

THE CONTROLLERS AND THE CONTROLLED:
The Swedish Ombudsman institution
as seen from the grass-roots level

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A. PREFACE

During recent years there has been considerable international literature about the legal institution of the Ombudsman in Sweden. Foreign delegations and specialists in law and administration have also visited Sweden in order to study our "peculiar institution" and Swedish Ombudsmen have lectured abroad about their role and experiences. However, as far as I know, there has been very little written, at least for readers outside Sweden, on how the Ombudsman institution is perceived by those groups who have to live and work, so to speak, in its shadow. I definitely belong to this category, having been a public prosecutor (which in our legal system is a separate life-time career) since 1950. Public prosecutors are a category which are often reported to the Ombudsman through complaints from the general public.

B. BACKGROUND

The relative importance of the prosecutors' category is shown by the statistical background of complaints against prosecutors. I will first give an extract from the statistical tables of the Ombudsman's Reports to Parliament for the five most recent fiscal years.

STATISTICAL TABLE OF OMBUDSMAN'S REPORTS¹

FISCAL YEAR	TOTAL NUMBER OF CASES	COMPLAINTS AGAINST	
		POLICE	PROSECUTORS
1976/77	3,170	309	117
1977/78	3,170	342	119
1978/79	3,201	356	114
1979/80	3,361	354	111
1980/81	3,571	371	111

The number of complaints against the police are provided as comparison with the number of complaints against the prosecutors. Although the number of total cases and complaints against the police have increased, the complaints against prosecutors have been very stable during this period. The reason why the number for the police is so much higher is partly because of difference in size between the groups and partly because of the different nature of their work.

C. THE INFLUENCE OF THE OMBUDSMAN ON PROSECUTORS

The Ombudsman's undeniable influence depends not so much upon what he does, as upon what he is. By this I mean to say that if one looks through his yearly reports for the last decades, one might easily get the impression that much of his work is of the pettifogging and nitpicking type,

¹The numbers are not quite comparable, as the column "total number of cases" contains both complaints lodged and self-initiated cases filed during the fiscal year, while the columns "complaints against" contain complaint cases finalized during the fiscal year.

consisting in retroactive reviews of legal, administrative or factual decisions. However, this impression might depend upon the fact that there are not many serious cases for him to handle. Swedish society is lucky enough to almost never encounter bribery. It is only very seldom that there is political influence involved in the process of making administrative decisions. This in its turn may partly depend on the long existence of the Ombudsman institution (since 1809). Furthermore, if one considers the cases which are reported and prosecuted at the end of the last century and up to World War I, there are many more examples of both intentional crimes by public officials involving breaches of constitutionally guaranteed liberties, and really serious examples of carelessness or incompetence. Today there are normally only a couple of prosecutions each year, a few cases with reprimands and a fair number of cases where the Ombudsman states that the official has committed a fault but that he will not prosecute him, either because it is not serious enough to be considered criminal or because he is entitled to waive prosecution. In 1975 there was a reform of Chapter 20 of the Swedish Penal Code "Of crimes in office" severely limiting the punishable area for the crime "breach of official duty". On the other hand, sometimes one finds cases reported where the official, who is suspected of a crime in his official capacity, produces explanations and excuses, which are evidently constructions made afterwards. In some cases one might think that the act itself does not

prove the official is unfit for his position but his explanation does.

There have been few cases, where a public official has been displeased with the declaration by the Ombudsman that he has committed a fault or even a crime, and has demanded that he be prosecuted in order to be found not guilty by a court and thus prove his innocence in the eyes of the public. Usually he has not succeeded, as there is no such legal right in Sweden as the right to be prosecuted. However, since 1968 there has been an agreement between the Ombudsmen to prosecute any person who demands prosecution in order to prove his innocence. This, however, presupposes that the Ombudsman considers the act criminal. Since it is usually the doubtful cases that end with a prosecution, a fair number of the cases prosecuted by the Ombudsman end with a verdict of not guilty.

There is much publicity both about complaints to the Ombudsman, his decisions in important or highly publicized cases and the publication of his yearly report, therefore the general public in Sweden is well aware of the possibility of lodging complaints with him. A great number of people use this facility.

