

# The Original Recipe: 200 Years of Swedish Experience

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## **Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions Friday, June 12, 2009**

*The ombudsman institution has come a long way, from its first incarnation as the prosecutor for the Swedish King (1713), to the Parliamentary or Justice Ombudsman of 1809, whose anniversary we celebrate today. This paper traces the history of the institution and examines the question: Whom does the ombudsman represent? Parliament? The public at large? The complaining citizen? The cause of human rights? In the original Swedish recipe, the ombudsman was conceived as the independent watchdog of Parliament – and remains so today. As the historical outline shows, the JO is part of a Swedish "Rule of Law"-doctrine. In this sense the JO differs from many of the world's more modern ombudsman institutions.*

### **Introduction**

Those of you who have attended this week's conference might think that you have heard enough about Swedish history by now. Unfortunately, I will have to dwell a little more on the subject, since I have been entrusted with describing the origins of the Swedish ombudsman. They go way back, but I will try to make the historical account short and painless, with the help of some pictures [excluded here].

### **The first ombudsman**

This is not the first ombudsman. It is a portrait of Karl XII, one of the relatively few outstanding personalities among Swedish kings. When he was fourteen years of age his father, Karl XI, another of the outstanding few, passed away. Shortly afterwards he ascended to the throne, placing the crown on his head with his own hands and giving no oath to the people, since he was not one of them but sent by God. A couple of years later, in 1700 to be precise, he was to leave his palace and embark on a very long journey. In fact he was never to see Stockholm again.

Being a born warrior, Karl avoided no opportunity to put his life at risk. Finally, he met a violent death on the battlefield. He was carried home under severe hardships by the army that had become his family.

A strange life, indeed, even for a king by the grace of God.

How was the country governed during his absence? Well, there was of course a cabinet in Stockholm, consisting of loyal servants to the king. And Karl could give orders from his tent, as it was moved around from battlefield

to battlefield in Europe. But he was, after all, absent. So he needed someone to represent him. And that, ladies and gentlemen, was the birth of the ombudsman.

In 1713 the office of the King's Supreme Ombudsman was established. The ombudsman was to act as prosecutor on the King's behalf and ensure that laws and royal decrees were observed.

### **The Age of Freedom**

King Karl's death in 1718 was the end of a dynasty. Homeless, wifeless and childless, he left no more behind him than memories of heroic deeds and glorious battles, not to mention the less glorious ones.

There was nobody of his stature to replace him. Obviously the monarchy, in a formal sense, prevailed: there were new kings, but no one gifted enough to assume the crown and carry out the task of ruling by divine right. This situation, with weakened royal power, gave room for the people's representatives — the Four Estates, as they were called, of the nobility, clergy, burghers and yeomen — to gain political influence and power. A new era started, in Swedish history-books known as the Age of Freedom. In a modern sense, it wasn't very free. What it meant was that political parties, formed in the Estates, could govern, more or less free from royal interference. In fact this period, which lasted for about half a century, was an early form of parliamentary government, and as such an interesting experiment. Among its achievements was the world's first constitutional Freedom of the Press Act, which contained the important principle that public documents were freely available to read, print and publish. During this period, Parliament, or rather the Estates, took over the ombudsman. He became the 'parliamentary ombudsman', although that was not the term used.

However, the Age of Freedom ended in misfortune. The nation was obviously not yet prepared to take on the responsibilities of self-governance. There was poverty, corruption, expensive warfare etc. While miseries like that piled up, the royal family slowly regained self confidence. In the second half of the eighteenth century the monarchy struck back, and a new period of autocracy by divine right started. A charismatic king, Gustav III, with a taste for art and divine splendor, took over. He shed light upon his poor people. Unfortunately, he also entertained an unrequited love for military action, thereby throwing the nation into unsuccessful warfare. Dark and dramatic decades followed. Gustav himself was assassinated and later on his less talented son had to be removed from the throne by force. Another dynasty had come to an end.

