

SOME EXPERIENCES OF 200 YEARS OF PARLIAMENTARY OMBUDSMANSHIP

Presentation by Kjell Swanström (Head of Staff, Parliamentary Ombudsmen in Sweden) at the International Ombudsman Forum (I Fórum Internacional de Ouvidorias/Ombudsmen/Defensores de Pueblo/Provedores de Justicia), Brasilia, November 10, 2009.

Let me, first of all, express my profound pleasure of having been invited to Brasilia and to address this qualified audience. My hearty thanks go to the organizers, the Brazilian Federal Ombudsman Ms. Eliano Pinto and her staff. I am certain that it will be an educative experience for me professionally and personally to meet with colleagues who – in a context which is different from that of Sweden – are interested in the protection and promotion of human rights and good governance.

I have been asked to speak about the experiences of the Swedish Parliamentary Ombudsman. As many of you know, the Swedish Office was established by the then new Swedish Constitution of 1809. Consequently, we have celebrated our 200 year anniversary this year. It took more than 100 years before the next institution of the same kind was established, in Finland, and another 45 years until the third Ombudsman was elected, this time in Denmark. Then, however, during the last decades of the latest century, the idea spread rapidly around the globe. In particular, many countries with a history of authoritarian rule chose to elect an ombudsman as one element of safe-guarding their transition to democracy and to the rule of law.

One of the most fundamental, and maybe somewhat surprising, experiences of the Swedish Office is that democracy is not really a pre-condition for an effective ombudsman institution. The work of the ombudsman may, however, contribute to *developing* and *strengthening* democracy in a country.

Let me illustrate this point with some Swedish history.

After his defeat at the hands of the Russian Army in 1709 at Poltava, the Swedish King Charles XII fled to Turkey where he was to remain for several years. To ensure that laws and regulations were observed in his absence, the King in 1713 appointed a Supreme Ombudsman as his representative. From 1719 and until today the title used to designate this post was, and is, the Chancellor of Justice. Today, the Chancellor is the Ombudsman of the Government, not the King's ombudsman.

During the 18:th century the King was both the supreme judge and the formal head of the state administration. Consequently, the King entrusted the Chancellor of Justice with the authority to control that his judges and his other state officials discharged their duties properly. The Chancellor had the right to prosecute judges and other public servants in cases of abuse of public power or negligence.

In 1809, after a period of autocratic monarchy – of absolute powers in the hands of the monarch – we experienced a revolutionary situation in our country. The King was dethroned and a new Constitution was adopted, based on a division of power between the King and Parliament. As a measure to guarantee the rights of the citizens and to make sure that the King’s judges and other officials respected the laws passed by Parliament and, maybe to some extent, to counter-balance the Office of the Chancellor of Justice, the new Constitution provided for the election of a Parliamentary Ombudsman. The Ombudsman was to act as the representative of Parliament and to exercise, and I quote from the *travaux préparatoires*, “supervision of the observance of the laws by judges and officers of state, and to prosecute, with due process of law, those who in discharging their duties, through violence, personal considerations, or for some other reason, act unlawfully or fail to fulfill the duties pertaining to their office”.

In short, Parliament elected, as their representative, an Ombudsman to supervise the King’s judges and the King’s state officials. This supervision was to be of a strictly legalistic nature. The idea was, that Parliament, constitutionally entitled with the power of legislation, had a special interest in controlling that the laws were correctly implemented by the courts and the administrative agencies. As another branch of parliamentary control, there were Parliamentary Auditors, whose task it was to see to it that fundings decided by Parliament (tax-payers’ money) were used by the courts and authorities in a loyal and effective way, warranting “value for money”.

In 1809, Sweden could not be characterized as a truly democratic state. Parliament was not elected by universal and equal suffrage and for another 100 years the King was still the supreme judge and the head of state administration. So, the Swedish Parliamentary Ombudsman during a little more than the first 100 years of his existence functioned in a state which was not democratic in the sense which we now attribute to that concept.

I think it is fair to say, however, that the idea of parliamentary ombudsmanship, and the work of the first Ombudsmen, even in those early

days, to some extent was the expression of the democratic ideal – and contributed to the advancement of that ideal.

Firstly, the Parliamentary Ombudsman contributed to the observance of the principle of the rule of law in its narrow sense. This principle implies that the citizens should not be subject to the arbitrary whim of the ruler – be that a King, a self-acclaimed President or a Central Committee. Instead, the State should be governed by general norms issued by a legislative body. Such norms should be generally applicable to everyone and known to the citizens who thus may foresee the consequences of their actions.

