

Inspections as a Pro-Active Method of Combating Maladministration

Kerstin André, Parliamentary Ombudsman, Sweden

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Inspections have been part of the Parliamentary Ombudsman's work in Sweden for two centuries, and remain extremely valuable today because of the information and evidence gathered, the maladministration that is uncovered, the deterrent effect that is produced, and the opportunity gained by the ombudsman to learn about the officials and public authorities they oversee. This paper reviews the Swedish Parliamentary Ombudsman's present methods of inspection and investigation. This experience shows it is good for an ombudsman to be seen "on the spot" and not hiding behind a desk; inspections could be especially advantageous for ombudsmen in countries where they are not yet well known by the authorities. If done in a positive way, there is much to gain in upholding the principle of the rule of law, in upgrading the quality of the public administration, and in combating maladministration through a process of Ombudsman inspections.

Introduction

Let us for a moment look back into the past, surprisingly not to 1809 but to 1810. Let us imagine a beautiful summer evening somewhere in Sweden. Let us feel the aromatic scent of summer flowers and flourishing bushes. Let us listen to the song of the birds and let us enjoy that there is still full daylight in spite of the late hour. Let us listen to the clattering of the hooves of horses and the sound of the squeaking wheels of carriages, hopefully, not too uncomfortable.

The travelers are coming from Stockholm and they are planning to be away from the capital for quite a long time. They will make stops in small cities on their way, not only to rest but also for a special reason. Their intention is to visit, primarily, the prisons, police authorities, hospitals and district courts of law and may be also one or two county administrative boards.

Who are they and what is the purpose for these visits? I suppose that you have guessed that the head of the company is the very first Parliamentary Ombudsman ever, Lars August Mannerheim, and the rest of the company is his assisting staff. The very first Parliamentary Ombudsman, who had entered upon his duties in March 1810, is now on his first tour of inspection outside the capital. By the way, inspections in the old days – for obvious reasons if you know a little of the winter climate in Sweden – were preferably carried out during the summer season.

So, ever since the very beginning of the long history of the institution of the office of the Parliamentary Ombudsmen, inspections have been part of its activities in exercising supervision over the application of laws and other statutes within public administration, as our task was and still is formulated in the constitution. As a matter of fact, in the former days the supervision mainly consisted of inspections.

The principle of the rule of law – a fundamental element of Parliamentary Ombudsmen supervision

In our constitution, The Instrument of Government, it is stated in the first article that all public power in Sweden proceeds from the people. In the same article it is stated that public power shall be exercised under law, and the principle of the rule of law has its origin, in Sweden, as early as in the 14th century. It is self-evident that it is of utmost importance for the citizens of the country that this principle is adhered to by the public authorities. A wide range of laws and other statutes of different rank must be complied with in a proper way; from basic constitutional provisions about the protection of fundamental rights and freedoms to statutes of a more detailed and practical character regarding administrative procedures but yet of highest relevance in terms of legal rights of the individual.

It is of crucial significance that the government, as well as all governmental and other public authorities, national, regional and local, uphold very high standards in controlling lawfulness in their respective fields. And there are in Sweden several governmental agencies entrusted with supervisory power in specific areas. But public power proceeds from the people, and this means that the Parliament, as representative of the people and on behalf of the people, has a special responsibility and interest in safeguarding the adherence to the principle of the rule of law within public administration.

One of the means used for the purpose of parliamentary control is the supervisory work by the Parliamentary Ombudsmen. It is obvious that a very important part of that work is the handling of individual complaints. There is undoubtedly some symbolic value in the fact that everyone, who for some reason finds himself or herself maltreated in the contact with a public agency, has a right to turn to the Parliamentary Ombudsmen. From a strict utility point of view, however, inspections could be of even greater importance as a measure for upholding the principle of the rule of law within public administration. In combating maladministration, inspections could actually be considered the most effectual way.

Before going further, it should be noted here, to avoid confusion, that according to the genuinely Swedish system from the 17th century, the public authorities in our country are autonomous in their dealing with individual cases. They enjoy independence similar to that of courts of law. Thus no one, not even a cabinet minister, is allowed to determine how an authority shall decide in a particular case concerning the exercise of public power against, for instance, a private subject – and no one is allowed to order a public

agency how to decide in a case concerning the application of an act of law decided by the Parliament. This principle of independence in the handling of individual cases is combined with the principle that every official is accountable for his or her doings, even under criminal law.

