THE PARLIAMENTARY OMBUDSMAN FOR PUBLIC ADMINISTRATORS IN NORWAY - QUESTIONS OF JURISDICTION

by Audvar Os

International Ombudsman Institute
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Table of Contents

A. INTRODUCTION

The initial assumption of this essay was to give a comparative survey of the rules of jurisdiction of the Ombudsmen in the Nordic countries. Owing to the heavy burden of my daily workload, the level of my ambition was quickly reduced, and I have been forced to limit this account to some generalities as far as the systems in the neignbouring countries are concerned. In regard to Norway I shall first and foremost discuss certain questions of jurisdiction in borderline cases and especially such questions which have surfaced in the two-year period I have held office.

To start with I shall mention some features as seen from a Nordic point of view, and with "Nordic" in this connection I mean Denmark, Finland, Sweden and Norway.[1]

I shall start with certain obvious similarities. In all four countries the Ombudsman acts as a representative of the national assembly; he is elected by this assembly and reports back to same. Furthermore, his assembly determines by Act and Directive the general framework for the functions of the OBM. In his daily work - in the individual cases - he is, however, free and independent and cannot be influenced in his decision.

Secondly, there are certain dissimilarities. In Sweden and Finland the control by the OBM covers not only the public administration, but the courts of law as well. This includes in principle also the contents of court decisions. In Denmark and Norway the courts are totally exempted from the jurisdiction of OBM owing to constitutional causes. This exemption is not strictly limited to the judiciary power, but includes also registration and other administrative tasks which might fall under the courts. On the other hand the Danish, Finnish and Norwegian Ombudsmen are - contrary to their Swedish colleagues - permitted to handle complaints against decisions and procedures in the Ministries including the respective Minister.

An important dissimilarity in the field of competence concerns the means of reaction: The Swedish and Finnish JO can act as a prosecuting authority and initiate a criminal case

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[1]In Finland and in Sweden the term Justitieombudsman is used, abbreviated JO. This abbreviation will occasionally be utilized in what follows. The Norwegian Ombudsman is in Act of June 22, 1962, referred to as Sivilombudsmann; this designation will also at times be used, as well as the abbreviation OBM.

against a civil servant for misconduct. This was originally the most important duty of the JO. To a lesser extent the same is the case in Denmark, as the Danish OBM can instruct the prosecuting authority to institute proceedings. The Norwegian OBM does not have such an authority; the main issue in Norway is not the supervision of the civil servants, but the relationship to the individual citizen - the OBM shall protect him against injustice on the part of the administration. From a practical point of view the penal means of reaction seem to be of small importance in all the Nordic countries; what characterizes the activity of the institution and justifies its existence in the society of today, is the supervision of the public administration through pronounced criticism of administration decisions and procedures.

B. THE CENTRAL FIELD OF COMPETENCE - THE ADMINISTRATION

The Ombudsman institution in Norway was established by the Act of June 22, 1962, "The Storting's Ombudsman for Public Administrators" (subsequent amended by Acts of March 22, 1968, and February 8, 1980[2]) what is covered by the phrase "public administration" is elaborated in section 3 of the Act, which states that the OBM shall endeavour to ensure that injustice is not committed against the individual citizen by the public administration. The same expression - the public administration - is used in section 4. It should not be necessary to embroider upon the very substance of this concept. It is the borderline questions which are of interest and create problems: Where and when do we go ouside the framework of the public administration? Certain questions of delimitation are resolved in the Act itself; I shall revert to this and consider it more thoroughly in Chapter C.

What is causing problems in the daily work are first and foremost complaints against institutions and organizations which according to the basis of their foundations or because of their activities, get a kind of private stamp. We find in one group public banks and public

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[2]The latter amendment is based on an extensive evaluation of the Norwegian Ombudsman system, undertaken by a specially appointed committee with former Ombudsman Andreas SCHEI as its Chairman. The committee's report is submitted in Stortingsdocument No. 9 (1977-78). The report and the suggested statuses were considered by the Judiciary Committee in Innst. O. No. 15 1979-80. Later on in this account I refer to these reports several times.

corporations, and in another hospitals an social institutions run privately, but with a considerable support from public funds. Considering the realistic need for the protection of the intersts of individuals, the trend points clearly to expansion of the fame of competence for the last mentioned group; whereas the OBM has taken a more reserved position to the first mentioned type of organization. The form of organization can, nevertheless, not be decisive; a corporation must also accept control if its activities are the same or closely related to that which is executed by public authorities.