The fundamental idea behind the Constitution of 1809 and the election of the Ombudsman was that the laws of the country were to be enacted by Parliament and that the Ombudsman was to supervise the King's judges and the King's public officials and to make sure that they acted in accordance with the norms decided by Parliament. The Ombudsman was in fact one of the elements designed to prevent authoritarian rule from re-appearing.

Secondly, the Parliamentary Ombudsman contributed to the democratic ideal by upholding an older administrative tradition of personal accountability on the part of the public officials. Public officials were held accountable by the Ombudsman in the sense that he could act as a special prosecutor and bring those who misused public office to justice. And, of course, even without the element of criminal prosecution, the work of the ombudsman to a large extent is precisely about accountability.

Consequently, even at these early times in Swedish history, the Ombudsman contributed to the democratic ideal

- by strengthening the role of Parliament vis-à-vis the King,
- by advocating the rule of law
- and by upholding the principle that it should be possible to hold those who have the power to exercise public authority responsible for their actions and omissions.

This is, of course, history. Modern Ombudsmen are, and should be, elected by a democratically elected Parliament – even if, in some traditions, the election is confirmed by the Head of State. The Ombudsman's authority is to a large degree based upon the fact that he or she is elected by the representatives of the people. This is also how the modern Ombudsman is generally perceived. A large number of the Ombudsman Offices existing today have been established precisely as a measure to safe-guard a well-functioning and stable democracy after a period of authoritarian rule.

We may probably conclude that nowadays democracy, at least in the sense that the legislature is elected by equal and universal suffrage, is a precondition for an effective modern Ombudsman institution. My point here is that, according to our experience, the work of an Ombudsman may contribute to the strengthening of an imperfect democracy.

Another experience in our country is that it is important that the parliamentary assembly devotes sufficient effort to find the right man or woman for the job or, as is the case in Sweden and some other countries, the right men or women.

There is no educational and professional background common to all Ombudsmen in different constitutional cultures. Some are lawyers, some are political or legal scientists, some are former State officials and some are journalists, just to mention a number of varieties. Since the Ombudsman has to interpret and apply legal norms, it is necessary for him or her to have access to legal expertise. In the case of Sweden, virtually all Ombudsmen have been high-ranking judges – and they are also assisted by a number of career judges in our daily work – but I do not think it is necessary for the Ombudsman to be a lawyer himself. What really matters is for Parliament to search for an honest man or woman of sound judgment and unquestionable integrity. I would suggest that this is the most important precondition of all for an effective ombudsman institution.

When conducting its search, it is necessary for Members of Parliament to leave party politics behind. If they want the Ombudsman of their choice to be trusted by all citizens, the candidate cannot be closely associated with any of the political spheres in the country. If he is affiliated to the parliamentary majority, there will always be those who suspect that he defends, or at least hesitates to criticize, government. If he is linked to the opposition, there will always be those who claim that he criticizes government without just cause. In order to help Members of Parliament to put their political preferences aside, or force them to agree on a candidate by consensus, most legal orders require a qualified majority decision for the election of an Ombudsman. In Sweden, strange as it may seem, there is no such formal rule requiring a majority vote. But then again, there is a long standing tradition which requires that the person to be elected as Ombudsman must be acceptable to all the political parties in Parliament.

Our experience is that a certain degree of what we, for the lack of a better term, could call political maturity, is of fundamental importance for an effective Ombudsman institution – that is an ability to put the wider interests of the State and its citizens before the interests of a certain political party or grouping.

Furthermore, the Ombudsman needs to be independent from other State organs. Of course, the election procedure, which we have already discussed, will provide him with some degree of independence, and so will certainly his or her personal integrity. But he will also need some financial independence – firstly in the sense that he must be given adequate means to perform his tasks. He needs to have sufficient resources to employ qualified staff, to temporarily hire expertise, to travel, to make his existence and mission known to the citizens and to give publicity to his findings. It should never be an alternative to require the citizen to pay a fee in order to have his complaint treated by the Ombudsman. It is one of the essential characteristics of an Ombudsman that the citizens should have free and easy access to his Office.

There is, secondly, a need for financial independence also from the perspective that the Ombudsman should not allow himself to be funded by any authority under his supervision. Such funding will risk giving rise to suspicions that the Ombudsman will not bite the hand that feeds him. This means that it is desirable for the Ombudsman to have his resources attributed to him directly by Parliament.