During the last few years, the number of complaints has increased so much that it has on several occasions been necessary to increase the number of Ombudsmen and their staff, and also to restrict access for lodging complaints. The complaints which fall within the competence of another

public authority are usually referred to that authority for decision and complaints concerning acts which occurred too many years earlier are formally shelved. Complaints against public prosecutors are usually handed over to the Chief Public Prosecutor of the country for a decision if they are not very important.

A large number of complainants are persons caught up in the machinery of justice, most often as suspects or defendants but occasionally as victims. Consequently a high number of complaints are quite understandably directed against the police or the public prosecutors. To be the subject of a complaint to the Ombudsman with the possible ensuing unfavourable publicity is thus an occupational risk for public prosecutors, which we have to be prepared for. Most prosecutors consider the possibility of complaint as one of the many small inconveniences which are part of any profession. If a prosecutor has to make a legal decision in a very doubtful case, with far-reaching consequences, and after careful consideration he makes a decision upon one of the possible choices, he does certainly not reason thus: "I choose alternative "A", because if I choose alternative "B", I will be reported to the Ombudsman and he will probably prosecute me". Much more influential factors in such a situation are probably the wish to proceed according to law and justice, to live up to one's personal ideal of how a prosecutor should act, the wish not to lose respect in the eyes of one's colleagues and, in some cases, the thought of

the reaction of one's supervisors and the decision's influence upon one's future career may enter into the decision making process. It is very possible however, that the awareness of the Ombudsman's existence acts as a subconscious factor, contributing to the "professional" part of a public official's conscience.

I will use myself as an example. I have been a public prosecutor since 1950 with only about 5 years having been spent either on leave in outside occupations, or as a prosecutor with such duties that there was not real risk of being the subject of complaints. Of the remaining 27 years from 1955 to 1982, during which I have been a prosecutor "on active service", I have been the subject of 13 complaints. Unfortunately, I have no material for the years 1950-54 but suspect that there were no complaints. Of these 13 complaints, three came from suspects or defendants, two from defense counsel, five from victims or offended parties, one from a union to which some defendants belonged, one was started on the Ombudsman's own initiative because of a newspaper article, and one was the by-product of a case where the Ombudsman had investigated a complaint against a policeman. Five complaints alleged that I had done too much or gone too far, five that I had done too little and three that I had acted wrongly. When I looked through the cases afterwards, I found that only four of the complainants showed paranoid tendencies; I would have guessed at a considerably higher proportion. The result of the

complaints was in one case that the Ombudsman gave me a serious reprimand for overzealousness. I consider this reprimand in retrospect to be justified. In one case his statement was that I had acted wrongly, but not committed a crime; in seven cases he found no reason to take any measure, and in one case he stated that the complaint fell outside his jurisdiction as the alleged fault concerned the Code of Liberty of the Press which he was not competent to prosecute. Two cases, finally, were handed over to my superior, the Chief Public Prosecutor for a decision and he found no reason to take any measures.

D. CONCLUSION

In my personal view on the workings of the Ombudsman institution, sometimes there has been a lack of professional experience, when extensive criminal investigations have been directed by his subordinate personnel the majority of whom come from the judicial career, and thus lack experience within that area which is normally the speciality of the prosecutors. During the last years, however, a small number of public prosecutors have also served in the Ombudsman's office. On occasion it takes a rather long time before a complaint is investigated and a decision is made. Even if the public official, whose conduct is in question, is convinced that he has not acted wrongly, it may be a serious, stressful situation to have to wait up to a year for a decision. That may, however, be the other side of the

Swedish legal perfectionism. Furthermore, some complaints are so maliciously false or patently careless, especially those from "professional" complainants who write to the Ombudsman not on their own behalf but because of something they have seen in a newspaper, that the complainants ought to be prosecuted because of false or careless incrimination.

Finally, there are cases where there does not seem to be a reasonable balance between the gravity of the offence investigated and the amount of work expended in investigating it. Thus, there have been cases, where highly qualified jurists have spent months of their time investigating and deciding whether a military man, a police official or a public official with qualified technical duties has acted rightly or wrongly in a situation, where the decision-maker had perhaps only seconds, or at most a few minutes to make an important decision. The Ombudsman institution is a normal part of the working environment of many Swedish public officials with legal duties. The risk of being the subject of a complaint is only important in a few categories, especially in law enforcement. Even for these categories it is of small importance compared to other factors which influence professional performance.