The Introduction and Development of the Swedish *Justitieombudsman* in Denmark

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Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions
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This paper outlines the similiarities and differences between Danish and Swedish ombudsmen, established some 140 years apart. Denmark adopted the same fundamental concept, but with significant differences, especially concerning the Ombudsman's authority over the courts and government ministers. Like most ombudsmen established since, the Danish Ombudsman has no authority over the courts, but ministers are within his jurisdiction. The Danish office played a special role in the development of administrative procedural law and standards of good administrative practice in the mid-20th century, and the Ombudsman also likely greatly influenced the principle of access to public adminstration files in Denmark, where no such tradition existed, unlike in Sweden. Despite these differences, there is nonetheless no doubt that the Danish Ombudsman office would not have seen the light of day without the Swedish inspiration and the Swedish model.

The idea of establishing an Ombudsman institution in Denmark originated in post-war public administration reform work. The crisis legislation of the 1930s and the ongoing economic reconstruction had necessitated strong state machinery, with extensive powers to interfere in the social economy and the daily lives of the citizens. Partly due to the extensive use of delegating legislation (i.e. authority provisions), the public administration increasingly appeared as an independent power factor. To mitigate the unfortunate aspects of this development, it was regarded as necessary to strengthen the role of the *Rigsdag* (the Danish Parliament, since 1953 called the *Folketing*) in relation to the public administration and at the same time expand the legal guarantees of the individual citizen's position in relation to the public administration.

An Ombudsman system based on the Swedish model was a central, albeit not uncontroversial, element of this reform work. One of the key stages was its inclusion in the amended constitution of 1953, which had been prepared with the Swedish legal expert Professor Nils Herlitz as an adviser.

According to the preliminaries of the Constitution and the subsequent Ombudsman Act, a Danish Ombudsman would serve as a supplement to the guarantees already in place to ensure that public administration activities were carried out correctly. This was deemed necessary due partly to the increasing importance of the public administration, and partly to the shortcomings detected in the existing guarantees.

In this connection, it was noted that civil servants are subject to disciplinary and criminal liability, but also that instances of civil servants being

called to account were rare and could in practice seem arbitrary. It was further noted that the administrative appeal systems, which were likewise intended to serve as legal protection of the citizens, were themselves part of the public administration. The appeal body was therefore unable to come fresh to a case in the way an external supervisory body would.

Experience showed that the opportunity to have a case tested by submission to the courts was very rarely used. Bringing a case before two or possibly three judicial bodies involved a lot of work and considerable costs. Moreover, testing by the courts was limited to the public administration's application of the law. The courts could not overrule the exercise of administrative discretion.

The introduction of the Ombudsman was seen as a protection – above all, of the individual citizen – for the enforcement of right and reason in relation to the public administration. The Ombudsman should be able to act at no cost to the relevant citizens, in their interest – and that of the general public – and address errors and negligence of every kind in the public administration. The Ombudsman's position under the Folketing was to ensure the office's independence in relation to the government and the public administration. At the same time, this position would also strengthen the Folketing's control of the public administration.

The proposal concerning the establishment of an Ombudsman system led to the provision in Section 55 of the new Constitution, which provides by law that the Folketing shall elect "one or more persons to superintend the civil and military administration of the State." (The distinction between civil and military administration was never implemented in practice and the option of electing more than one person as Parliamentary Ombudsman has likewise never been used. The limitation of the Ombudsman's authority to the state administration was removed in 1996, when the entire regional and municipal administration was included under his authority).

The Ombudsman bill was debated at the same time as the Constitution bill in 1953, but not passed until 1954 by the new Folketing as Act No. 203 of 11 June concerning the Parliamentary Ombudsman. The first Ombudsman took up office on April 1, 1955.