We may conclude that political maturity in yet another sense is necessary. Members of Parliament need to understand that it is in their best interests to generously finance a vivid critic of the State administration. Firstly, such a critic may improve State administration, to help it serve the citizens better and to put things right. Secondly, to have an effective watchdog will enhance public confidence in State administration and its organs and thus contribute to the stability of society.

Financial independence is not enough, however. The Ombudsman also needs to be independent with regard to the objects of his investigations. He should not, when choosing what matters to investigate, be governed by anything else than the complaints filed by the citizens and, if it is within his power to start investigations on his own initiative, *ex officio* (which in my opinion it definitely ought to be), by his own sound judgment. State organs, including Parliament, should refrain from ordering – or even asking – the Ombudsman to investigate specific matters. Such requests will only risk compromising the Office of the Ombudsman in the eyes of the public.

This requires a certain amount of political maturity too. Members of Parliament must realize that from the fact that the Ombudsman is elected by Parliament and reports to Parliament they cannot, or at least *should* not, derive a power to instruct their Ombudsman what to investigate and, especially not, what to leave aside.

Another aspect is that the Ombudsman must be given adequate means to investigate cases thoroughly, not only with regard to money and personnel. It is of crucial importance that he is given access to any documents or information in other forms possessed by the government and the state administration. It should, in principle, not be possible to hide anything from the Ombudsman, regardless of whether a certain piece of information is classified or not. To me, this is essential – first of all because otherwise the Ombudsman cannot make a correct and proper assessment in the case before him. And, secondly, it is certainly difficult to ask the citizens to put trust in his work if he cannot claim to know all the relevant facts.

In my country, we rely on a constitutional provision which requires all public bodies and each state official to cooperate fully with the Ombudsman and to provide him with any piece of information he may ask for.

Indeed, it could be argued that it is of special importance that the ombudsman, when necessary, may study confidential information and is given access to otherwise closed premises. When certain information is – and must be – closed to the general public, there is a particular need for a trusted person to have insight on behalf of the citizens, at least when there are claims put forward to the effect that unlawful, unfair or otherwise improper actions have occurred. A specific problem in this area is that, since a decision of the Ombudsman should not be kept confidential, the Ombudsman may, when dealing with matters of State security, not be in a position to fully state the reasons for his findings like he would in an adjudication concerning non-confidential matters.

The Swedish Ombudsmen have experienced difficulties in this area. In some cases where the Ombudsman has investigated the work of the Secret Police and found no evidence of any wrong-doing, he has been forced to keep his decision relatively short and to exclude a number of confidential details. If his work and his Office is trusted by the people, there are at least good chances that his findings in such a case also will be trusted. On the other hand, a couple of years ago a Parliamentary Ombudsman investigated a case of expulsion of suspected terrorists by the Swedish Secret Police in close cooperation with the CIA. In that case, he found reason to severely criticize the work of the police and also found it necessary to disclose some confidential elements in order to substantiate his allegations.

We may conclude that, while it of course has to be accepted in any State that there may be compelling reasons for confidentiality – for example for reasons related to state security, foreign relations or the right to privacy, a precondition for the establishment of an efficient Ombudsman institution is that such

confidentiality is kept to a necessary minimum and that there is an awareness of the fact that even the most secret corners of society need to be supervised. A culture of secrecy without any possibility of control from the outside may create a state within the state, with its own values and practices which risk running contrary to the ideals underpinning the rest of the society.

I would also like to speak briefly about the weapons at the Ombudsman's disposal. The decisions of virtually all Ombudsmen are essentially only recommendations. They lack the legally binding force of a court's judgment or a decision issued by a public authority. Their strength lies exclusively in the convincing reasoning, in the persuasive force of the legal argument. And, hopefully, in the authority of the Ombudsman as an institution and in the respect for the person holding office.

This is the case also in my country. The Ombudsmen have, however, two other possible ways of action. The first is to, as I touched upon at the outset, act as a special prosecutor and bring criminal charges against a public official found to have misused public office. We find it necessary to do so a couple of times each year. The second is to, in less serious cases, ask for disciplinary sanctions against an official. The Ombudsman's decision in those cases still lack legally binding force. When an Ombudsman brings criminal charges it is of course for the Court to decide whether the accused should be sentenced or acquitted. And when an Ombudsman asks for disciplinary sanctions, it is for a special body to decide whether or not such sanctions should be applied.

