum" (C.J. 1, 55, 4)

[4] "Interim illud sciendum est prius, ut nulli hominum sit licentia defensoris ordinationem declinare, sed invicem universo nobilioris civitatum habitatores hoc ministerium eis adimpleant; hoc enim et in prioribus temporibus valuisse, et in republica gestum didicimus. Nulli, nec si honoratus sit magnificentissimorum illustrium dignitate, hoc declinare concedimus, nec si militiam habeat honestam, neque si proferat privilegium suum ex divinis formis, vel si pragmatici sint collati , sed secumdum circulum habitatoribus civitatis, quorum aliquarum rursus revertentibus ad solicitudinem et civitati praedictam curam ministrantibus, ut in unaquaque civitate defensor iudex potius, quam defensor esse videatur, decreto quidem cum iureiurando factus omnium possessorum in illa civitate consistentium, sed non in hac urbe degentium" (Nov. 15, 1, pr.).

their post without the authorization of the prefect of the praetorium.[1]

We have learned from the texts that the competence of the defenders extended over the entire territory of the *civitas*, that is, it was not limited to the *urbs*, the capital, but extended itself also to all the lower *loci*, so that the defenders had to protect the inhabitants of the countryside and those of minor cities in the same way. It is possible that in certain secondary *loci* there existed (if not originally, at least later) special defenders who had in principle the same attributions as the *defensor civitatis*, but were more particularly in charge of the interests of the rural plebs.[2] They are undoubtedly those designated by the expression *defensor locorum*, that we find in some texts and that in a broad sense could be applied to the same *defensor civitatis*.[3]

With regard to the functions exercised by the institution, we refer in particular to Title 55 of Book 1 of the Code of Justinian, which shows that the defenders have powers in judicial, fiscal, registry and documentary matters. In order to exercise these powers, the defenders needed a minimum infrastructure, which, according to Novel 15 of Justinian, would be composed of a clerk and two officers. In this sense, the text adds that the position will always be remunerated and that the defenders themselves can never appoint a substitute.[4].

[1] "Nulli defensorum licere decernimus, si de publica sollicitudine voluerit se liberare, nisi divinos ad fatus intimaverit tuae sublimitatis iudicio, triginta librarum auri poenam tam moderatoribus provinciarum quam ceteris iudicibus vel temeratoribus sacri nostri oraculi subituris, si neglecta fuerit auctoritas principalis" (C.J. 1,55,10).

[2] Cfr. C.J. 1, 55, 5: "rusticos urbanosque"; C.Th.16, 5, 45: "intra aliquam civitatem vel ulla territorii parte secreta".

[3] Cfr. C.J., 1, 55, 3: "id est defensorum locorum"; Nov. 30, 7:' "sed locorum defensoribus".

[4] "Quia vero etiam defensores civitatum extra omne commodum fient, et pro decretis eorum, si quidem civitates maiores sunt, quattuor solummodo dabuntur aurei foro tuae sublimitatis, si vero minores, tres, sicut iam dudum nostris constitutum est legibus. Si vero quaedam salaria habent publica, etiam haec secundum consuetudinem percipient. Audient quoque leviora crimina et castigationi competenti tradent, et eos, qui maioribus criminibus capiuntur, detrudent in carcerem et mittent ad provinciae praesidem. Sic enim fruitur civitas unaquaeque cura iudiciali, et omnis gens sub maiori constituta iudice maiorem sentiet providentiam; et recidentur plurimae iudicum curae, cum civitatum defensores in semetipsis eas imponunt et levigant praesidum, quas pro omnibus habent, sollicitudines, ipsi particulariter removentes ea, quae vim patientibus inferuntur, aut dubitationes solventes, et honestos, sicut saepe dictum est, eos qui in administrationibus sunt demonstrantes. Si vero etiam detineantur ab aliquibus publicae functiones, gentium praesides defensoribus imperabunt contra detentatores exactiones, ut et secundum hoc eos adiuvent. Si qua vero defensoris praeter haec fiat ordinatio, aut renuerit aliquis defensoris officium in semet ipsum veniens, sive

In the first place, and with respect to the judicial function, Title 55 includes the faculty that defenders have to act *in minoribus causis*[1], i.e. in matters of minor amount (50 salaries), claim for payment of debts, a runaway slave or an excess in the payment of taxes. This type of procedure gave the citizens the possibility to obtain a quicker, more direct and closer justice, avoiding more than once to be victims of the false and fraudulent activities that often took place in the courts. This jurisdiction of the defenders of the cities, which was destined to grow later, was at first completely secondary and did not constitute its main attribution: the new magistrates had above all the mission of protecting the plebs. In fact, in the fourth century this occupation could not be defined as an advantage, since the plebeians, especially the peasants, were then exposed to numerous miscarriages of justice and flagrant injustices. When they were immersed in a judicial proceeding, it sometimes happened that the clerks (*exceptores*) deviated or falsified the acts or that the chiefs of the governors' *officium*, mocked by the opponent whom they used to meet always at the threshold of their office, allowed themselves to be swayed by his flattery or corrupted by his gifts.[2]