The wording of the Danish Ombudsman Act was extensively influenced by the Swedish model. However, there were two main significant differences in its legal basis:

Swedish ministers (*statsråden*) are not covered by the Swedish Ombudsman's authority. In Denmark, a similar limitation would reduce the impact of the Ombudsman control very significantly, as Danish ministers – unlike their Swedish counterparts – in addition to their function as members of the government are also heads of administration and therefore both formally and in reality responsible for the state administration. There was accordingly no doubt that the Danish Ombudsman system must also include supervision and control of the ministers' discharge of their office.

The other major difference in the law involved the Ombudsman's relationship with the courts. The Swedish *Justitieombudsman* also supervises the courts. In Denmark, the assumption was that an Ombudsman elected by the

Folketing should not undertake general supervision of the courts. However, the Constitution Commission in its comments to Section 55 of the Constitution stated that the provision could authorize the inclusion of the courts' purely administrative activities as within the Ombudsman's jurisdiction. The first proposals for an Ombudsman Act were in line with this, as they aimed to cover all administrative services, including the administrative functions of the courts, but not their judicial activities. However, this attitude changed during the reading of the bill in the Folketing and instead agreement was reached on a provision that generally excluded the judges' discharge of all their functions from the Ombudsman's jurisdiction.

By an amendment of the Act in 1959, the other civil servants of the courts (magistrate's clerks, clerks of the court, etc.) were also exempted from the Ombudsman's jurisdiction. The Ombudsman at the time himself suggested that such an amendment was desirable. He considered it natural for the judicial power to be largely subject to the control of the courts themselves and the Ministry of Justice.

In practice, the Ombudsman's office has in fact gone further than the legislators in this respect, by drawing an extremely clear line between the activities of the courts and the Ombudsman. Complaints are rejected by the Ombudsman not only if they concern issues that have been settled by the courts, but also when the issue is pending or testing by the courts is being considered.

In Denmark, this aspect is thus very clear. The Ombudsman does not exercise any kind of control – directly or indirectly – over the judiciary.

While there were thus significant differences between the Danish and Swedish systems as far as the Ombudsman's relationship with ministers and the courts was concerned, the Swedish emphasis on the personal responsibility for administrative activities was retained as the objective and aim of the Ombudsman's investigations when the legal basis in Denmark was formulated. The main provision about the Ombudsman's tasks thus amplifies the constitutional provision concerning control of the administration as superintending "whether the ministers, civil servants and other persons acting in the service of the State [later also the service of the local authorities] are guilty of errors and derelictions in the exercise of their office." As far as the Ombudsman's powers to react were concerned, the main emphasis was likewise placed on the disciplinary and criminal liability of the civil servants.

In this respect, insufficient account may have been taken of the fact that the strong emphasis on personal responsibility reactions in Sweden was based on a long tradition of regarding personal responsibility in office as a cornerstone of the citizens' legal protection in relation to the public administration. However, Denmark did not have a similar tradition.

During the Danish Ombudsman's first year of existence, it therefore became apparent that the personal responsibility reaction would only be of very minor importance in the institution's activities. In fact, the Ombudsman has never exploited his powers to order a prosecution, or to call on an administration to institute criminal or disciplinary proceedings against a civil servant. On rare occasions, however, the Ombudsman has asked an authority to con-

sider whether there was a basis for instituting criminal or disciplinary proceedings against certain persons.

As a result of Danish administrative tradition and the organizational structure of the public administration, civil servants rarely act independently. They act on behalf of the minister or the relevant local authority or at least on behalf of the administration to which they belong. Case processing is usually organized in such a way that several persons within the administration take part. The responsibility for planning the work rests with the management of the administration. Formally, the individual employee always has a personal responsibility – this is clear from, for example, the Penal Code and the civil servant legislation – but usually the responsibility of the authority as such is crucial in external relations. This applies above all to the decisions made, but also to a very great extent to the case processing and the factual administrative functions.

In keeping with this system of responsibility, the Ombudsman's criticism is predominantly directed at the authorities, rather than the specific individual or individuals participating in the case processing.