### **The Constitution of 1809**

We have now reached the events that we are celebrating. This period, two centuries ago, marks a turning-point in Sweden's constitutional history. By that time, the country had experienced two kinds of autocracy: monarchy by divine right and parliamentary abuse. It wanted neither of them back. In the spring of 1809, after March 13, there was no king and no constitution. It was

indeed a formative moment, a window of opportunity, but also a time of great danger for the Swedish nation. Its enemies were gathered around the borders: Russian troops had even crossed them and were eating their way through Finland, which was after six hundred years of coexistence with Sweden now separated from us.

In the beginning of June, almost exactly two hundred years ago, a constitution was adopted. It struck a balance between the Parliament and the King, stating as a matter of principle that the people's constitution was the founding document. Divine right was forever replaced by constitutional bonds.

The constitution of 1809 was dualistic. At that time the fashionable theory was Montesquieu's triptych, with its characteristic division of power between the Legislative, the Executive and the Courts. The constitutional committee honored this model but the constitution itself contained no traces of an independent judiciary. Due to historical experience, the legislators focused on the relationship between the king and the parliament. And, maybe most important of all, they wanted a constitution that could provide the threatened nation with an efficient leadership. The aim was to get the best out of the two forms of government that Sweden had experienced and to avoid the kind of autocracy or dictatorship that unbalanced rule could lead to. In that sense the constitution was a great success. It served the nation for more than a century and a half, a period of peace, growing prosperity and democratization.

The function of ombudsman was an important part of the constitutional discussion. Independent lawyers were essential for the establishment of the Rule of Law.

But who was to host the ombudsman?

### **The Justice Ombudsman – the JO**

Everyone recognized that there had to be a lawyer in a leading position in the Executive. The existing ombudsman – whose title had already been altered to Chancellor of Justice – therefore reverted to his function as the king's "crown lawyer". But the Parliament had become used to having an ombudsman of its own. And there *was* need for a constitutional watchdog. The title of *Justitieombudsman* (Justice Ombudsman) – JO – was invented.

This is a picture of the first JO. His name was Lars August Mannerheim. He had played an active part in the revolution and the dethronement of the king. He was one of the authors of the new constitution, indeed he had chaired the constitutional committee and was thus one of the most prominent founding fathers. Today, it would be impossible to have an ombudsman appointed on political merits, but that was definitely the case with Mannerheim. It might be added, that he was not a lawyer.

According to the 1809 recipe, the JO had both a constitutional and a more general role of supervising legal matters in the public domain. The constitutional part was complicated since the king himself was immune to legal action. However, decisions by the King were always to be countersigned by a high officer of state. The thought behind this procedure was that if the King wanted to do something that was not in accordance with the constitution, it

would not be countersigned and would therefore not become valid. Furthermore, an official who countersigned an unconstitutional act by the King could be arraigned by the ombudsman. In this way the King was indirectly subject to the supervision of the JO.

It should be said immediately that this form of constitutional control was never very vigorously executed. Mannerheim, the first JO, has been characterized as a “moderator between king and people”. His dealings with the King were diplomatic – sometimes successful, sometimes in vain.

As the country gradually became democratic, the need for the ombudsman to scrutinize the Executive diminished. Historically, this seems natural: when the parliament controls the government directly, the indirect supervision by the ombudsman is no longer required. Since then the Swedish view has been that no judicial body has the authority to supervise political decision-making.

### **The task**

According to Article 96 of the constitution of 1809, the Estates of the Riksdag were to elect a citizen, known for his knowledge of the law and excellent honesty, to, as their “ombud”, supervise the observance of the laws by judges and public officials and bring legal action against those, who in exercise of their authority out of partiality, favoritism or for any other reason committed any unlawful act or neglected their official duties. To summarize, the main ingredients were those below:

- An “ombud”
- to supervise the observance of the laws
- by judges and public officials; and
- to prosecute those who did not act lawfully.

Let’s take a look at some of these functions and how they are carried out today. I will do so in reverse order, starting from the bottom.

#### *The JO as prosecutor*

There can be no doubt that the original idea was that the JO should act as prosecutor and indict anyone subject to his supervision who failed to comply with the law. With Mannerheim as an exception, the JO’s during the 19<sup>th</sup> century were all keen prosecutors. Later on, the ombudsman developed a practice in which officials who admitted to having acted unlawfully could be publicly criticized by the JO, instead of being indicted. If the official *objected* to the JO’s judgment, it was deemed necessary to prosecute. An important reason for this was the official’s right to have the matter tried in a court of law. However, prosecution increasingly became the exception as the ombudsman developed the practice of publishing critical opinions. The final breach with the tradition of the JO as prosecutor came in the 1970s when the Swedish legislation dramatically diminished the area of criminal responsibility for public officials.