It would be logical to think that they would never win a lawsuit, but we can say that the joy of the corrupt was short-lived, because the intercessor immediately demanded a higher price than he would have asked in case of failure. Even the emperors Valentinian and Valens, who were aware of these dishonest procedures, were right when they wrote to the Senate that the plebeian inhabitants of the countryside, "those quiet people who do no wrong", really needed a special patronage, lest they find oppression instead of the justice they demanded from the swindlers. Moreover, they had the right and even the duty to denounce to the governor of the province anything that was detrimental to the interests of their protégés. Thus, they could file a complaint if the lists of their censuses (*suscriptiones*) were not drawn up according to the law, and from the moment the governor received such a complaint, he had to carry out an investigation

dignitatis sive militiae sive privilegii sive alterius cuiuspiam occasione, iste quinque librarum auri subiectus poenae etiam sic post eius exactionem ad opera civitatis proficientem cogatur defensoris implere sollicitudinem. Convenit enim unumquemque nobilium semper functionem agere civitatum quas inhabitant, et hanc eis conferre habitationis repensationem" (Nov. 15, 6).

[1] C.Th. 1, 29, 2.

[2] C.Th., I, 29 ,5.

into the matter and bring it to trial.[1]

In a different order of thought, but always with the same idea of protecting private individuals, in 384 the emperors ordered the governors of the provinces and the defenders of the cities to denounce all those soldiers who, contrary to military regulations, left their barracks to enter private property.[2]

Finally, in a general constitution addressed in 385 to a *defensor* named Theodore, the role of the defender in all provinces was summarized as follows: "he shall be a father to the plebeians", he must protect them as if they were his children and defend them against the audacity of the *officiales* and the excess of power of the magistrates; it will not be allowed that they should be wrongly enrolled in the census lists, overtaxed, and required to contribute more than what is customary, the last measure being "the only remedy for the situation". Most important, the emperors say, is that the *defensor* would have "ad iudicem liberam facultatem", that he can see the magistrate whenever he wants.[3]

In the field of criminal jurisdiction, the *defensores* were authorized to reprimand with their authority acts of banditry and to bring before the courts, with the corresponding summary information, those who were delivered to them as defendants discovered in the flagrant crimes of robbery, homicide, adultery, as well as those committed by the tax collectors. This is attested by a constitution of Valentinian, Theodosius and Arcadius of 392, given in Constantinople to Tacianus and Caecilian, prefects of the praetorium (C.J. 1, 55, 6-7).

Later, in 535, Justinian, in his novels 15 and 86, pointed out that the *defensores* also served as ordinary judges in the cities for civil cases up to 300 salaries, with their decisions subject to appeal to the provincial governor, and also increased their interventions in criminal cases.[4]

[1] C.Th., 13, 10, 7

[2] C.Th. 7, 1, 12, 4 and C.J. 12, 36, 11.

[3] C.J. 1, 55, 4.

[4] "Et iudicare in causis omnibus pecuniariis usque ad aureos trecentos: non valentibus nostris subiectis trahere sibimet obligatos apud clarissimos provinciarum iudices, si usque ad praedictam trecentorum solidorum quantitatem lis consistat" (Nov. 15, 3, 2). "Oportet ergo eos qui diriguntur a tua celsitudine ex memorato fabricensium scrinio ad prohibendos privatos armorum factione confessionem accipere, etiam per loca iudices et subiecta eis officia et civitatum defensores et patres, quia nihil valebunt de cetero horum quae a nobis prohibita sunt aliquid agere, sed quae per praesentem sancita sunt legem costodient, poenam et in pecuniis et in ipsum formidantes caput' (Nov. 86, 3, 1).

Finally, regarding the extraprocedural order we discover in the sources one of the functions that most assimilates it to the figure of the current ombudsman, that is, the exercise of mediation or arbitration. Specifically, C.Th. 1, 29, 2 includes the term *disceptatio*, which could suggest that the ombudsman's decisions would be the result of his acting as a true justice of the peace or kind mediator.[1]

In tax matters, on the one hand, the ombudsman exercised general supervisory functions over activities related to the determination and payment of taxes, with the primary motivation being the denunciation of incorrectly applied taxes. On the other hand, the sources refer to the duty to be present at the drawing up of the lists and the act of payment to the collectors, ensuring that they issued the appropriate receipts and even acting as could even act as direct collectors of taxes from the *minores possessores*.[2]

In general, it can be said that the defenders had the duty to control and oppose any type of abuse that could occur in fiscal matters, for which they could have direct access to the Governor of the Province, before any other magistrate or official. This aspect, in particular, maintains a striking similarity with the position of the current Ombudsman, to whom the law assigns the possibility of preferentially approaching the executive bodies concerned and of requesting the necessary cooperation of the same and of all administrative bodies in general, in order to clarify the matters entrusted to him by the citizenship.[3] Lastly, Justinian gave the defenders a more important role in fiscal matters by making them assistants to the collectors, with the duty of drawing up decrees against the rebellious.[4]

Finally, we refer to the powers exercised by the defenders in matters of registration and certification. In this sense, they took on the function of receiving and recording complaints against tax collectors, and in the absence of governors and other magistrates they had the duty to take on the task of drawing up records in matters as diverse as registration in professional associations, the insertion of wills and donations, and the control of the export of goods. In 535, it

[1] Cfr. A.H.M. Jones, *The Later Roman Empire* (Oxford: Blackwell, 1964), vol. 1, 517; Max Kaser, *Das Römische Zivilprocessrecht*, (München: Beck, 1996), 437 f. Cuena Boy, *El defensor civitatis*, 191.