In this context, the Ombudsman control appears more like a control of institutions than of persons. As the Ombudsman Act also states that in case of complaints concerning decisions, all opportunities to remedy the alleged error within the administrative system must have been exploited – i.e. special administrative appeal bodies must also have considered the case – before it is brought before the Ombudsman, it is probably most accurate to describe the Ombudsman control as a kind of system control.

This, then, is a third difference between the Danish Ombudsman system and its Swedish model, although not one that can in any way be discovered by reading through the legal basis of the two offices. In view of the development of the Swedish *Justitieombudsman* office, the difference can also only be described as partial. Today, the *Justitieombudsman* also carries out institution or system control. More accurately, the difference is that the Swedish *Justitieombudsman* also implements the personal responsibility reactions, while the Danish Ombudsman limits himself to institution and system control in the form of criticism of the authorities.

Even though the Danish Ombudsman system was based on the Swedish model – with certain clear differences – and could therefore benefit from the clarity and precision which had developed around the tasks and activities of the *Justitieombudsman* through just under a century and a half, the political taskmaster, the Folketing, left some lack of clarity in relation to the nature and performance of the task in certain important respects. The expectations of the fundamental position of the Parliamentary Ombudsman in society and the state pattern and pivotal point of the office's activities were ambiguous. This ambiguity largely related to two aspects which can be summarized in the following questions:

- Should the Ombudsman represent the politicians or the citizens?

- Should the Ombudsman in his activities aim mainly at being a kind of administrative court or should the office rather function as an "administration procedural supervisory body"?

While the first question had been clarified and well-established in Sweden due to the long historical development of the *Justitieombudsman* office, the second constituted a separate problem in Denmark, as Denmark – unlike Sweden – did and does not have any administrative courts.

The question of whether the Danish Ombudsman represents the politicians or the citizens had a fairly long history that will not be repeated here. It involved many politicians feeling that the legislative power, the Rigsdag, as a result of the development of the public administration during World War I and through the inter-war years had to some extent been put out of action by the ever-growing administrative system. The increasing (and probably necessary) use of the authority provisions in the legislation contributed to this feeling. What was therefore desired – and on several occasions formally requested – was a kind of parliamentary Legal Secretary, who could monitor, investigate and report to the Rigsdag on the public administration's actions and behavior in relation to the rules of law and the intentions of the legislative power. This person would, so to speak, "superintend the administration of the state," as it was later expressed in Section 55 of the Constitution concerning the Ombudsman.

At the same time, there was of course no doubt that the Ombudsman would be the place where individual citizens could lodge their complaints about the public administration and expect these to result in reprimands and correction if found justified. As already mentioned, the period of the two world wars, the economic crisis years in the 1930s as well as the immediate post-war period were characterized by the public administration's increasing intervention in trade and industry as well as the daily lives of citizens. Rationing, currency restrictions, allocation and reallocation of the scarce goods and many other similar measures had a major impact on the individual citizen. There was a growing sense that the ordinary citizen's welfare was increasingly dependent on the goodwill and abilities of public employees. There were undoubtedly many people far beyond the political circle who looked forward to the new institution, which was constantly referred to as "the defender of the man in the street".

The first Ombudsman soon established the base line in relation to this fundamental policy issue in relation to his office, which has been followed ever since. His reply contained the necessary nuances without in any way lacking clarity.

The Danish Ombudsman is appointed by the Folketing. His mandate must be confirmed (if approved) after every general election and the Folketing can at any time dismiss the Ombudsman without giving reasons. There can therefore never be any doubt that the Ombudsman at all times carries out his duties on behalf of the Folketing and with the confidence of the Folketing as the essential basis of his mandate.

However, the mandate can just as incontestably be regarded as being of a general and overall nature. In the discharge of his office, the Ombudsman must avoid expressing political statements in the handling of the actual cases. Formally, the Folketing has no powers to instruct the Ombudsman. It must either dismiss him or allow him to carry out his business as he thinks best – there are no compromises. However, it is even more important that the Ombudsman is not led astray in the performance of his tasks by political statements, however well meant. In this respect, the Ombudsman does not represent the Folketing, but himself.