Personally, I wouldn't mind taking a few steps back towards the original concept. However, the system also works as it is. With or without prosecution, our decisions are almost surprisingly well respected.

### *Supervision of judges*

A few words ought to be said about another somewhat controversial issue – the surveillance of the courts by the JO.

The constitution of 1809 did not fully recognize the independence of the judiciary. In fact there was a substantial distrust of courts and judges in Swedish society at that time. The judicial system was linked to the king and not perceived as trustworthy. Therefore the constitution of 1809 contained several instruments that aimed to control judicial power. One of them was a special committee of Parliament with the task of reviewing the Supreme Court. The committee was authorized to dismiss judges who had lost public confidence. This authority was never used but the institution as such was alive, if not kicking, until the 1970s, when the constitution of 1809 as a whole was replaced.

Another instrument aimed at controlling the courts was the Justice Ombudsman. The JO had full competence to supervise judges. The constitution did not differentiate in any way between them and other public officials. A symbolic sign of the ombudsman's authority in this respect is the constitutional right that still survives for the JO to be present at all kinds of court proceedings, including the judges' deliberations behind closed doors.

Originally, the JO was authorized to prosecute members of the Supreme Court, if they had through malice or negligence ruled wrongfully, thereby causing someone severe loss, harm or damage. The constitution provided a special court of law for this kind of procedure. Of greater practical importance was, of course, the possibility for the JO to initiate proceedings against judges in lower courts. This happened rather frequently, and still does, although much less frequently.

Nowadays, step by step, the Swedish constitution is recognizing the independence of the judiciary, partly as a consequence of Sweden's membership in the European Union. But some distrust endures, or at least a fear that the courts, as it was formulated by the founding fathers, might become "a state within the state". According to the Swedish view, judges need not be untouchable, and the possibility for the ombudsman to examine complaints against courts and judges is still essential.

### *Observance of the laws*

Some twenty years ago I was appointed Press Ombudsman for the General Public. When an American friend of mine heard about this he made a skeptical remark, saying "So, you are going to play God?". I said no, my job is only to apply the ethical principles laid down by the Press itself. But I must admit that my friend had a point; ethical principles cannot be applied without adding a fair amount of more or less personal values. And who was I to tell journalists that my moral standards were higher than theirs?

In this respect, the job as Justice Ombudsman is less complicated. We apply the law, no more no less. Of course there are views and values involved, but only those that can be derived from the legal system. There were no intentions among the founding fathers that the ombudsman should be an institution *beside* the law. The task was and is to supervise that the existing laws are observed by judges and public officials.

How is that to be done? Well, to put it simply, applying the law consists of two things: procedure and judgment.

During the centuries of JO-practice the focus on procedural issues has gradually increased. Rightly so, to my mind. A society in which public authorities act according to legal procedures is likely to treat citizens equally and in a foreseeable way. In other words supervision of this kind is basic and necessary. Sweden is a small and informal society, where the importance of “due process” is often underestimated. There is still a great deal of work for the JO to carry out in this field.

The supervision of procedure is mostly uncomplicated: you read the manual and check to see that it has been followed. To examine judgments in specific cases is definitely more complicated. It cannot be done without complete knowledge of the facts. It includes assessments that an ombudsman is not as well equipped to make as those who have had first access to the evidence. Early in history, the JO learnt that restraint had to be shown in reviewing judgments made by the supervised authorities. Of course this should not prevent the JO from looking more closely at a case when there are signs of wrongful judgments or incorrect assessments. But a court or a public agency which has followed the legal procedure and acted within its powers must be given the benefit of the doubt when it comes to evaluating the merits of a case. Otherwise you are trying to play God, which is not appropriate, not even for an ombudsman.

#### *Acting as an “ombud”*

And finally “ombud” – what does it mean to act as an “ombud” or an ombudsman?

