

The Ombudsman Travels to the Anglo-Saxon World

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Seen in its widest context, the adoption of the ombudsman concept and process throughout the English-speaking world is part of a significant constitutional shift which has taken place over centuries and in different ways. From the absolute power of monarchs to the electoral power of individuals, the focus of constitutional arrangements has changed. The Swedish objective in 1809 was to protect rights and freedoms through a supervisory agency independent of government. Many years passed before the rest of the world outside Scandinavia came to fully understand the benefits of that approach. Now, through the passage of time, innovation and modification to suit local circumstances, ombudsman-like institutions can be found in some 135 countries.

The ombudsman institution's journey from Scandinavia to the Anglo-Saxon world was, as it were, by the slow, slow train. In many ways, this should not have been so, especially given the pace with which the concept was adopted in English-speaking countries once New Zealand caught that train and established its first ombudsman institution – the Parliamentary Commissioner for Investigations – in 1962.ⁱ Thus New Zealand became the first country outside Scandinavia to do so, and consequently the first in the Anglo-Saxon world.

New Zealand gives a great deal of the credit for its adoption of the ombudsman concept to Swedish society and the careful way it nurtured and kept alive a process or system which, although it had historical roots far back in Roman, Chinese and Islamic societies, was only in 1809 allowed to exist with characteristics that so nearly equate to the current prevailing ideas of what a truly independent ombudsman office should comprise and how it should function. Although that credit is so warmly given, the significant influence of the other Scandinavian countries which established their own ombudsman institutions, particularly Denmark, is also acknowledged. The Danish model, as developed by its Ombudsman, Professor Stephan Hurwitz, became the key precedent for New Zealand. It had been developed and refined from the Swedish model to fit most comfortably with New Zealand's use of the common law, which made the transition easier.

A distinguished scholar once observed:

The success of the Danish Ombudsman thus cleared the way for New Zealand's adoption of the institution in 1962, and New Zealand created a precedent for other countries.ⁱⁱ

The changes made by Denmark to its Ombudsman institution when compared to the Swedish model appealed to New Zealand's politicians and senior officials and made easier the final commitment to adopt an institution modelled closely on that operating in Denmark.ⁱⁱⁱ

At the same time as New Zealand was moving towards the adoption of the ombudsman concept, so too was Great Britain, where there were concerns about the expanding growth in the machinery of government. A problem arose over the perceived misuse of power in the so-called "Crichel Down" affair which resulted in public outrage and a ministerial resignation. The event brought to attention the views of Harold Laski, who in 1930 described bureaucracy as "the term usually applied to a system of government the control of which is so completely in the hands of officials that their power jeopardizes the liberties of individual citizens." The outcome after an enquiry and a report was the creation of a Parliamentary Commissioner for Investigations, but with one major difference to the model adopted for New Zealand. Reference to the Commissioner had to be through a Member of Parliament rather than directly by the complainant. This could be seen as reinforcing the Commissioner's role as an Officer of Parliament, supporting the work of individual members concerned with the problems of their constituents, but it otherwise limited the citizens' right of access.

With ombudsman institutions in place in New Zealand and Great Britain, the stage was set for an explosion in the number of such institutions throughout the English-speaking world. The outcome has been outstanding, in terms of a successful transplantation of a concept with the potential of universal application.

Why did such an old concept harnessed and applied successfully for 200 years by Sweden ultimately take root so successfully?

There can be little doubt about the international relevance of the philosophy which underpins the classical ombudsman institution: The maintenance of citizens' rights to just and fair treatment from the state and its agencies. Two hundred years after the establishment of what is now generally regarded as the first model of the modern ombudsman institution, the Swedish Justitie Ombudsman, it is appropriate to acknowledge also the contribution of the Romans and their *tribuni plebis*, the Chinese and their office of Control Yuan and the Muslim office of Qad al Quadat, to the thinking from which the Swedish model emerged.

The core of that philosophy, with roots extending back thousands of years, is and remains the strength of an enduring society. The ombudsman institution gives meaning and form to that philosophy for the ordinary citizen and has proven to be popular, adaptable, flexible and effective. Roy Gregory and Philip Giddings, in their foreword to *Righting Wrongs*, published in 2000, put it like this:

...the detailed work of the ombudsman institution may vary considerably from one time period to another ... what is constant and ... certain to endure, is the need for individual citizens and groups of citizens ... for accessible and inexpensive assistance in maintaining their rights to just and fair treatment from the State and its agencies.^{iv}

In 1644, the great English poet John Milton published an essay to the English Parliament in which he said:

When complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bounds of civil liberty attained that wise men looked for.^v