Quite a few complaints concern alleged violations of the rules of procedure stated in Forvaltningsloven (Administrative Procedure Act) of February 10, 1967, or refusal to inspect documents according to Offentlighetsloven (The Public Documents Act) of June 19, 1970. Both of these acts apply to "administrative agencies" - a term which supposedly is somewhat narrower than "public administration". There is no example to be found where the OBM has abstained from handling a complaint within this sector on the grounds that his field of competence did not have the same scope as the Forvaltningslow or Offentighetslov.

These two acts explicitly state that private legal persons" are considered as administrative agencies as far as they, on behalf of state or municipality, issue decisions or prepare rules". The control by the OBM will undoubtedly be expanded accordingly when private institutions or organizations are entrusted with public authority in this manner.

A limitation of the OBM jurisdiction might thus be a result of the very activity to which the complaint relates. The main goal is to protect the individual from injustice on the part of the public administration. This will basically be an injustice in connection with the exercise of public authority or with the duties especially associated with the appropriate agency or institution. Included in this are also contractual relations with public monopolistic enterprises within transport, communication and power supply.

Sometimes a public agency acts "privately" on the level with other private ones, e.g. in regard to contracts. Conflicts arising out of contractual relationship will not always be suitable for consideration by the OBM. Disagreement concerning the interpretation of a

contract between a public body and an individual, does not necessarily imply that the standpoint of the authority in question is an injustice toward the joint contractor. The deciding criterion in this case ought to be whether or not the contractual relation falls within the scope of the regular authority of the administrative agency concerned. I find for instance a clear fundamental difference between those contracts which the housing authority in its official capacity - on one side enter into with hundreds of tenants and - on the other side an agency's sublease of four or five rooms for office use to an architect. I am inclined to characterize the latter as a civil-law case, and the OBM must be entitled to refuse to deal with such a disagreement.

A different kind of case which might fall outside the sphere of competence of the OBM on account of its "civil-law nature", are cases concerning tort i.e. question of compensation relating to accidental damaging actions - contrary to damaging decisions with the "public" competence of the agency, or damages created by implementation of decisions already taken. Compensation for such an accidental damage might acquire a totally civil-law character dependent on how far removed the consequences of the damage are from the public agency's own activity. For instance: The reponsibility which might be raised against the road authorities for damage due to poor maintenance of streets, differs principally from the responsibility which might be a consequence of damage inflicted upon an expensive rented office machine by an employee. The latter is a conflict which might as well have occurred between two private individuals. A denial of compensation in such a case is, in my opinion, scarcely an injustice - and not at all typical - in the public administration. The OBM must merely admit that he has no special competence to express his opinion in such cases; he should rather refer the disagreement to the courts.

Along with these doubtful matters on the functional level, certain circumstances relating to the organization of the administrative authority might create doubt.

In Norway, as in the other Nordic countries, there is little by little established special ombuds-institutions in certain fields. There is Consumer's Ombud, Equality Ombud, and

Children's Ombud. The holder of office is appointed by the Government and is not elected by the Parliament. There has been no problems worth while mentioning concerning the question of jurisdiction regarding these other Ombuds. Here the cue has been "informal cooperation", with the fundamental principle being that a complaint first should be dealt with by the appropriate ombud before the OBM takes it under consideration. The Ombuds will - as a part of the public administration - be covered by the Sivilombudsman's sphere of jurisidction. There have occasionally even been cases of complaint to the OBM in regard to the handling of a case by an ombud.

When the law was enacted, it was expected that the limitation of the OBM's sphere of work would lead to doubtful questions of interpretation. The Storting therefore reserved the right to determine "whether a particular public institution or enterprise shall be regarded as public administration". This power of attorney has never been used owing to the underlying philosophy that the limits ought to be determined through practice to avoid unwanted restrictions.

The result has been that the OBM himself decides the scope of competence through interpretation of the various provisions in the Act and Directive. If the decision might cause doubt, it will be included in the annual report. The Storting is thus given the opportunity to consider the question. The OBM will, of course, be responsive to the reactions in this connection. I am, however, unaware that the Storting at any time has questioned the OBM's interpretation of the rules of competence. However, there has been criticism from other quarters, stating that the OBM has drawn too narrow a frame for his competence. I shall return to this below.