A consequence of this system is that the Parliamentary Ombudsmen in Sweden are not supposed to interfere in the work and decision-making activities of the authorities in the sense that we can order an authority to do this and that. Neither do we, as a main principle, express our opinion regarding the material content of individual decisions of an authority. Most decisions could be appealed in an administrative court of law, and it is not up to the Parliamentary Ombudsmen to be a substitute for the courts. Only when the material content of a decision is obviously unlawful will the Ombudsman act – in serious cases even as a prosecutor.

Normally, however, we focus in our supervisory work on administrative procedure or what could be summarized as “due process”. It should also be mentioned here that the Parliamentary Ombudsmen in Sweden do not supervise cabinet ministers. This task is instead fulfilled by a standing committee in the Parliament, the Committee of the Constitution.

What makes inspections so valuable in the supervisory activities of the Parliamentary Ombudsmen?

Inspections are of great value in many different respects. Inspections give the Parliamentary Ombudsmen and their staff the possibility to get an overall perspective on the works and doings of the public authorities. In the handling of individual complaints, it is not always easy to get the whole picture, since our control will be concentrated more or less on what has been complained about in the specific case. Furthermore, a great deal of maladministration would never come to our knowledge if our work was limited to the handling of individual complaints. In this context, we must not forget that many people, perhaps the most fragile ones, are not always able to make a complaint, however relevant a complaint would be.

It is quite obvious that it is much easier for the Ombudsmen to discover mistakes of a systematic kind in the routines of an authority during an inspection, rather than in dealing with an individual complaint. A very simple example is delays in the case handling of an authority. What you can judge from an individual complaint may give you cause to criticize the slow handling of that particular case. But it could be much more serious if the slow handling is typical for many similar cases. You would not be aware of all those other cases unless you go to the authority concerned and investigate the situation. Of course there are several other examples of maladministration that you are likely to remain unaware of if you never go out and find them for yourself. I will leave it to your imagination. Think, for instance, about what sometimes could be revealed during an inspection of the office of a chief guardian and its administration of trust money on behalf of those under guardianship – people

who are very often not capable of making a complaint to the Parliamentary Ombudsmen.

Inspections are of great value also in that they give an Ombudsman and his or her staff an opportunity to meet officials in the public authorities on their own turf and learn about the conditions under which they work. This is important as we, in our role as supervisor, to uphold the respect from the authorities must have good knowledge of the reality in which they are working. The Ombudsmen may issue general statements intended to promote a uniform and appropriate application of the law. There is a risk that such statements will not be taken seriously by the authorities if the statements are not to some extent related to what the authorities are facing in their daily work. As the Parliamentary Ombudsmen are entitled to address the Parliament and the Government regarding deficiencies in legislation that could be observed in our supervision, it is of course of great value that we can discuss different issues with officials who are applying the legislation concerned and get information about what difficulties they have experienced.

The preventive effects of inspections are beyond questioning. The mere knowledge that every authority may at any time be inspected helps to keep the officials alert. Usually, an authority, after having been informed that an inspection is going to take place, is very anxious to look through its routines, to change what has to be changed, to hurry up the handling of old cases etc. This kind of pre-inspection action could lead to necessary changes. It does not really matter that it is often very apparent to the Ombudsman, upon arrival at the authority, that this cleanup has already taken place. On the contrary, it is highly satisfying to end an inspection by concluding that our mission, at least in some respects, has already been fulfilled by the authority itself – and it is of course in the interest of every authority to give as little cause for criticism as possible.

The disseminating effect of inspections also should not be underestimated. If it is known, and it surely will be, that an inspection is planned, let us say, of the local authorities in a little town in the middle of nowhere, authorities in other small cities or municipalities in the region will be relieved that the Ombudsman is not paying a visit to them this time, but at the same time, they will be reminded of the existence of the Ombudsman. This can give rise to reflections regarding the quality of the work of those other authorities. So, in an indirect way, the mere rumor of an Ombudsman inspection in the neighbourhood could give some incitements to improving routines, to speed up the disposition of “bad conscience cases”, etc.