It was also clarified that the Ombudsman is not really "the defender of the man in the street," even though he is frequently regarded as such by the broad population. The Ombudsman's function is not comparable to a defender or an advocate, but more to a judge. Any complaint before the Ombudsman has two parties – a complainant and the subject of the complaint; i.e., a citizen and an authority. Of course both parties must be treated in accordance with the fundamental principles of fairness – principles largely taken from the court process. The fact that the Ombudsman may sometimes appear to be a defender or an advocate as well is connected with his well-known lack of authority to make binding decisions. In order for the citizens to receive their rights in relation to the authorities, the Ombudsman therefore frequently has to argue in detail and take follow-up steps to ensure compliance with his recommendations, which a court does not need to do.

The other fundamental ambiguity in the expectations of the office was this: Should the Ombudsman be a kind of administrative court or rather a form of "administration procedural supervisory body"?

In the public administration itself, there seemed to be a fairly widespread expectation that the Ombudsman would only consider procedural aspects in relation to case processing time, etc., as well as the various issues relating to the civil servants' behaviour in the widest sense. By contrast, matters of substantive law, or the substance of the cases, would largely remain outside the scope of the Ombudsman; i.e., they would be reserved for the public administration's own recourse systems, if necessary subject to the external control of the ordinary courts.

However, this view of the Ombudsman's functions and their limitations was by no means shared by everyone. When the complaints began flooding in after the office opened, it turned out – not surprisingly – that most concerned the actual content of the decisions; i.e., it was the decisions and their content with which the citizens were dissatisfied and wanted the Ombudsman to change.

As a result, the Danish Ombudsman office from the start also considered the substantive law issues contained in the complaints. In other words, it was established from the beginning that anything considered by the courts in administration cases could also be reviewed by the Ombudsman. In addition, various areas and issues relating to procedural and behavioural aspects are outside the scope of the courts, but subject to investigation by the Ombudsman.

The problem of the weighting between the procedural and behavioural aspects, or "good administrative conduct" on one hand and the substantive law aspects on the other, in a sense still exists. The issue is permanently present and has to be assessed in the daily practice of the office. However, when it is said today that the Danish Ombudsman's activity over the years has to some extent replaced the function of the administrative courts (which Denmark lacks, unlike Sweden and several other European countries), this is due to the very early and clear setting of the office's course in this completely fundamental respect.

When the Danish Ombudsman office was established in the mid-1950s, there were certain special bodies with characteristics from both courts and administrative authorities, such as the Labour Courts and the Cadastral Courts. In addition, there were several administrative collegiate appeal bodies working with some functional independence of the government. The National Income Tax Tribunal and the Nature Protection Board of Appeal can be mentioned as examples. Since the establishment of the Ombudsman institution, the number of these special appeal bodies has increased significantly and their social importance has been greatly strengthened. Today, there is a system of appeal bodies in almost all major administrative areas, often structured with regional boards as the first instance and a central board of appeal as the final instance. Important examples include the social area, with social boards of appeal and employment boards of appeal as regional instances of appeal and the National Board of Social Appeal as the central and final forum. Within the tax area, there are tax boards of appeal as the regional bodies and the National Income Tax Tribunal as the final administrative board of appeal. Specific decisions within the environmental area can be appealed to the Nature Protection Board of Appeal. Refugee status cases can be brought before the Refugee Appeals Board, etc.

Unlike general administrative courts, these boards of appeal are specialized within a particular subject area and lack the full personal and organizational independence of the courts. In terms of administrative law, most of them are therefore also regarded as purely administrative bodies rather than courts. An important corollary of this is that most – although not all – of these boards of appeal are subject to the control of both the ordinary courts and the Parliamentary Ombudsman and covered by general administrative legislation, including the Public Administration Act and the Access to Public Administration Files Act.