That succinct plea in support of civil liberty aptly describes the fertile soil into which the Swedish Ombudsman concept came to be planted into Anglo-Saxon jurisdictions. Nonetheless, more than three centuries were to elapse before actual planting occurred through the adoption of the ombudsman concept as Parliamentary Commissioner for Investigations, first in New Zealand in 1962 and shortly thereafter in Great Britain, but in different forms. In this context it is appropriate to acknowledge the influence of Denmark and its first Ombudsman, Professor Stephan Hurwitz, on the form of both the New Zealand and Great Britain models and their empowering legislation.^{vi}

The Danish model, being of more recent origin (1953) and benefiting from the Swedish models nearly 150 years of operation, fitted more relevantly into a country used to the application of common law.^{vii}

As austere as the original Swedish model may appear today, with its emphasis on a judgemental or disciplinary role, it is to that model the world owes a considerable debt of gratitude for developing and giving purpose and credibility to an institution which sought to address the need to maintain the citizen's right to just and fair treatment from the state and its agencies.

Although originally the Swedish Ombudsman's supervisory role involved a decision whether or not to prosecute, the Office has retained a flexibility to adapt to the realities of its emerging society.^{viii}

As Kerstin André, Parliamentary Ombudsman in Sweden, observes:

Nowadays one of our most important tasks is to promote, through our decisions, good administrative and judicial behaviour.

This flexible approach by Sweden helped ensure that the ombudsman concept cosseted for so long in that country found its way to the world stage, resulting in an outbreak of "ombudsmania," particularly initially in Anglo-Saxon countries.

Adaptation of the Swedish model by so many countries has not involved a simple copying but rather the adherence to the rule of law and good public governance as the basis for a just and civil society.

A primary reason for the Swedish Ombudsman model being seen as the source or inspiration for modern ombudsman institutions is that the model is underpinned by the universal principles of flexibility, accessibility, credibility and independence.^{ix}

The Swedish objective in 1809 was to protect rights and freedoms through a supervisory agency independent of government. Many years passed before the rest of the world outside Scandinavia came to fully understand the benefits of that approach. Now, through the passage of time, innovation and modification to suit local circumstances, ombudsman-like institutions can be found in 135 countries that have met the membership criteria of the International Ombudsman Institute.^x

This aims to reinforce the requirement that membership brings with it the obligation to meet four fundamental requirements:

- accessibility
- credibility
- flexibility; and
- independence.^{xi}

The obvious question at this time is why, with that long line of historical roots and the success of the Swedish Justitie Ombudsman, it took so long after 1809 to transplant the ombudsman concept into the governance mix of the Anglo-Saxon world. The simple answer may be that there was not the political courage to do so. A more delicate answer is that provided in 1966 by one of my predecessors, Sir Guy Powles, and Alfred Bexelius:

The countless reminders of the true meaning of the rule of law which have emanated from the office (of the Swedish Ombudsman) during the 156 years of its existence, surely like the raindrops that follow a storm, by repeatedly falling, have had a definite influence on the way civil servants have fulfilled and fulfil their mission.^{xii}

In other words, we were slow to appreciate and adopt a good idea.

The genesis for Sweden's adoption of the now classical model can be found in the desire to have a system by which citizens' interests could be effectively balanced with the power of executive action. The fact that the Justitie Ombudsman had both the power to investigate and to prosecute may now be seen as one obstacle to the earlier adoption of the Swedish model by others. The Swedish model potentially imposed a restraint upon those with the power to govern which others saw as neither necessary nor desirable. Sweden saw clearly that the ombudsman concept could enable it to achieve the supervision of officials and prosecution of any who acted unlawfully, arbitrarily or unreasonably. Sweden may well have been forced to act in 1809 and put in place an ombudsman system because of its constitutional difficulties, but what it did gave recognition to the reality of governing – that the governor must rely upon officials to govern. The official is an instrument of the exercise of the governor's powers.^{xiii}

The perception, then, was of the governor in fact being able to control the officials' actions, with any external review being nothing but a constraint upon the governors' exercise of their legitimate powers. The reality was that there were more officials than governors and the information needed to make decisions was more often under the control of officials upon whom the governors depended.

Interestingly, in an historical sense, Sweden established in law in 1766 the principle that virtually all official documents were public. This principle was not adopted by Anglo-Saxon countries until the late 20th century, and then only by some – and somewhat reluctantly. It can be seen today as a major step toward improving the accountability of public officials for the exercise of administrative functions.