The planning and preparation before an inspection

Together, the four Parliamentary Ombudsmen of Sweden spend, or at least try to spend, 50-60 days a year inspecting public authorities of all kinds. Each of us makes inspections within his or her area of responsibility. An inspection may be made without a previous warning to the authority concerned. Usually, however, the Ombudsman does not arrive without having issued prior notifi-

cation. In most cases the authority will be notified one or two weeks prior to the planned inspection. One of the reasons for this is that the Ombudsman wants to make sure that the responsible head officials are available to meet with us when we arrive. Another reason is that we must give the authority some time to collect all the documents required, to make paper copies, if needed, of data material that should be presented to the Ombudsman and his or her staff, to make sure that there are enough computers for the Ombudsman's staff and so on. These practical issues must be arranged and prepared by the authority in advance, as our time is extremely pressed and we do not want to waste time in waiting for documents.

The decision of which authority should be inspected and the frames of the inspection are very often quite random and made without any deeper analysis. Sometimes an ombudsman just realizes that it has been a long time since he or she inspected a certain kind of authorities. Or sometimes there may be an even simpler reason: we look at the map of our country to find out whether there are some "white spots" – areas or cities where it has been quite a while since an inspection took place. Sometimes, however, inspections may be made owing to certain circumstances. We might receive indications through individual complaints, articles in mass media or maybe a regular supervisory board that things are not in the shape they should be in a particular public agency.

It is absolutely necessary to be well prepared before an inspection takes place. We spend quite a lot of time in advance to learn about the authority that we are planning to visit, in order to be at least somewhat familiar with what is specific for that particular authority and the relevant public sector. This could be time-consuming but also very educational for us as we gain knowledge and experience that give us a good platform for our work. Before an inspection, we also require written instructions and other normative provisions of special interest from the authority. If there is a regular supervisory board in the area, we usually ask for information from that board about what could have been observed in its supervisory work or if there are particular factors of which we should be aware.

The scenario of the "normal" inspection

During an inspection, a great deal of time is spent going through files and other documents. The inspection normally starts, however, with a meeting where the Ombudsman and his or her staff meet the head of the authority and other members of its administration. This is a good opportunity to get further information about the authority, special problems that it is facing internally or in coexistence with other authorities in connecting areas, and so on. In this context, it is important to underline that our mission is not only to look for errors, mistakes, bad routines, etc. An important element in an inspection is the dialogue between the Ombudsman and his or her staff on one hand and the officials at the authority on the other. Since the Ombudsmen are entitled to address the Parliament and/or government regarding deficiencies in legisla-

tion, it is of great value for us to listen to the experiences of the officials. They are the true experts in their fields and can often contribute good ideas and examples.

It goes without saying that the atmosphere during an inspection is much nicer when the officials realize that the Ombudsman is not just the bad guy looking for failures – sometimes even with the eyes of a prosecutor – but he or she is also genuinely interested in helping the authority create better administrative routines. Often we can even play the role of supporter to the officials in their sometimes vain efforts to explain to the head administration that routines must be changed in order to comply with the legislation, for instance the Act of Administrative Procedure. In my experience, we are often warmly welcomed by the legally trained staff at public authorities and by the professional executives of the municipalities.

Since our time and resources are limited, we often have to concentrate on issues of special interest from a legal administrative point of view. For instance, in the area of health and medical care, we focus primarily on the application of the laws regarding compulsory psychiatric treatment, and in the social welfare area we often make priorities: We pay a particular attention to the application of legislation that gives authorities the power to use compulsory measures, such as taking children into custody. Inspections of the police may often focus on the handling of a special kind of case, such as those involving children or young people, that should be treated without delay. Another example is the control of the application of special rules about coercive measures; for instance, arresting people, confiscating goods or secret telephone tapping during criminal investigations. The inspections of prisons are also focused on the legality of the use of coercive measures.

During inspections of prisons, psychiatric hospitals and similar institutions, the inmates are given an opportunity to meet the Parliamentary Ombudsman and present any complaints they may have. These talks are of course in confidence. Deficiencies in the routines could be revealed during these talks; problems that hardly could be discovered by looking through files and other documents. For instance, we receive very few complaints in the area of compulsory psychiatric care and we could easily get the preconceived idea that all legal rights of the inmates are well taken care of, as most of the decisions by the senior consultant psychiatrist could be appealed in a public administrative court of law. However, sometimes we discover that an inmate who has made an application for leave has been denied a formal decision and consequently deprived of his right to appeal, since there is nothing to appeal against. Such a situation is not easily disclosed by looking through documents.