There has been no systematic research into the way in which the lack of ordinary administrative courts has influenced the development of the Ombudsman institution in Denmark. However, it seems obvious to seek the explanation of the Danish Ombudsman's testing of not only administration procedural issues, but also to a high extent the content of the public administration's decisions in the fact that the citizens do not have the option of having those decisions reviewed by an administrative court. The Parliamentary Ombudsman has thus to some extent taken on the role of administrative court, and over the years he has attained a court-like function, while also fulfilling the role of conflict-solver and regenerator of administrative law through the

establishment of precedent. It is also likely that Denmark's failure to establish administrative courts can explain other characteristics of the development of the Parliamentary Ombudsman.

Oddly enough, the Swedish *Justitieombudsman* office has functioned for precisely one century without competition from general administrative courts, and one century with such competition, as the Swedish administrative courts were established in 1909. Information about whether the Swedish Ombudsman's activities and function changed in the period after 1909 – and if so, in which direction – would be of great interest, but is unlikely to affect the above-mentioned considerations about the Danish Ombudsman, due to the major differences in the social conditions and the development of administrative law in the 19th century, when Sweden had an ombudsman but no administrative courts, and in the period after World War II when Denmark introduced the ombudsman system.

Sweden was not only the first country to introduce an Ombudsman; it was even more pioneering in introducing access to public administration files. In Sweden, this was introduced in 1766, so that a degree of openness in the Swedish administration already existed when the *Justitieombudsman* office was established.

This was not the case in Denmark, where access to public administration files was not introduced until 1970, i.e., 15 years after the first Danish Ombudsman took office. There are indications that the Ombudsman's activities were dominated by this fact in the early period after the office was established in 1955. The Danish administration was generally unfamiliar with having to submit information and documents to the outside world. A new body such as the Ombudsman must be prepared to encounter an administration that is not prepared to submit all documents in a case for examination for the purposes of external control. For a long time, the central administration also believed that it was not under obligation to submit internal working papers to the Ombudsman, and the first Ombudsman Act contained provisions suggesting that the Ombudsman did not have an absolute right to access confidential information. These issues were formally resolved with the amendment of the Act in 1996, so that there is now no longer any doubt that the Ombudsman is entitled to demand the submission of all documents and information – internal or external, confidential or not. However, it is part of the story that, in practice, the Ombudsman also received the requested information before the amendment of the Act in 1996 and that this period included several cases of an extremely confidential nature where all files were made available for the Ombudsman's investigations.

A result of the Ombudsman's activities was that a number of individual cases, which were not subject to ordinary disclosure, were made public through the Ombudsman's annual report. As a new feature, the Ombudsman reported on selected cases in great detail. These detailed descriptions of individual case processing in the public administration and the Ombudsman's assessment in general terms of the treatment of the citizens were received with great interest by the media, which passed on the information to a wider circle. The Ombudsman's activities resulted in the initiative being taken −

after many earlier unsuccessful attempts – to consider the introduction of a general act concerning access to public administration files. A commission consisting mainly of high-ranking civil servants was set up in 1956 to review this matter and published a report in 1963.

A majority of members of the commission could not recommend a general act concerning access to public administration files and, among other things, argued that the control exercised by the Parliamentary Ombudsman was adequate, so that there was no need to supplement it by giving the press legal access to public administration files. The Ombudsman at the time was a member of the commission and belonged to the minority who recommended a system of general access to public administration files. The last appendix to the report was a note from the Ombudsman, flatly denying that the Ombudsman's control on its own was enough. He concluded his note as follows:

> Finally, it should be noticed that experience in Sweden shows that an access to public administration files system and an Ombudsman system have worked well in tandem for many years.

Initially, an act was passed that reflected the majority opinion, granting access to public administration files only to the parties involved in a case. However, the arrangement was extended to give general access to public administration files in 1970.