C. CERTAIN QUESTIONS OF DELIMITATION

In addition to the principal rule that the OBM's scope of activities in "the public administration" the Act states in section 4 the framework in a rather negative manner through the following provisions:

"Nevertheless, his powers do not include:

a) matters on which the Storting or Odelsting has adopted a standpoint,

b) decisions adopted by the King in Council of States,

c) the functions of the Court of Law,

d) the activities of the Auditor General,

e) matters which, as prescribed by the Storting, come under the Ombudsman's Board or the Ombudsman for National Defence and the Ombudsman's Board or the Ombudsman for Civilian Conscripts,

f) decisions which, as provided by law, may only be adopted by the municipal council or the country council itself, unless the decision is adopted by the municipal exective board in accordance with S. 22 of Act no 7 of 12 November 1954 concerning Administration in Rural and Urban District Municipalities or by the country executive committee in accordance with S. 24 of Act no 1 of 16 June 1961 concerning County Municipalities. A decision such as referred to may nevertheless be investigated by the Ombudsman in his own initiative if he considers the regard for the rule of law or other special reasons so indicated."

It will appear that the Act has a many-sided way of expressing itself when it comes to the various exceptions - such as "has adopted a standpoint", "decision", "functions/activities", "as prescribed by the Storting come under". The variation of expression has in practice been of little consequence. The basic intention has been far more important that the interpretation of words. This applies especially in relation to the exceptions mentioned in litra a) and b). The OBM will abstain from handling a matter which in some way or other has been dealt with by the Storting without considering whether the Stroting has adopted a standpoint. In the same manner the case will be rejected if the complainant states that he has brought the case before the King (the King in Council) - without the OBM awaiting a result from this highest source.

The expression "functions/activites" does not mean the same in relation to the courts of law and to the Auditor General (litra c) and b)). A case will not be considered by the OBM when it comes within the sphere of competence of the Auditor General. However, it is not a reason for rejection that a case may be brought before the courts of law in the ordinary manner; such as interpretation of "the functions of the courts of law" would make the OBM institutional rather superfluous as the scope of court review is extensive.

In what follows I shall consider more carefully the exceptions mentioned in section 4 a)-d). In those areas we find the interesting and somewhat doubtful borderline questions. There has been no significant doubt about the jurisdiciton in those matters dealt with in section 4 e) and f).

1. THE RELATIONSHIP TO THE STORTING

The provision of exception in section 4 a) has been considered so obvious that this rule until the amendment of the Act in 1980 had a modest place in the Directive only. Because the OBM is the representative of the Storting, his powers will not include any control of the Storting. In Denmark there is no corresponding provision; nevertheless, the conclusion has been the same, which means that the Danish OBM does not handle questions which have been dealt with by the Folketing or a committe of the Folketing.

As mentioned, the exception goes further than the wording states. An explicit "standpoint" on the part of the Storting is not required - e.g. if the circumstance with which the complaint is concerned has been up for a vote. The OBM has from the very beginning chosen to tread lightly in his relationship to the Storting. An American professor - Walter Gellhorn - describes as early as in 1966 the attitude of the OBM with these words:[3]

> "He has regarded a matter of having had parliamentary consideration if it has passed through the legislative halls at all, no matter how swiftly and, one is tempted to say, no matter how unconscious the legislators were of its presence."

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[3]Ombudsman and Other (Harvard University Press) p.161

The wording leaves the impression that the author finds the attitude of the OBM somewhat excessively cautious. But at the same time he indicates how very difficulty it would be to follow a different path: When can you be certain that a case really has been considered in the Storting, or that "the legislators have been conscious of the matter: and what extent of "consciousness" should be required? It is undoubtedly a safer and more undisputable manner to ascertain whether the case in question has been on the agenda of the Storting and been "considered" there. Even if a rejection on this ground might disappoint a complainant, he will under any circumstance have the possibility of having his case reconsidered by the Storting itself, provided he can arouse sufficient interest from a member of the Storting.

On the other hand, a resolution by the Storting in the general form will not be an obstacle for the OBM to deal with an individual complaint. A practical example of this is provisions regarding duties or other fees which the Storting has adopted; the application in the concrete case will remain dependent upon an administrative decision, - and a complaint about this will not fall under the exception in section 4 a).

And the OBM will today scarcely feel tied down because the matter in question has been raised in connection with a query and been answered by the Minister. However, the fact that the case has been taken up in the Storting is a point which counts when considering whether or not the OBM ought to deal with such a case.