My point here is that, according to our experience, the right of the Ombudsman to ask for criminal or disciplinary sanctions contributes to the respect for the Office.

But this right needs to be exercised with restraint and great caution. One reason for this is perhaps obvious: If a Court or a disciplinary board finds against the Ombudsman and in favor of the defendant, such an outcome may be detrimental to the authority of the Ombudsman.

But then again, this possible negative effect should not be exaggerated. As our Danish colleague, the longest serving national ombudsman, Prof. Gammeltoft-Hansen, once said: "If it is of decisive importance to a person that his surroundings comply with what he says, in principle he should not be an ombudsman. Such a person should rather strive to be a judge".

And he continued with remarks which I think provide an important basis for reflection: "Luckily, it is quite rare that the recommendations of the ombudsman are not followed. When this happens, it is of course detrimental to

the authority of the institution...If the ombudsman deals with a case where he has a feeling that the public authority may refuse to follow his recommendation, he may be tempted to close the case without a recommendation. This is however not possible. For there is one thing which is more detrimental to the ombudsman institution than a blow to his authority. And that is a blow to his credibility...And – he added – it should be of some comfort to the Ombudsman that in the long run, credibility is essential for upholding authority.”

There is, however, yet another reason for exercising restraint and caution when it comes to asking for, or applying, more severe sanctions against public officials. In my country, public officials sometimes claim that the supervision conducted by the Ombudsman makes it difficult, or even impossible, for them to do their job effectively. Their claim is that public officials, out of fear to be criticized or even prosecuted, tend to be over-cautious and to do as little as possible. And that is, of course, not in the public interest.

There are, to our experience, two things for the Ombudsman to keep in mind in order to avoid public officials being too passive. One is, needless to say, to stick firmly to the normative rules. An official who acts in clear contravention of the law deserves to be sanctioned. This is not, however, necessarily true for actions which could be questioned with regard to reasonableness, fairness or suitability. In such cases the Ombudsman may state his or her opinion in a reasoned decision without necessarily making the official in question “loose face”. Such a decision by the Ombudsman may more have the character of providing guidelines for the future, rather than criticizing what has taken place.

Secondly, I find it to be important for the Ombudsman to take into consideration what the actual circumstances were when a public official made a wrong decision or took a wrong course of action. Swedish policemen sometimes tell us that they find it unreasonable to be criticized by an Ombudsman after months of careful considerations on his or her part for an action which they had to take in an agitated, perhaps even violent, situation without time for reflection. The Ombudsman usually responds that of course this may seem unfair, but that we need to learn from our mistakes. A critical statement on the Ombudsman’s part serves to help them, and their colleagues, to a better, more informed, decision-making the next time they encounter a similar situation. We also underline that, when deciding what action the Ombudsman should take, he or her always takes the factual circumstances into consideration. There is certainly reason to look less favorably at a policeman who deliberately disregards the law than at an officer who takes a wrong decision but nevertheless tried to do his best in a difficult situation.

I would like to make one final point, concerning the readiness on part of the public authorities to follow the recommendations made by the Ombudsman. I think that it is fair to say that in Sweden we have a culture of sensitiveness to the recommendations of the Ombudsman. This is of course partly due to the long Ombudsman tradition. To create such a culture I think it is important – apart from the diligent work of the Ombudsman himself – that the Ombudsman receives the firm support of Parliament, its individual members, of Government and of the Director Generals of various public authorities. It is, of course, possible to disagree with the conclusions of the Ombudsman. But at least the highest officers of the State need to refrain from showing disregard for the authority and independence of the Ombudsman by, for example, questioning his motives or attacking the person holding office.

Finally, there is no Shangri-la in the real world. None of the existing Ombudsmen work in Paradise but in States with varying degrees of shortcomings. Especially in countries with more recently established Ombudsman Offices it may take some time for the citizens to realize that they have access to an independent elected official who will investigate allegations of unlawful, unfair or otherwise improper decisions, actions or behavior on the part of the public authorities and the civil servants. Equally, it may take some time for the public authorities to fully comprehend that such a figure, while interfering with their work and thus making a nuisance of him, in the longer perspective will serve their best interests too. In the meantime, as I touched upon at the outset, the Ombudsman may, through his existence and daily work, contribute to a society with better conditions or at least with a lesser degree of imperfection.