In 1955, Danish administrative law had reached a fairly high level with regard to developing limitations on administrative discretion. This was a result of the ordinary courts largely agreeing with the view of the issue launched by the Danish legal expert Professor Poul Andersen, with inspiration from French and German administrative law. In the administration procedural area, however, the development had been more stagnant. During this period, the public administration was characterized by a lack of general rules in relation to case processing by public authorities, apart from some fundamental unwritten legal principles, such as the requirement that a case must be adequately elucidated and that parties must be informed of decisions as well as the principles of special disqualification.

During its first 30 years of operation, the Danish Ombudsman's office developed several basic general procedural requirements applying to the public administration. The strategy followed was based on the Ombudsman's ability not only to determine whether the public administration observed existing law, but also to criticize other errors and derelictions. On the basis of this power, the Ombudsman established guidelines for good administrative practice, which he then further developed into actual legal principles.

In the 1960s, the Ombudsman criticized several authorities for failing to give guidance to parties about the opportunity to appeal to a higher administrative authority in connection with decisions to their disadvantage. Seen with today's eyes, the Ombudsman had an extremely good case, as the existing administrative complaint system was very complex and confusing. In addition, he focused on the social area, where the citizens affected were typically weak, so that the need for guidance on appeal opportunities was particularly manifest. As a result of the Ombudsman's efforts, it was generally accepted

by the mid-1970s that the authorities had a non-statutory duty to give guidance on appeals.

In the early 1970s, the Ombudsman initiated a campaign to get the public administration to hear the parties before making decisions to their disadvantage, and give reasons for such decisions to those who requested them. In the Ombudsman's practice, the requirements were formulated as legal principles, but it was somewhat unclear whether the courts interpreted them in the same way.

In 1985, the first Public Administration Act was passed in Denmark after many years of deliberation. Sections 19 and 25 of the Act introduced provisions concerning hearing of the parties and guidance on appeal. In the explanatory remarks to the bill, these points are referred to as a codification of the Ombudsman's practice. Sections 22-24 of the Act introduced rules concerning the obligation to give reasons, but here the legislator made the requirements more rigorous than the Ombudsman's practice by introducing an obligation to give reasons at the same time as the decision, rather than afterwards. Nonetheless, it was obvious that this, too, was a legal rule based on the Ombudsman's practice.

As a result of an administration procedural system in Denmark which was fairly under-developed compared to the Swedish system, the Danish Ombudsman thus came to play a special role in the development and implementation of the legal norms found in the Danish Public Administration Act today.

Conclusion

In this paper, I have tried to outline how Denmark was inspired by the Swedish *Justitieombudsman* office, some 140 years after it was established. The fundamental concept was adopted, but with significant differences in certain respects, especially concerning authority in relation to the ministers and lack of authority in relation to the courts.

In other respects, the development of the Danish office differed from the Swedish model. The standard reaction of the Ombudsman became criticism of institutions and systems, rather than person-targeted reactions in the form of criminal and disciplinary liability. The lack of administrative courts also influenced the Danish Ombudsman office, as it resulted in greater need and scope for the Ombudsman to deal with substantive issues of law in the decisions made by the public administration.

The Ombudsman's exercise of his mandate to supervise the public administration probably had some influence on the development of the principle of access to public administration files in Denmark, where no tradition of access to public administration files existed, as had long been the case in Sweden.

Finally, the Danish office came to play a special role in the development of administrative procedural law and the standards of good administrative practice, as these areas were still characterized by great looseness and pragmatism in Denmark in the mid-20th century.

Despite differences in basis and development, there is nonetheless no doubt that the Danish Ombudsman office would not have seen the light of day without the Swedish inspiration and the Swedish model. The bicentenary of the *Justitieombudsman* office is therefore a most welcome occasion for *Folketingets Ombudsmand* to express our warm thank and the heartiest congratulations.