An inspection ends with a meeting where the Ombudsman informs the head officials and others about the observations that have been made. In many cases, the Ombudsman expresses an opinion immediately. Minor faults are usually dealt with in this way and taken down in the record, and that's it. Sometimes observations may have reasonable explanations and the question can be settled directly at the table without further comment. Very often, however, inspections give rise to a great deal of analysis of the observations made

and the material collected. An inspection can also reveal mistakes in dealing with individual cases that prompt the Ombudsman to initiate a special inquiry – sometimes even a criminal investigation. The Ombudsman also quite frequently makes statements in the records with recommendations to the authority to improve its organizational directives and other instructions for officials concerning the work of the authority.

The laborious work after the inspection

One reason why it is quite difficult to find time for inspections is all the work that must be done afterwards, in producing the records from the inspection. These can sometimes be quite comprehensive and voluminous. Also any questions about further special inquiries or even criminal investigations arising from an inspection must be settled without delay.

After the final adjustment of the records, they are of course distributed to the authority concerned. We also refer them to the regular supervisory board, if applicable. Sometimes, if there are statements of principal interest in the record – for instance, about observed difficulties in applying a special section of a law – a copy will be sent to the relevant ministry or committee in the Parliament. It might be added, since the Parliamentary Ombudsmen in Sweden are neutral and non-political, that we are now talking about deficiencies of a formal or technical character.

All records from inspections are open to everyone and available on our website. This is of great interest and value for other authorities as well. It is not unusual that other authorities, for instance, in their written reports to the Ombudsmen in individual complaint cases, refer to what an Ombudsman has expressed in former records of an inspection. And I have done inspections where the officials are very well aware of my earlier statements and recommendations in similar inspections. Occasionally, they would proudly announce that they had already remedied what had to be changed according to what they had learned from the record of previous inspections. So indeed, we must not underestimate the dissemination or rather indirect effect of inspections.

There is also another indirect effect of these inspections. As I have already said, there are regular supervisory authorities in many areas of the public sector in Sweden. National boards and county administrative boards often have supervision as one of their tasks. These boards are supervised by the Parliamentary Ombudsmen but it is not presumed that the Ombudsmen, in our capacity as a so-called extraordinary constitutional institution, shall replace this regular supervisory work. Sometimes, however, an inspection by an Ombudsman may reveal maladministration in a public authority that should have been disclosed by the regular supervisory board if its task were properly fulfilled. Such observations could prompt measures against the agency inspected, and against the regular supervisory board. On the other hand, we can also give some support to a regular supervisory board in a situation where the board earlier has pronounced criticism against a public agency and we find

out that the agency has still not corrected its routines. Such negligence might give cause to especially severe criticism by the Parliamentary Ombudsman.

Finally, it is worth mentioning that the rate of decisions where criticism is pronounced by the Parliamentary Ombudsmen is much higher when an investigation has been done on an Ombudsman's own initiative – for instance, after an inspection – compared to the rate of decisions involving individual complaints; about 80% compared to about 10%. These figures indicate just how effective inspections can be as a measure in combating maladministration.

Concluding remarks

In combating maladministration, there are many actors. The Parliamentary Ombudsmen are and should be only part of the system. Nevertheless, we represent a very important part with considerable impact. The very existence of the Ombudsmen has an obvious preventive effect. Since the principal task of the Parliamentary Ombudsmen is no longer, as it was a long time ago, to institute prosecutions or even to make critical remarks, but to contribute proactively to and monitor the maintaining of a high legal quality of work within public administration, it is valuable to be seen out there “on the spot” and not hiding behind the desk of your office. Especially in countries where the ombudsman institutions are quite young and maybe not yet so well known by the authorities, it could be of special advantage for the ombudsmen to show up and pay attention to the administrative work of the authorities. If this is done in a positive way, there is much to gain in upholding the principle of the rule of law, in upgrading the quality of the public administration, and in combating maladministration.