2. THE RELATIONSHIP TO THE KING'S COUNCIL OF STATE

According to the wording in section 4 b) decisions adopted by the King in Council (i.e. the King & the Ministers) are excepted. Here also the OBM has chosen a careful mode with the view that such decisions - and the basis for them - are subject to preliminary control and the object of special investigation by a certain committee of the Storting. The provision is interpreted in such a way that neither the preliminary processing nor preliminary decisions, which are taken in the Ministry or other lower agencies prior to the resolution in the King's Council, are considered as being under the sphere of competence.

Decisions made by a Ministry can in many cases be brought before the King in Council for reconsideration. If so, the OBM will not be entitled to deal with a complaint concerning the same matter. At times a complainant applies to the King as well as to the OBM. In such a case he will from the OBM receive the discouraging message that the complaint falls outside the OBM'sjurisdiction. This has lead to the practice that the Ministry will inform the party concerned that he looses the right to complain to the OBM, if he should send a complaint to the King. Such a procedure is comparable to the practice the OBM himself uses in another context, viz. to inform a complaintant that a prospective court trial will mean that the handling of the case by the OBM comes to an end.

The pardoning of criminals creates a special problem. According to the Constitution such a decision must be taken by the King in Council. Decisions to reject application may, however, be taken by the Ministry. Nevertheless, the OBM has been of the opinion that he cannot handle complaints concerning such decisions by the Ministries. A complaint about a refusal will necessaily suggest that a pardon ought to be given. The review by the OBM will, however, have to be concentrated on a denial and this is a decision which can only be taken by the King in Council. In conformity with the practice which imply that the OBM cannot consider preliminary decisions in King-in-Council-cases, the OBM has abstained from evaluating the Ministry's denial of pardons. For the applicant there will always be the possibility of bringing the denial before the King in Council.

3. THE FUNCTIONS OF THE COURTS OF LAW

The exception in section 4 c) has its clear constitutional background; the courts of law make their decisions independently of and without subsequent review by any other agency of the state. As far as judicial decisions are concerned, the exception is quite obvious. The courts of law - especially on the lower level - are, however, given authority of administrative character in certain fields, especially in connection with registration and other business as notary public. The sector of the functions of the courts of law is excluded as well, based on

the assumption that doubtful borderline questions might easily arise. The limitation has nevertheless turned out to be less than perfect due to the fact that administrative decisions of the courts of law are subject to appeal to the Ministry, and the Ministry's decision may be followed by a complaint to the OBM. It goes without saying that it will often be avoidable during this phase that the OBM also will have to reconsider the handling and decisions of the notary, i.e. the court, as far as this might influence a justifiable evaluation of the complaint against the decision taken by the Ministry. As far as I know this indirect involvement with the functions of the courts has not created any problems.

The expression "the functions of the courts of law" is given a comprehensive interpretation. But, compared to the practice in connection with the exceptions concerning the Storting and the King in Council, a narrower path has been followed. As already mentioned, not all cases which can be brought before the courts of law, will fall outside the field of competence. Because almost all decisions by the public administration are subject to court review, such an interpretation would be both unintentional and meaningless.

However, the OBM may easily deem himself incompetent. If the complaint indicates that the displeased person at the same time has brought the case before the courts, this will lead the OBM's rejection, even if the aim of raising the case merely is to make a deadline. A notification to this effect sent to the complaintant often leads to his withdrawal of the suit - temporarily. At this point the OBM will deal with the complaint. It is the simultaneous handling which is deemed inconsistent with section 4 c) and not the fact that the case sooner or later may end up in court.

The relationship to the courts creates special problems in criminal cases. Many complaints are connected with the prosecuting authorities' handling of the case or to conditions related to the serving of the sentence. One may easily touch on questions which presumably will fall under the jurisdiction of the courts of law exclusively. In a certain case a sentenced person complained that the prosecutor had advanced the case without the plaintiff's presence in court. This complaint was deemed outside the OBM's field of competence. Later on it

turned out that the sentenced person had raised the very same objections in his appeal to a higher court.

An acquittal in a criminal case might take place after a mere consideration of the question of guilt. In a criminal case concerning tax evasion, for instance, the mere basis for taxation may remain untouched by the judgment. In such a case I shall not deny the OBM's right to feel entitled to consider a complaint concerning the assessment.

In other situations as well is the expression "the function of the courts of law" given a wide frame of reference. The bailiff has, according to the Civil Procedure Act, certain tasks in connection with serving summons, sentences etc. A party complained that the serving had been executed in an inexcusable manner. On account of the bailiff's connection with the courts of law the OBM stated that the complaint fell outside his sphere of competence. This caution has also gone beyond Norway's borders: To be used in a current trial in Denmark a report was produced by a local Norwegian office. A complaint was forwarded to the OBM concerning the basis for and the contents of the report. But "even though the court of law was Danish", as it is formulated, the OBM did not find sufficient grounds for taking under consideration a report, the evential value of which was for the courts oflaw to estimate.