There was therefore in Sweden in 1809 a convergence of access to official information and an independent review of administrative conduct that was only first achieved in New Zealand in 1982, when the Official Information Act was adopted, with responsibility for its operation placed in the hands of the Ombudsmen. This convergence in New Zealand has greatly enhanced the effectiveness of the Ombudsman's role by giving a complainant the opportunity to request information relevant to the subject of the complaint. The principle that official information was secret unless release was authorized by the officials holding it was replaced with a principle of availability on request unless there was a good reason in law for withholding. Consequently this created a new environment of considerable "constitutional" significance, evidencing the existence of a society with an open and accountable system of governance.^{xiv}

This convergence of two principles – access to official information and independent review of officials' administrative conduct, either constitutionally or legislatively – is not and was not easy to achieve even in New Zealand. Hence the significant time gap between what was achieved in Scandinavian and Anglo-Saxon societies. Those with governance powers only slowly and somewhat reluctantly released control of their information and opened doors to independent review of officials' administrative conduct. Why? The simplest answer in my view is the emergence after the end of World War II of the need to better recognize the universality of fundamental human rights – a movement that emphasized a shift away from the primacy of nation-states towards the primacy of individual citizens and how they were to be regarded by the nation-state. Perhaps uncomfortably for some, it came to be understood that real power was being transferred to unelected officials simply as a consequence of the growth in the size of the bureaucratic machinery needed to implement the social policies adopted to return the world to normalcy after war.

As in Sweden in 1809, in the late 1940s in the Anglo-Saxon world, there was a growing recognition that the governor could benefit from having some mechanism with public credibility and a capacity to undertake oversight of the governor's bureaucracy to find out why things went wrong administratively and to suggest ways to right those wrongs.^{xv}

Without in any way appearing to be cynical, one might suggest that such oversight may also have assisted the amelioration of the harsher consequences of resignation protocols relating to ministerial accountability for departmental conduct. There always was, in my view, an element of artificiality to that age-old protocol, as it was rarely the minister who acted or even knew of departmental actions which impinged unfairly upon individual citizens. It was generally the actions or inactions of departmental officials that caused individual citizens to be aggrieved.^{xvi}

What better solution to righting wrongs could there be than have a person of standing and independence with the power to look behind the curtain, find out what went wrong and why, and get the matter fixed? Accountability was directed to the agency that was the source of the complaint and not to some-

one removed from the issue in question. In other words, there were political and practical reasons rendering obvious the advantages which would attend the appointment of an ombudsman. No longer need the ordinary citizen feel oppressed by the might of the system. There could be an available and inexpensive remedy, an opportunity to seek an independent review. The governor could rest content that that review would generally result in a remedy if the complaint was justified, without the need to attribute wrongdoing or embark upon a prosecution.^{xvii}

Thus both governor and citizen could be seen to benefit. It took time, circumstances and political courage of a major kind in Anglo-Saxon countries to recognize the benefits of the ombudsman concept and do something about it. Ultimately, it did happen, thanks in part to the actions of the Swedish Riksdag in 1809, the precedent of Justitie Ombudsman, and the creation of kindred organizations throughout Scandinavia.^{xviii}

My focus has been on highlighting the rationale behind the adoption of the ombudsman concept into the governance of Anglo-Saxon societies. In each case, that adoption has been with variations to suit local realities and circumstances. The solutions vary greatly, but all were based on a recognition that governing was not just about the exercise of power by those temporarily controlling the machinery of government, but the exercise of that power on behalf of those being governed. Addressing individual country solutions is beyond the scope of this paper, but the worldwide literature on the ombudsman institution is extensive for those wishing to further explore the advantages from following Sweden's lead and learning how so many countries have adapted its model to their needs.

As we pay tribute to the institution we honour on the bicentennial of its establishment, let us also express the hope that ombudsman institutions everywhere can continue to survive to support the rights of ordinary people and their good governance.

In many ways, the ombudsman journey from Sweden in particular and Scandinavia in general to the English-speaking world was inevitable and easy, even if surprisingly slow. It just required the recognition of a new and accessible process by which ordinary citizens could have their grievances with government considered and, where justified, complaints were effectively resolved. The problem was known. There had been many efforts made to achieve a better balance between the exercise of legitimate authority by government and the need to hold accountable those responsible for its day-to-day functioning. Resort to a member of Parliament or to the law came to be the two options for a citizen aggrieved by the conduct of officials. Both had limitations. Members of Parliament were under-resourced and had no legal powers to investigate the actions of officials. Access to the law was prohibitively expensive for most and the process was slow and adversarial.

The ombudsman institution has been able to significantly address those limitations without diminishing the role of a member of Parliament or constraining the role of the courts in dealing with illegalities or administrative unreasonableness.

Seen in its widest context, the adoption of the ombudsman concept and process throughout the English-speaking world is part of a significant constitutional shift which has taken place over centuries and in different ways. From the absolute power of monarchs to the electoral power of individuals through a right to vote at regular intervals to elect those who would be given control of the machinery of government, the focus of constitutional arrangements has changed. Originally, the emphasis was more upon the system by which those who could control that machinery were identified. Today, the emphasis gives as much weight to the means by which those in control would be held accountable.