The Swedish word “ombud” means deputy or representative. It is normally used in a more or less judicial context. Attorneys, solicitors, barristers — they are all “ombud” in the sense that they can represent parties in legal matters. When King Karl appointed his legal representative the word was used in exactly this way. In modern Swedish, ombudsman is someone who has a professional mandate to promote some kind of interest or interest-group. It is widely used within the trade unions, for example.

In an international perspective the word seems to have a more specific and well-defined meaning. Webster’s dictionary of American English defines an ombudsman as a public official appointed to investigate citizens’ complaints. This pretty much describes the JO, but it leaves the important question about who the ombudsman represents unanswered.

There are several ways of looking at this issue. *The question of mandate* can be approached in at least these four ways:

- The Riksdag — the Swedish Parliament — is the ombudsman’s principal
- The JO is ombud for the general public
- The JO is the (complaining) citizen’s ombudsman
- The JO is the ombudsman for human rights

One could of course say that all four contain grains of truth. However, I would still insist on a more precise answer. The question of mandate is of such great importance for how the work of the ombudsman should be perceived and carried out. So, let's get back to basics! Who is the principal?

In a formal sense Parliament – the Riksdag – has always been the ombudsman’s principal. But the assignment involves a different relationship from the one that typically applies between a principal and his or her legal representative. An “ombud” is normally fully controlled by the principal. But the Riksdag does not control or even supervise its ombudsmen. It has no desire to do so, regardless of the fact that such control would be unconstitutional. What the Riksdag wants — and what the constitution prescribes — is an *independent* ombudsman.

Independence is the backbone of any ombudsman institution. At the end of the day this might be the only characteristic that all ombudsmen ought to have in common.

However, an independent ombudsman is, from a Swedish linguistic point of view, almost a contradiction in terms. It could appear to be an illogical name for an odd institution. I might add that there are lawyers in Sweden who regard the JO’s as ripe for a folklore museum, like Skansen.

What is missing when the JO is described merely as an ombudsman for the Parliament is what the ombudsman was appointed to do, namely to supervise the observance of the laws. Our real principal is the constitution, which has full control over us, and our mandate is to safeguard the justice system. That is why we are called Justice Ombudsmen.

Some of you may find it annoying to hear the title pronounced in its anglicized form. And I agree that from an idiomatic point of view one can object to it. On the other hand, Justice Ombudsman has always been the official Swedish title and our institution is known, indeed very well known, under the abbreviation JO. It is our logo and it also provides a rather good description of what we have been doing for two centuries and are still doing.

### **Final remarks**

Let me finish with some personal remarks.

According to the original recipe the ombudsman is ultimately, like any public institution, part of the state and serves the public interest. There is a modern recipe, sometimes used also in Sweden, where ombudsmen are appointed to promote the interests of a certain group. Without questioning the usefulness of institutions of this kind, I want to emphasize that the JO is not one of them. As the historical outline shows, the JO is a part of a Swedish “Rule of Law”-doctrine. In this sense the JO differs from many of the world’s more modern ombudsman institutions.

In his opening speech the other day, the President of the IOI, Mr. Angrick, used the watchdog as a metaphor for the ombudsman. This evoked an old memory of mine. I once discussed our shared responsibilities with a member of the Indian Press Council. He told me that he regarded himself as “a watchdog with two heads”. One head would bark at the press when it misbehaved. The other head, he told me, would bark at politicians, celebrities, the public at large: anyone who demonstrated by their complaints that they did not respect the idea of a free press. In short he was guarding the public interest whenever there was cause for it.

It is pretty much the same with the JO. It is of course my job to bark at public officials when they do wrong. And no, the JO can neither bark at, nor bite a complaining citizen. But it is our duty to stand up for public officials and institutions against unfounded complaints. We are guardians of the public interest, not advocates of any specific group or individual. We do not have to wag our tails at everything that lands on our desks.

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Ladies and gentlemen, it is not very polite to spend so much time talking about one’s own affairs as I have done here this morning. Being a sort of birthday boy is a poor excuse, I guess. Anyway, my colleagues and I are extremely well aware of the many different ways in which the mandate of an ombudsman can be perceived and carried out in different parts of the world.

The ombudsman is not a Swede anymore. The word itself has left home, like a dear child, to live a life of its own. I look forward to hearing today’s reports of what has become of it.