According to law, judges are to participate as chairmen in certain administrative committees and commissions, especially where there is a question of personal deprivation of liberty. The fact that judges according to law are members, does not give such collegial agencies status as a lawcourt. A complaint about handling or decisions may therefore be dealt with by the OBM. The competence of the OBM in this respect has never been in dispute.

4. THE ACTIVITIES OF THE AUDITOR GENERAL

It seems clear enough according to section 4 d) that the OBM shall have no kind of supervision with the Auditor General of deal with complaints concerning decisions he has taken. The Auditor General is instituted in the Constitution itself and is in the same manner as the OBM a representative of the Storting. This has had the result that not only so-called

"desisjones" in cases of auditing redeemed to be outside the OBM's competence, but also complaints concerning failures of promotion and similar conditions relating to civil servants of the Auditor General.

However, the traditional construction of the provision has lead to further restrictions. The expression in the Act "the activities of the Auditor General" has in practice been extended to include matters which best can be described as "cases coming under the jurisdiction of the Auditor General according to existing rules:. Such provisions will be found - apart from in the Constitution - also in a special Act of December 14, 1919, and appurtenant directives. The Auditor General shall besides auditing the accounts of the State - numerically and critically - also control that the dispositions of the authorities of the State are economical and justifiable. It is in connection with this administrative auditing that the delimitation between the institutions of the Auditor General and the OBM may cause doubt.

Not every case which involve dispositions regarding funds of the State lies exclusively under the Auditor General. Such a delimitation would for instance result in making the OBM incompetent in all cases concerning pensions, supports and loans. The borderline has in practice been worked out from case to case and the situation today ought to be described by the line of incidence: The guideline for the Auditor General's control in individual cases will be whether or not the economical interests of the State are taken care of in the proper way. Other aspects of the case will not necessarily be examined. The possibility of complaining to the OBM will, however, remain open.

This division in the jurisdiction is illustrated by cases having to do with bids. The Auditor General will concentrate on whether the economical interests of the State have been adequately taken care of; the OBM has deemed himself justified in examining whether the rules of bidding in one way or another have been offended to the detriment of some of the bidders, in other words whether an injustice has been committed towards the party in question because the prevailing principles of bidding have been violated.

D. FINAL REFLECTIONS

It seems to have been a successful philosophy to let the borders for the jurisdiction of the OBM have their solution through practice and not through detailed directives. This has made possible an elastic adjustment to the varying requirements. One ought to continue along the same lines. The tasks of the public administration and the form for organization differ, and it is of importance that the OBM can keep up and not lag behind in the formal limits of competence. The guideline will at all times be the demands of the Act that the individual must be protected from unfortunate results of the wrongful use of authority embodied in the machinery of society.

It is intereting to note that insofar as there has been criticism raised against the stipulation of the limits, it has been claimed that the scope of competence has been drawn too narrow. The criticism seems to imply that the OBM too easily agrees that a matter comes within the sole competence of another authoirty of the State, and that he thus at times even "neglects his duties".

This criticism is really quite encouraging if seen as a reflection of confidence in the OBM institution. However, the critics may fail to see certain distinctive characteristics of the OBM system which may lead one astray. There is, of course, no doubt that the OBM has the duty to execute the tasks stipluated by Act and Directive. Nevertheless, the duty to handle complaints has a distinctive formal limitation in the last paragraph of S. 6 in the Act: "The Ombudsman shall decide whether there are sufficient grounds for dealing with a complaint." According to the circumstances refusal can thus occur even if the case is clearly within the scope of competence. At the same time the provision will serve as a regulator in many borderline cases where the guiding principle must be the necessity to intervene. The evaluation of the questions of competence will in other words be influenced by the circumstances which might exist in the particular case. Flexibility is both desirable and necessary and - as far as I can see - without injurious effects.

Here again is a connection with the OBM's jurisdiction in material sense: The OBM cannot alter any decision - only express his opinion in the matter. The foundation of survival for the institution depends on the public administration's responsiveness toward statements given and its attentiveness thereto. Justifiable doubt whether the OBM gives his opinion within his sphere of competence might counteract the necessary compliance. This also is part of the question of jurisdiction.