As a footnote to this paper, and with reference to my noting the historical role of Chinese society in seeking to provide for supervision of officials through the Control Yuan, I want to mention that I sought during my term as President of the International Ombudsman Institute, without success, to see China join the international acceptance of the modern ombudsman concept. Although the role of the Control Yuan was supervisory for the benefit of the governors, supervision can also be of benefit to ordinary citizens if they are given access to the process to have their individual grievances considered. It should be possible for the function of China's Ministry of Supervision to be supplemented by a process of citizen assistance in dealing with government under the guidance of a high-level respected Chinese official, independent of the Ministry of Supervision and appointed by and directly accountable to the People's Congress. I continue to hope this may come to pass and that China can take its place as a full member of the international ombudsman community. That would be a great outcome to the celebration of the bicentenary of the Swedish Ombudsman Office.

ⁱ New Zealand adopted amending legislation, The Ombudsmen Act in 1975 and henceforth the Parliamentary Commissioner was legislatively given the title of Ombudsman.

ⁱⁱ Hing Yong Cheng, "Emergence and Spread of the Ombudsman Institution", *Annals of the American Academy of Political and Social Science*, vol. 377, p. 4.

ⁱⁱⁱ For a brief description of the differences see Bryan Gilling, "The Ombudsman in New Zealand" 1998.

^{iv} Roy Gregory and Philip Giddings in their foreword to "Righting Wrongs" a publication of the International Institute of Administrative Sciences, 2000.

^v John Milton in an essay, "Areopagitica" to the Parliament of England 1644, in support of the Liberty of Unlicensed Printing.

^{vi} C.C. Aikman, "Some Developments in Administrative Law" (1960), *New Zealand Journal of Public Administration*, vol. 23, no. 2 (March 1961), pp. 134-136.

^{vii} Bryan Gilling, "The Ombudsman in New Zealand" 1998, pp. 16-17.

^{viii} Kerstin André, Parliamentary Ombudsman for Sweden in a paper presented to the VIIIth Conference of the International Ombudsman Institute in Quebec City September 2004 and reported in vol. 7 of the *International Ombudsman Yearbook*, p. 42.

^{ix} *The Ombudsman and his Environment: A Global View*. Marten Oosting, National Ombudsman of the Netherlands and former President of the International Ombudsman Institute, *International Ombudsman Journal* number 13, 1995, p. 1-6.

What should be the Primary Focus of the Ombudsman Institution? Professor Najmul Abedin, Austen Peay State University, Clarksville, Tennessee, in the *International Ombudsman Yearbook* vol. 8, p. 151-153.

The Changing Nature and Contemporary Role of National Ombudsman Institutions in the Commonwealth and Elsewhere: Lessons of Experience. A paper by Victor Ayeni, Deputy Director, Commonwealth Secretariat, reported in the *International Ombudsman Yearbook*, vol. 4, p. 92–102.

^x 2008 International Ombudsman Institute Directory of Offices.

^{xi} Proceedings of the International Ombudsman Institute Conference, Buenos Aires, 1996.

^{xii} Alfred Bexelius and Sir Guy Powles, "The Ombudsman: Champion of the Citizen" in *Record of the Association of the Bar of the City of New York*, vol. 21, no. 6 (June 1966), pp. 388–390.

^{xiii} Sir Guy Powles, "The work of an Ombudsman" A speech to Hutt Valley Jaycees, New Zealand, 3 April 1963. Office of the New Zealand Ombudsman.

^{xiv} New Zealand does not have a written constitution.

^{xv} "The Ombudsman Around the World" Sir John Robertson, former Chief Ombudsman of New Zealand and President of the International Ombudsman Institute, *The International Ombudsman Yearbook*, vol. 2, 1998, pp. 114–115.

^{xvi} "An Ombudsman Scheme for Canada" D. C. Rowat, *Canadian Journal of Economic and Political Science*, vol. 28, no. 4 (Nov. 1962), p. 543. "It is quite possible nowadays for a citizens rights to be accidentally crushed by the vast juggernaut of the governments machine."

^{xvii} "The Ombudsman in New Zealand", Bryan Gilling, 1998, p. 15" ...it was natural for the 'little man' to feel oppressed by 'them', that 'they' did this or that to him, 'they' decided on his behalf without consulting his wishes and that there was no appeal against 'them'.

^{xviii} Hing Yong Cheng "The Emergence and Spread of the Ombudsman Institution", *Annals of the American Academy of Political and Social Science*, vol. 377 (may 1968), pp. 20–30. D. C. Rowat, "Worldwide Spread of an Institution" p. 436.