[2] This is declared in C.Th. 3, 10, 7 and 11, 1, 19 together with C.J. I, 55, 4 and 9 pr.

[3] Spanish Ombudsman Law 3/1981, April 6þ, art. 19-21.

[4] Nov. 15, 3, 1, pr.

was Justinian who finally granted them general powers of registration and public records, even allowing public buildings to serve as their registry. Moreover, at the end of the text, he adds that no one can be forbidden to draw up before the defenders any document of interest to them, with the logical exception of those in which the matter depends exclusively on judicial decisions, since they are of a purely judicial nature.

5. Conclusion

In short, we could finally ask ourselves the same question that we still ask ourselves today regarding the figure of the ombudsman: what was the real power of the *defensor civitatis* and whether it was truly effective? It is not necessary to point out what is evident, namely that his jurisdictional power was almost insignificant, or that his right to send reports or complaints to provincial governors and emperors was sometimes reduced to a futile effort, since even the best-founded complaints were not always heard. In our opinion, however, the real power of the defender was the free access to the magistrate. In the event that the latter was an effective and diligent administrator, this privileged access became a reliable and effective means of achieving the desired outcome.

The next question is whether it was possible to find efficient and diligent men among these *defenders*. It should not be forgotten that they were appointed by the administration and selected from among its first agents. Is it not somewhat illusory to entrust the task of fighting the abuse of power to those who have helped to perpetuate it? They must have been well aware of these abuses, but would they want to correct them? This leads us to a logical conclusion in the form of another question: would it not have been better to grant directly to those who have suffered abuses the right to choose their own protectors?

It is a proven fact that the *defensor civitatis* played a fundamental role in the exercise of control over the administrative activity, which at that time was overdimensioned by the complexity of the structure and circumstances of the empire. As it has been the case throughout the centuries, its effectiveness depended above all on the qualities of the person who exercised it. However, there is no doubt that this Roman institution is a source of inspiration to deepen the usefulness of the current Ombudsman, who, as then, saving the distance of the two thousand years of history that separate them, is faced with a large administrative machinery with bureaucratic overload and, above all, taking into account the tasks and the new scenarios of possible collision between the different administrations and between them and the administered, with which the social and democratic State has involved itself.

In order to provide further clarification regarding the defended in this effort to approximate the figure of the Roman *defensor civitatis*, it is necessary to reiterate the idea that was previously mentioned, namely, that the *defensor civitatis* of the Roman Empire cannot be considered as equivalent to the contemporary ombudsman. It is evident that they do not possess the same legal nature, structure, or powers. Their operations are also distinct. However, both figures share a common essence: the defense of the most vulnerable citizens, who are weaker against abuses committed by administrative bodies. In this regard, in my opinion, it would be prudent to consider a legislative review of the current Ombudsman to underscore its significance in the democratic functioning of institutions and in the defense of citizens' rights.

It is crucial to acknowledge that, despite attaining international recognition, the institution is not immune to threats that jeopardize its future. Its effectiveness is subject to scrutiny, and there have been proposals to reduce its powers and budget, a course of action that would effectively diminish its significance. For this reason, it is not trivial to undertake a reflection with the objective of ameliorating and fortifying its performance, its nature, and its legal structure, which is imperative in a democratically advanced society. This reflection should not be exempt from an examination of the common parameters that Roman Law provides to the current legal construction. I insist that the Defensor Civitatis is not, nor can it be considered, our Ombudsman. However, its history undoubtedly provides a high level of interest and inspiration.

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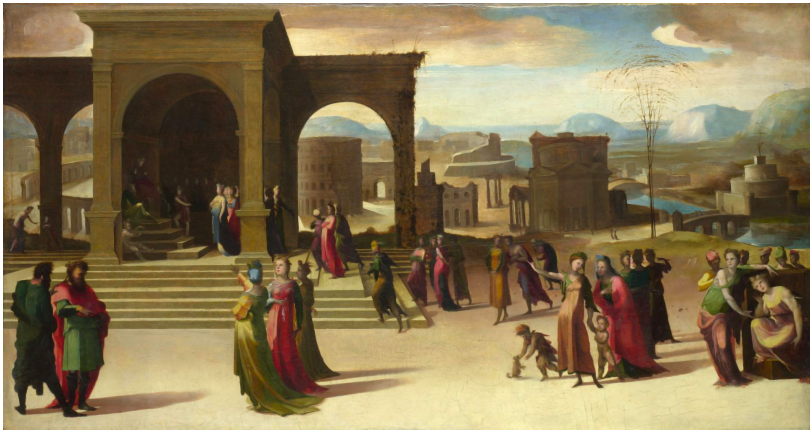

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